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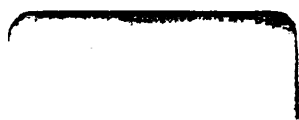
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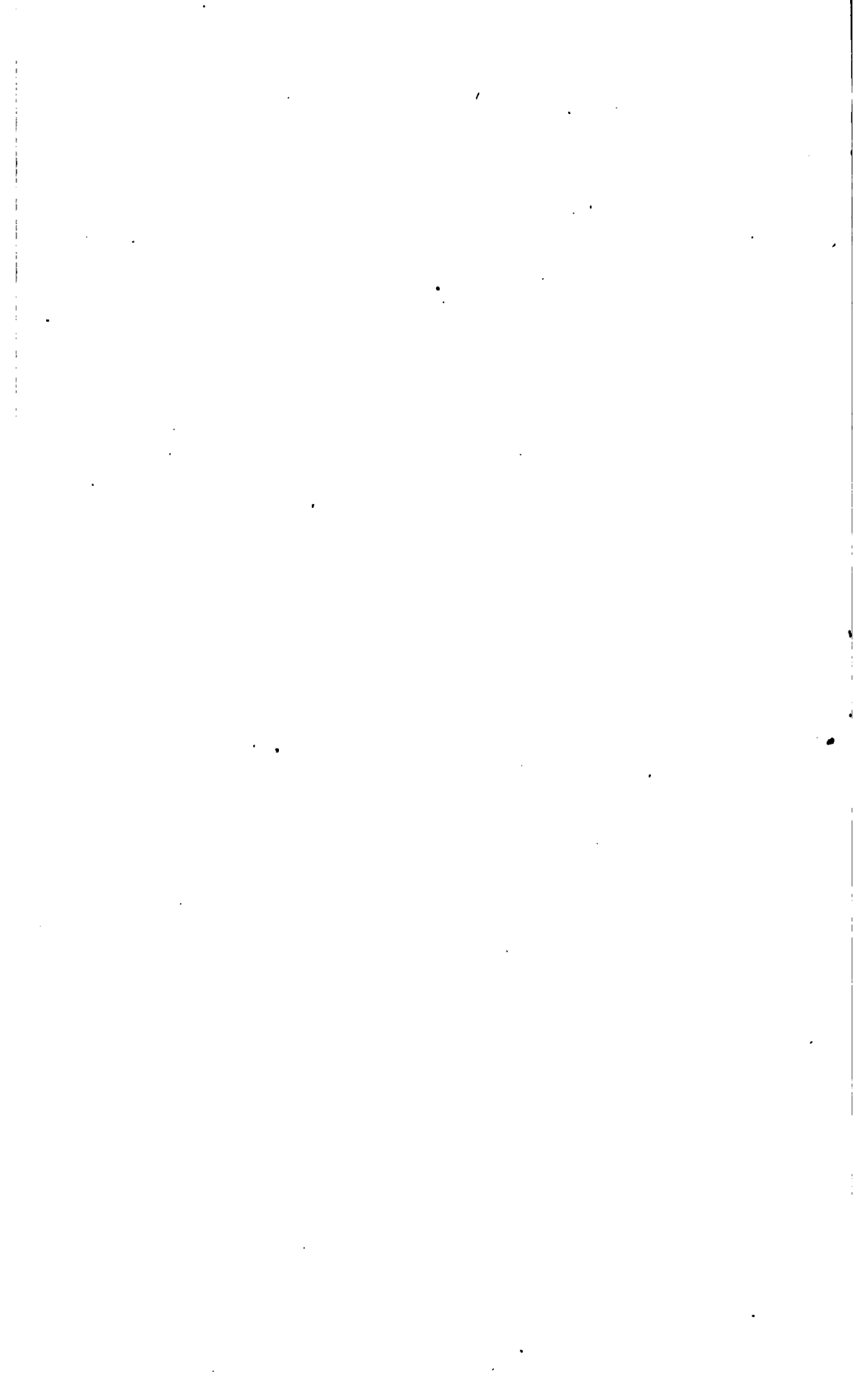


















# THE LAWYERS REPORTS ANNOTATED

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BOOK XXV.

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ALL CURRENT CASES OF GENERAL VALUE AND  
IMPORTANCE WITH FULL ANNOTATION  
BURDETT A. RICH, EDITOR, HENRY  
P. FARNHAM, ASSISTANT

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1894.

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EXTRA ANNOTATED EDITION

WITH L. R. A. CASES AS AUTHORITIES.

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# LAWYERS' REPORTS,

## ANNOTATED.

### UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Robert MITCHELL, *Plff. in Err.*,

v.

Eliza M. MARKER.

(62 Fed. Rep. 130.)

1. **Passenger elevators are within the rule governing other carriers of passengers**, which requires the highest degree of care.

2. **Reasonable opportunity must be given a passenger** on entering an elevator to obtain a balance before a rapid and sudden start of the elevator is made.

(May 8, 1894.)

**ERROR** to the Circuit Court of the United States for the Southern District of Ohio to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servant. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Charles T. Greve and C. D. Robertson*, for plaintiff in error:

The general principle is stated in Wood on Railway Law, p. 1076, § 801, that "it is not meant that they (railway companies) are re-

quired to exercise superhuman care and vigilance, or the 'very utmost care,' but such care, in view of the circumstances, as a reasonably prudent man would exercise, in view of the consequences likely to ensue from a relaxation of such care and vigilance."

The terms in question (the highest possible degree of care) do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from every possible peril.

*Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 28 L. ed. 898.

A carrier of passengers for hire is not held to take every possible precaution against danger.

*Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 93 Am. Dec. 99; *Arkansas Midland Railway v. Canman*, 52 Ark. 517; *Furnish v. Missouri Pac. R. Co.* 102 Mo. 438; *Southern Kansas R. Co. v. Walsh*, 45 Kan. 658; *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138; *Stokes v. Eastern Counties R. Co.* 2 Fost. & F. 691; *Ford v. London & S. W. R. Co.* Id. 730.

*Messrs. W. H. Jackson and T. F. Hallam*, for defendant in error:

In order to show negligence on this particu-

**NOTE.—Liability for injuries to elevator passengers.**

#### *Passenger elevators.*

The obligation to passengers on elevators is the same as that of common carriers to passengers, and the case of *MITCHELL v. MARKER* is sustained by the cases *infra*. If the owner and operator of an elevator has taken the highest degree of precaution and is without fault, no recovery can be had for an accident; the contributory negligence of the passenger may defeat his right to recover in other cases.

In *Goodsell v. Taylor*, 4 L. R. A. 673, 41 Minn. 207, the rule is stated to be that "the relation between the owner and manager of an elevator for passengers and those carried in it is similar to that between an ordinary common carrier of passengers and those carried by him. The same reason exists for requiring on the part of the owner the utmost human, care and foresight, and for making him responsible for the slightest degree of negligence, and also, in case of injury by the breaking or giving way of the elevator, for putting on him the onus of proving that it was through no fault or neglect of his."

And those operating and using passenger elevators are bound to use all reasonable means and efforts to furnish good and well-constructed machinery, adapted to the purpose of its use, and all reasonable means and efforts to furnish or pro-

vide it of good material, and of the kind that is found to be the safest when applied to use, and evidence of caution and notice in the use of the elevator is competent to show knowledge and carelessness in its operations, and the fall of an elevator is *prima facie* evidence of negligence. *Treadwell v. Whittier*, 5 L. R. A. 498, 80 Cal. 574.

And where the door of an elevator cage is thrown open, and the party having a right to use it has reasonable ground to believe that it was opened for him, and that the cage was opposite the door, the question of contributory negligence in stepping through the open door, where the light was insufficient, was properly submitted to the jury. *People's Bank of Baltimore v. Morgolofski*, 75 Md. 432; *Dawson v. Sloane*, 100 N. Y. 630, affirming 17 Jones & S. 304; *Tousey v. Touberta*, 114 N. Y. 312. See *Patterson v. Hemenway, infra*.

But a newsboy forbidden to ride in a passenger elevator cannot recover for injuries in attempting to board the car, unless he was willfully injured. *Springer v. Byram (Ind.)* 23 L. R. A. 244.

So where a person recklessly puts his head in the well-hole, he cannot recover, and the fact that the elevator boy failed to sound a whistle to warn passengers of his descent, is not negligence. *Mau v. Morse*, 3 Colo. App. 359.

And Mass. Stat. 1882, chap. 206 (Amend. Pub. Stat. chap. 104, § 14), providing that elevator cars shall have a safety device to hold the car securely

lar occasion in the speed at which the agent started and ran the elevator, it was competent to show that he had previously been warned as to its speed.

*Treadwell v. Whittier*, 5 L. R. A. 498, 80 Cal. 574.

The duty of a carrier of passengers is to carry safely as far as human care and foresight will go; that is, for the utmost care and diligence of very cautious persons; not an absolute liability, but a responsibility for the very highest degree of care and diligence, and liability for slightest neglect.

See *Stokes v. Saltonstall*, 88 U. S. 18 Pet. 181, 10 L. ed. 115; *New Jersey R. & Transp. Co. v. Pollard*, 89 U. S. 23 Wall. 841, 23 L. ed. 877; *Gleason v. Virginia Midland R. Co.* 140 U. S. 442, 85 L. ed. 462; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 280; *Story*, Bailm. § 601; *Gaylord v. Grand Trunk R. Co.* 48 N. H. 814, 2 Am. Rep. 229; *Farish v. Reigle*, 11 Gratt. 711, 62 Am. Dec. 666; *Fairechild v. California Stage Co.* 18 Cal. 599; *Treadwell v. Whittier*, *supra*.

Every one who undertakes a business is bound to exercise a care proportionate to the chances of injury resulting therefrom.

*Baltimore & P. R. Co. v. Jones*, 95 U. S. 489, 24 L. ed. 506; *Holladay v. Kennard*, 79 U. S. 13 Wall. 254, 20 L. ed. 890.

The owner and proprietor of a building must exercise a degree of care commensurate—or, in the language of the court below, “consistent”—with the circumstances, to insure the safety of those coming upon business.

See *Whittaker's Smith*, Neg. pp. 224, 225; *Bennett v. Louisville & N. R. Co.* 103 U. S. 577, 26 L. ed. 235; *Nave v. Flack*, 90 Ind. 208, 46 Am. Rep. 205; *Currier v. Boston Music Hall Assn.* 135 Mass. 414; *Oberfelder v. Doran*, 26 Neb. 118.

The same responsibility should and does rest upon one who operates a passenger elevator as upon any other carrier of passengers.

*Goodsell v. Taylor*, 4 L. R. A. 673, 41 Minn.

In case of accident, does not mean that a device shall be used which will in all cases hold the car, but it is sufficient if it is provided with a suitable device approved by the state inspector. *Bourgo v. White*, 159 Mass. 216.

And a party who had taken goods up in the freight box of a passenger elevator, and left the door open and returning stepped through without looking, cannot recover although the elevator had been moved, where he knew that the elevator boy could not close the door from his position. *Ballou v. Collamore*, 160 Mass. 246.

The owner and operator of a hydraulic passenger elevator is not liable for accident caused from the air in the street pipe connecting with the water main, where the main was shut off without his knowledge and the elevator had all known safety appliances. *Shattuck v. Rand*, 148 Mass. 83.

And in *Egan v. Berkshire Apartment Assn.* 51 N. Y. S. B. 545, it was held where the visitor of a servant who entered an elevator used for freight, baggage, and servants, which had a sliding baggage door on one side, and who fell through and under the sliding door and into the shaft, that no recovery could be had, and this on the theory that her falling was caused by vertigo or stumbling; and her friend in attempting to rescue her had pulled her through the opening back into the well by catching her dress, and it was held not negligence to leave the sliding door open.

25 L. R. A.

207; *Treadwell v. Whittier*, 5 L. R. A. 498, 80 Cal. 574.

There is no one of the duties of a railroad company more clearly embraced in its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions.

*Gleason v. Virginia Midland R. Co.* 140 U. S. 442, 85 L. ed. 462; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 280; *Stokes v. Saltonstall*, 88 U. S. 18 Pet. 181, 10 L. ed. 115.

Argued before Lurton, Circuit Judge, and Ricks, District Judge.

Lurton, Circuit Judge, delivered the opinion of the court:

This was an action for personal injuries sustained by appellee while being carried in a passenger elevator in an office building in the city of Cincinnati, Ohio, owned by the appellant. There was a jury, and a verdict for the appellee. The bill of exceptions is very meager, and was prepared chiefly with a view of presenting certain questions of law arising upon the charge of the court. There is, however, one error assigned upon the ruling as to the admission of evidence. To understand that assignment, and its bearing upon the other assignments which relate to the charge, we set out so much of the bill of exceptions as relates to the evidence submitted. It is as follows:

“The plaintiff, to maintain the issue on his part, offered testimony tending to prove the allegations of the petition, to wit, to prove that the servant of the defendant, while in the line of his employment, for hire, operating a passenger elevator in the Mitchell building, in Cincinnati, belonging to said defendant, was negligent in such a degree and manner as to injure the plaintiff, who was lawfully entering said elevator; and, in

For liability of landlord for injuries in elevator. see note to *Jones v. Millsaps* (Miss.) 23 L. R. A. 154.

*Freight elevators used by outside parties as passenger elevators.*

A party operating and controlling an elevator is not liable to a person who has notice that he is forbidden the use, or is not privileged to use, the same, and who is injured in attempting to use it without the knowledge or consent of the owner or operator.

And the owner of a building is not liable for injuries caused to a fire insurance patrol man, who attempted to use a freight elevator in the night after he had broken open the building to save its contents from fire. *Gibson v. Leonard*, 17 L. R. A. 588, 143 Ill. 182, 87 Ill. App. 344.

And a person who has notice that the elevator is not for passengers, and attempts to use it, cannot recover for injuries caused by his stepping through the door which he has negligently left open, or from the effects of the elevator rope. *Patterson v. Hemenway*, 145 Mass. 94; *Snyder v. Natchez, R. R. & T. R. Co.* 43 La. Ann. 302.

In this note cases in regard to injuries to employees using elevators, and injuries to persons other than passengers, in stepping through an open door, are omitted.

L. T.

the course of said testimony for plaintiff, counsel for plaintiff asked the following question, which was objected to by counsel for defendant, but said objection was overruled by the court, to which exception was then and there taken by counsel for defendant, and the question was answered as herein set forth, to wit: 'Q. You say that you frequently spoke to this man about the rate of speed at which he was running the elevator? A. Yes, sir; time and again' (the man referred to being the man whose alleged negligence in operating said elevator at the time of the accident is the cause of complaint herein). That thereupon plaintiff rested, and thereupon defendant offered testimony tending to contradict the evidence of plaintiff, and to prove the allegations of the answer, to wit, that there was no negligence on the part of the defendant, causing said accident, and thereupon defendant rested; and thereupon plaintiff offered evidence tending to rebut the evidence of the defendant; and this was all the evidence offered by either party to the cause."

The first error assigned is as follows:

"(1) The court erred in allowing the asking of the following question of plaintiff: 'You say that you frequently spoke to this man about the rate of speed at which he was running the elevator?' (the man referred to being the elevator man, whose alleged negligence in operating the elevator is the cause of complaint herein),—and in allowing said question to be answered, as follows, to wit: 'Yes, sir; time and again.' The council for the defendant then and there excepting."

This assignment is bad. The ground of objection was not stated in the court below. The exception was a general one. The ground now assigned is that "the question was an improper one, as it tended to establish a habit of negligence on the part of defendant's agent, while the point at issue in this case was not the negligence of defendant in employing a careless servant, but the negligence of that servant at the time of the accident." What was said about the speed of the elevator man is not shown. We are left to speculate and conjecture as to whether it was a warning that his speed was dangerous, or a commendation as to his regulation of the speed, or a complaint that his speed was too slow. The cases are numerous which hold that, to avail on writ of error, an objection to evidence must be specific, and distinctly indicate the grounds upon which the objection is made. *Noonan v. California Min. Co.* 121 U. S. 400, 80 L. ed. 1088; *Patrick v. Graham*, 132 U. S. 627, 83 L. ed. 460. Aside from this, it is impossible for this court to assume that the court was in error in excluding the testimony now complained of; for its character is not sufficiently evident, and its bearing upon the issues by no means plain, in view of the meagerness of the bill of exceptions.

The second error is that the court erred in charging the jury as follows: "It follows that reasonable care, under those circumstances, is a high degree of care,—the highest degree of care consistent with the possibility of injury."

This sentence is the last of a paragraph concerning the degree of care required in the operation of an elevator. That paragraph is as follows: "Mr. Marker seeks to recover damages from Mr. Mitchell, on the ground that he suffered an injury because of Mitchell's negligence. Mitchell is the owner of a building on Fourth street, in which there is an elevator. The elevator is put in there for the purpose of accommodating those who wish to go to offices of Mitchell's tenants; and Mitchell owes a duty, therefore, to those who take that elevator for that lawful purpose, to see that he uses every reasonable means that carriage on the elevator shall not injure those who use it. Now, every reasonable means are those means which a man of ordinary, careful prudence would use under the circumstances. When a man steps upon an elevator of this character, he places himself under the control of another; and it follows that reasonable care under those circumstances, is a high degree of care,—the highest degree of care consistent with the possibility of injury."

Particular objection is made to the expression, "consistent with the possibility of injury." Appellant's counsel argue that the jury were thereby given to understand that the owner of an elevator was "practically an insurer;" that "consistent with the possibility of injury" "means just allowing for such a possibility." This is a strained and unnatural interpretation. The sentence must be read with its context, and in the light of the particular action being tried. The expression, "consistent with the possibility of injury," is not the happiest which might have been chosen. It is plain, however, that the court was not misunderstood, when we consider the subject-matter of the suit, the dangers incident to vertical carriage, the helplessness of a passenger so carried, and the serious consequences to ensue from even slight negligence. The obvious meaning of the court, when the objectionable sentence is read in the light of the particular case on trial, and in connection with the context, was, that reasonable care, under such circumstances, would be a high degree of care, the highest degree of care being only such as would be commensurate with, or proportionate to, the possibility of injury to one so entirely dependent upon the caution and skill of another, and the soundness of the machinery used for his transportation. To say to a jury that the law requires that the degree of care to be exercised must be such as is "consistent with the possibility of injury" is only to say that the care must be commensurate with, or in proportion to the possibility of injury presented by the particular situation. There was nothing in the paragraph excepted to which would justify an inference that a carrier by elevator was an insurer of the safety of his passengers. Assuming that the charge meant what we understand it to mean, and that the jury would not be justified in putting any other meaning upon it, we think the principle of law stated was both wholesome and sound.

We see no distinction in principle between the degree of care required from a carrier of

passengers horizontally, by means of railway cars or stagecoaches, and one who carries them vertically, by means of a passenger elevator. The degree of care required from carriers by railway or stagecoach is the highest degree. Neither is an insurer, but, in regard to each, care short of the highest degree becomes, not ordinary care, but absolute negligence. Speaking of the degree of care required from a railroad company, the supreme court, in *Pennsylvania Co. v. Roy*, 102 U. S. 458, 26 L. ed. 144, said: "He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill, and this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger." See also *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458.

In *Stokes v. Saltonstall*, 38 U. S. 13 Pet. 181, 10 L. ed. 115, the same measure of care was required from the owner of a stagecoach.

The suggestion that this rule applies only to the vehicle or machinery is not sound. There is no distinction between the duty in regard to vehicle and machinery and track and that required in the control and management of the means of transportation. In the last case cited the supreme court approved a charge in which the degree of care required from a driver of a stagecoach was laid down as the "utmost prudence and caution."

The rule in regard to carriers of passengers has been well stated by Judge Cooley in his very able work on Torts. He says: "Such carrier only undertakes that he will carry them without negligence or fault. But as there are committed to his charge, for the time, the lives or safety of persons of all ages, and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life and limb, it is reasonable to require of him the most perfect care of prudent and cautious men; and his undertaking as to his passengers goes to this extent; that, as far as human foresight and care can reasonably go, he will transport them safely. He is not liable if injuries happen from sheer accident or misfortune, where there is no negligence or fault, or where no want of caution, foresight, or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his servants." Cooley, Torts, 2d ed. 768, 769.

The case of *Treadwell v. Whittier*, reported in 80 Cal. 574, 5 L. R. A. 498, is directly in point. The question there presented was the degree of care required from one operating a passenger elevator. After considering and stating the rule required from carriers by railway and coach, the California court said: "The same responsibility must attach to one controlling and running an elevator. Persons who are lifted by elevators are subjected to great risk to life and limb. They are hoisted vertically, and are unable, in case of the breaking of machinery, to help themselves. The person running such ele-

vator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of every cautious person, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised. Where the danger is great, the utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence. We know of no employment where the law should demand a higher degree of care and diligence than in the case of the persons using and running elevators for lifting human beings from one level to another. The danger of those being raised is great. When persons are injured by the giving way of the machinery, the hurt is always serious, frequently fatal; and the law should, and does, bind persons so engaged to the highest degree of care practicable under the circumstances. It would be injustice and cruelty to the public, in courts, to abate in any degree from this high degree of care. The aged, the helpless, and the infirm are daily using these elevators. The owners make profit by these elevators, or use them for the profit they bring to them. The cruelty from a careless use of such contrivances is likely to fall on the weakest of the community. All, including the strongest, are without the means of self-protection upon the breaking down of the machinery. The law therefore throws around such persons its protection by requiring the highest care and diligence."

The case of *Goodell v. Taylor*, 41 Minn. 207, 4 L. R. A. 673, is a like case, and the rule applicable to carriers by railway is there applied to carriers by passenger elevators.

The third assignment of error is as to so much of the charge as held it to be "the duty of the elevator man to see that all his passengers are on, and to give them sufficient time to adjust themselves." The petition charged that as the plaintiff "was entering the car of the elevator in said building, to be carried to the fifth floor thereof, while he was in the act of entering said car, and before he was allowed the proper time to safely balance or adjust himself therein, the agent or servant having charge of the running of said elevator negligently and carelessly caused the same to be suddenly started, with great, unusual, and dangerous speed and violence, and negligently failed to guard the door or entrance to the car of said elevator, . . . by reason of which negligent acts and omission of defendant's agent or servant, and also by reason of the unsafe construction of said elevator, the plaintiff was thrown violently from his feet, and was caught between the cage of



said elevator and a projection of the floor above, and sustained serious and permanent injuries," etc.

Upon this allegation the court said: "Now, it is charged in this petition that Bartholomew failed in three respects: First, that he started the elevator too quickly; and by that I don't refer to the starting of the elevator by jerks, but I mean that he didn't wait long enough, until Marker should have time to adjust himself to the quick, upward motion. Of course, it is the duty of the elevator man to see that all his passengers are on, and to give them sufficient time to adjust themselves. Whether that was done in this case, it is for you to say. If he did not do that, and if, by reason of starting too quick, the accident occurred, Mr. Mitchell is liable."

We think there was no error in this, as applied to the issue to which it related. It was clearly the duty of the engineer operating the elevator to give passengers reasonable opportunity to obtain a balance upon entering the car, before a rapid and sudden upward movement is begun, having a tendency to disturb the equilibrium of one yet in motion.

The fourth and last error assigned is in these words: "The court erred in charging the jury with reference to the duty of the elevator man in extending his arm." The language of the assignment is precisely the language in which the exception was taken.

Looking to the petition, we find that it alleged that the door or entrance to the car was unguarded, and that plaintiff fell out this door, and was jammed between the elevator and the shaft. Looking to the charge, we find that the court commented upon the issue thus presented, and the testimony relating to the issue, and submitted to the jury the question as to whether, under the circumstances, reasonable prudence would have required the elevator man to have extended his arm in such way as to prevent one losing his balance from falling out the door. The facts relating to this issue are not included in the bill of exceptions; and we cannot say whether there was or was not evidence justifying the submission of this question to the jury. Certainly, we cannot, on this record, say that it was error in the trial court to have so instructed the jury. But a fatal objection to this assignment is that it does not set out the part of the charge referred to. Rule 11 requires that, "when the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused."

Counsel, in brief, have complained of other parts of the charge. But as no exception was taken on the trial, and no error has been assigned as required by the rule cited above, we cannot consider them.

*The judgment must be affirmed.*

## OHIO SUPREME COURT.

SPRINGFIELD FIRE & MARINE INSURANCE CO., *Pff. in Err.*,

v.

Julia M. HULL.

(51 Ohio St. —)

"1. A contract, the consideration of which, in whole, or in part is the suppression of a criminal prosecution, is without any legal efficacy, either as a cause of action, or as a defense to an action not founded on, or arising out of, the agreement.

2. The rule that a party who would rescind a contract must restore what he has received under it, does not apply to contracts founded on an illegal consideration, and void for that reason.

3. In certain cases where applicable, the rule is satisfied if the judgment

sought will substantially restore the party to the situation he was in when the agreement was made; as, when money paid by him is less than he justly owed the other party, and the same is credited, and the action brought for the balance.

4. Where a person is induced by threats of a groundless prosecution to accept a less sum than is justly owing to him on a policy of fire insurance, in satisfaction of his claim, and to surrender the same, he may maintain an action on the policy for the balance due, without returning or tendering back the money so received.

(April 24, 1894.)

**E**RROR to the Circuit Court for Mahoning County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover the unpaid amount upon a policy of fire insurance. *Affirmed.*

*Headnotes by the COURT.*

**NOTE.**—On the question what constitutes duress, see *Adams v. Irving Nat. Bank* (N. Y.) 6 L. R. A. 451; *Bhatnuck v. Watson* (Ark.) 7 L. R. A. 551, and note; *De La Cuesta v. Insurance Co. of North America* (Pa.) 9 L. R. A. 651, and note.

As to duress by lien on real property, see *Joannin v. Ogilvie* (Minn.) 16 L. R. A. 376.

For the doctrine of returning consideration as a condition of rescinding a contract, see note to *Katz v. Bedford* (Cal.) 1 L. R. A. 826, also *Tarkington v. Purvis* (Ind.) 9 L. R. A. 607, and note.

36 L. R. A.

For the somewhat analogous question of returning considerations before bringing replevin for property obtained by fraudulent purpose, see *Sisson v. Hill* (R. L.) 21 L. R. A. 206, and note.

And as to recovery of property obtained from an intoxicated person by fraud, without restoring what has been received in consideration, see *Baird v. Howard* (Ohio) 23 L. R. A. 846.

Statement by **Williams, J.:**

The Springfield Fire & Marine Insurance Company, of Springfield, Massachusetts, on the 1st day of September, 1883, issued a policy to Julia M. Hull, insuring her against loss or damages by fire, to the amount of \$1,200 on her dwelling house in Youngstown, and \$300 on furniture and other articles therein, for the period of three years; which policy, at its expiration, was renewed and extended for another like period. In October, 1887, the property was damaged by fire to the amount of \$815, which was paid by the company, and the policy continued in force for the balance, viz.: \$1,185. Afterward, on the 27th day of December, 1887, while the policy was in force, the property was totally destroyed by fire; and the action below was brought to recover the loss. The petition, to which a copy of the policy is attached, alleges the foregoing facts, and also the performance by the plaintiff of the conditions of the policy on her part to be performed, the proof of the loss in due time, and the payment thereon of \$575, leaving a balance of \$610, for which, with interest, judgment is claimed. The answer denies certain allegations of the petition, and avers as a further defense, that by the terms of the policy the loss was not payable until sixty days after the receipt by the defendant of the proof of the same, and that the next day after the fire, the parties came to a compromise and settlement, which was reduced to writing and duly signed, by which the plaintiff agreed to accept the immediate payment of \$575, in satisfaction of her claim; which sum the defendant then paid by draft, and the plaintiff surrendered the policy and thereafter collected the draft, and has not offered to repay the amount to the defendant. The reply to that defense alleges that on the day after the property was burned, the plaintiff met the defendant's agent, at his request, in his room at a hotel where he was stopping, "and while there alone with him, the said agent knowingly, falsely charged and accused her of being guilty of the crime of setting fire to and burning her own house and furniture, and then and there told her that he had evidence that would sustain said charge, and said to her that by reason of the proof which he had knowledge of, she could not live in the city of Youngstown, and the company would not permit her to remain in said city, but would send her to the penitentiary for said crime; and said agent then and there presented to her for signature, a paper writing which may have been a receipt, and said to her that unless she then signed said paper writing that she could not live in the city of Youngstown, and would have to leave said city, and that said company would send her to the penitentiary; all of which statements were made by said agent knowingly, falsely, and fraudulently, for the purpose of intimidating and threatening her, and working upon her feelings and fears, so as to coerce her, and place her under duress, and frighten her into signing said paper writing. That she was then in infirm health, and weak and exhausted from the excitement occasioned by said fire, all of which was known and ap-

parent to said agent, and of which he wrongfully, and with fraudulent intent, took advantage, and reiterated and repeated said threatening statements until she was in such state of mind and body that she was entirely incapable of knowing and understanding her situation, and she then said to said agent that she desired to consult her counsel before acting in the matter, and thereupon said agent reiterated said threatening statements, and others of a similar import and meaning, and told her that if she did not sign said paper immediately she would never get anything, and that she would have to leave the city of Youngstown and her family, and the company would prosecute her criminally on the charge of burning her house and furniture, and she would have to go to the penitentiary, but that all this could be avoided by signing said papers. And plaintiff says that in her said condition of mind, she was compelled to, and did sign some papers, but avers that her signature was obtained through force, duress, and fraud, as hereinbefore set forth, and that if any paper writing is in the possession of said defendant purporting to settle or compromise her said claim, as set forth in her said petition, the same was procured from her by means of the aforesaid fraudulent and criminal acts of said agent of defendant, perpetrated upon her while she was weak in mind and body, and laboring under severe mental strain and excitement, induced by the said agent for the purpose of coercing her into signing the same, and while she was incapable of understanding her rights in the premises, or the effect of her said acts; and that the same are fraudulent and void, and of no virtue or effect in law."

The trial of the issues resulted in a verdict for the plaintiff, upon which judgment was rendered, and that judgment was affirmed by the circuit court. It is sought here to obtain the reversal of the judgments below, for error in the charge to the jury, and the refusal to give in charge instructions requested by the defendant, which will be noticed in the opinion.

**Messrs. Thomas Bates and Hine & Clarke**, for plaintiff in error:

There is no fraud or duress about the transaction.

Plaintiff knew far better than Reed, or any other person, whether she burned that house.

To constitute fraud there must certainly be deceit.

*Edna Ins. Co. v. Reed*, 38 Ohio St. 233.

Granting that a "part of that contract or compromise was an agreement not to prosecute the plaintiff upon the charge of burning her own house," we submit that it is not the law of Ohio that the court should declare such contract void, and permit a recovery upon the surrendered policy.

Such a contract of compromise would be illegal, it is true, whether Mrs. Hull was guilty or not.

*Moore v. Adams*, 8 Ohio, 373, 83 Am. Dec. 723.

But it was an executed contract—the money

was paid, and the policy surrendered under it—and before recovery could be had on such surrendered policy, a court must “corrupt itself by interfering between” the corrupt parties, and declaring their corrupt contract of compromise void.

Such course the following decisions in Ohio expressly forbid:

*Moore v. Adams*, *supra*; *Thomas v. Cronise*, 16 Ohio, 54; *Hooker v. DePalos*, 28 Ohio St. 251; *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759; *Williams v. Englebrecht*, 37 Ohio St. 383; *Kahn, Jr., v. Walton*, 46 Ohio St. 195.

Before Mrs. Hull could rescind that contract of compromise and settlement she must put the other party *in statu quo*.

*Home Ins. Co. of New York v. Howard*, 111 Ind. 545; *Brown v. Hartford F. Ins. Co.* 117 Mass. 479; *McMichael v. Kilmer*, 76 N. Y. 86; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 76; *Biebes v. Ham*, 47 Me. 543; *Worley v. Moore*, 97 Ind. 15; *Pangborn v. Continental Ins. Co.* 63 Mich. 638; *Wilbur v. Flood*, 16 Mich. 40; *Jewett v. Pettit*, 4 Mich. 506; *De Armand v. Phillips*, Walk. Ch. 186; *Galloway v. Holmes*, 1 Dougl. (Mich.) 380; *Dunks v. Fuller*, 33 Mich. 242; *Martin v. Ash*, 20 Mich. 166; *Hubbardston Lumber Co. v. Bates*, 81 Mich. 159; *Michigan Cent. R. Co. v. Dunham*, 80 Mich. 128; *Crippen v. Hope*, 88 Mich. 344; *Gray v. St. John*, 85 Ill. 223; *Mann v. Stowell*, 3 Chand. 243; *Evans v. Gale*, 17 N. H. 575, 48 Am. Dec. 614; *Shepherd v. Temple*, 8 N. H. 455; *Lucy v. Bundy*, 9 N. H. 298, 32 Am. Dec. 359; *Hogan v. Weyer*, 5 Hill, 389; *Degraw v. Elmors*, 50 N. Y. 1; *Bull v. Bull*, 48 Conn. 465; *Higham v. Harris*, 108 Ind. 246; *Physio-Medical College v. Wilkinson*, 108 Ind. 314; *Doane v. Lockwood*, 115 Ill. 490; *Turner v. Orusen*, 70 Iowa, 202; *Potter v. Taggart*, 59 Wis. 1; *First Nat. Bank of Barnesville, Ohio v. Yocum*, 11 Neb. 328; *Wells v. Naff*, 14 Or. 66; *Gates v. McLean*, 70 Cal. 49; *Benton v. Marshall*, 47 Ark. 241; *Deans v. Robertson*, 64 Miss. 195.

One who has been led into a contract upon which he has received something of value cannot ignore the contract, however induced, and proceed in a court of law as if the relations of the parties were wholly unaffected thereby. He cannot while retaining the benefits and thus affirming the contract, treat it as though it did not exist. He cannot treat it as good in part and void in part, but must affirm or avoid it as a whole.

*Home Ins. Co. of New York v. Howard*, 111 Ind. 545; *Parsons*, Cont. 6th ed. p. 395; *Bigelow*, *Fraud*, 184; *Wharton*, Cont. §§ 283, 285, 288, 290.

**Messrs. R. B. Murray, T. W. Sander-son, and C. R. Truesdale**, for defendant in error:

The true test for determining whether or not the plaintiff and defendant were actually *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party.

Whart. Cont. § 540.

To the rule that parties implicated in an executive illegal transaction have no remedy against each other, an exception is recognized 35 L. R. A.

in cases where one is the victim of duress, or fraud, or superior influence.

Whart. Cont. § 358.

Dupes and victims of an illegal transaction are not precluded from suing on it.

Whart. Cont. § 345.

A cancellation only nominally obtained does not bind the party.

For menaces in four instances a man may avoid his own act: First, for fear of loss of life; second, of member; third, mayhem; and fourth, for fear of imprisonment.

2 Bacon, Abr. 156, 157; *James v. Roberts*, 18 Ohio, 562.

To constitute duress *per minas*, it is not essential that the party be threatened with loss of life or limb, or with mayhem; but it is enough if he act from fears excited by threats of illegal imprisonment.

*Powhay v. Ferguson*, 5 Hill, 154, *Taylor v. Jaques*, 106 Mass. 291.

It was decided as early as 1849 in this state that a contract of settlement entered into under the circumstances as shown in this case might be avoided.

*James v. Roberts*, 18 Ohio, 548; *Williams v. Englebrecht*, 37 Ohio St. 386.

This pretended contract of compromise was void, not voidable.

Whart. Cont. § 463; *Pollock*, Cont. 3d ed. p. 7.

**Williams, J.**, delivered the opinion of the court:

The record discloses that on the trial the plaintiff gave evidence sustaining the allegations of her petition, and the only defense attempted to be maintained was that which plead the compromise, in support of which, and of the averments of the reply thereto, the parties respectively offered their proof. The court instructed the jury, in substance, that if the parties made a compromise and settlement of the plaintiff's loss, by which she accepted \$575, in satisfaction of her claim, and a promise that she should not be prosecuted on the charge of burning the property formed no part of the consideration, she could not recover; but if such promise was a part of the consideration, the contract was void, and constituted no defense to the action. To the last proposition the defendant excepted; and whether that part of the charge was erroneous, or not, is one of the questions in the case.

It is not disputed that a contract founded upon a consideration which, in whole, or in part is illegal, immoral, or against public policy is void, and will not be enforced at the instance of any party to it; but, it is contended that rule cannot avail the plaintiff, because the contract of compromise was executed by the payment of the sum agreed upon, and the surrender of the policy, and was therefore, notwithstanding its infirmity, a bar to the action. We think not. The rule is, that the court will not assist either party to such a contract to enforce it against the other, or to recover what he has parted with under the contract; and the test in determining when it applies to a plaintiff, is whether his cause of action is founded on, or arises out of, the illegal agreement. If

the action is of that character, whether it appear from his own stating, or is shown by way of defense, he must fail; otherwise, not. The plaintiff's action was upon the policy of insurance, which, it was admitted was issued by the defendant, and was without taint or blemish. The destruction of the property insured was total; so that, under our statute, the amount owing to the plaintiff was fixed and certain, being the amount for which the policy was in force when the fire occurred. Rev. Stat. § 3643; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45.

The petition, to which a copy of the policy is attached, contains all the necessary allegations to entitle the plaintiff to recover upon it; and upon proof of those that were denied, to the satisfaction of the jury, the plaintiff was entitled to their verdict, unless the alleged compromise agreement set up in the answer should be established and enforced against her. Her cause of action was not founded on, nor did it arise out of, that agreement. She predicated no claim to recover, upon it, nor in any way sought its enforcement, or the recovery of anything she had parted with under it. On the contrary, the defendant set it up by way of defense, and sought to make it effectual against the plaintiff, who controverted its validity, on the ground that it was illegal, and had been obtained by duress. We see no reason why the plaintiff might not pursue that course. She was not obliged to first bring an action to set aside the agreement, and compel the return of the policy so wrongfully obtained from her, or set out in her petition the facts contained in the answer and reply. They were not a part of her case. The agreement was a matter of defense which might, or might not be pleaded; and the necessity of pleading it, as well as the burden of proving it, was on the defendant. *Larimore v. Wells*, 29 Ohio St. 18. The plaintiff was not required to anticipate the defense, and assail the agreement, in the petition; and when set up in the answer it was none the less open to attack by her, than it would have been if made the foundation of an action against her; nor, when attacked, can it be more effective in the one case than in the other. The party asserting it in either way, as the ground of a right which he is seeking to enforce, must be defeated, because of its illegal character. "An instrument may be shown to be void and without legal existence or efficacy, as for want of consideration, or for fraud, or duress, or incapacity of the parties, or any illegality in the agreement." 2 Parsons, Cont. 8th ed. 670. And that is so, whether the instrument be pleaded as a cause of action, or as a defense to an action not arising out of the agreement. In the cases of *Roll v. Raguet*, 4 Ohio, 400, 23 Am. Dec. 759, and *Raguet v. Roll*, 7 Ohio, 70, the actions were upon instruments given for an unlawful purpose; in the former case, on promissory notes, and in the latter, on a mortgage executed to secure the notes, which were given for the sole consideration that a criminal prosecution against one of the makers should be suppressed. In each of the cases the plaintiff failed because his cause of action

was founded upon the illegal contract. The plaintiff in the case of *Moore v. Adams*, 9 Ohio, 372, 32 Am. Dec. 723, sought to have a deed, executed by him, set aside on the ground that it was made in consideration that he should not be prosecuted for an alleged crime, of which the grantee accused him. The illegal character of the agreement, and the plaintiff's connection with it, were alleged in his bill, and constituted the only ground for the relief he prayed for; and it was held no relief could be granted him on such a cause of action. Upon the same principle, the plaintiff in *Thomas v. Cronise*, 16 Ohio, 54, and *Kahn, Jr. v. Walton*, 46 Ohio St. 195, were denied the remedy sought in those cases. And in *Hooker v. DePalos*, 28 Ohio St. 351, which was an action to recover back money paid in the part performance of an illegal agreement, the plaintiff was defeated on the same ground. In all of these cases, and others of like character, where the plaintiff failed to obtain the relief he desired, his cause of action was founded upon, or arose out of, the illegal transaction; and in that important and decisive feature the case before us is distinguished from them.

It was held in *James v. Roberts*, 18 Ohio, 548, that a court of chancery will restrain the collection of a note and mortgage procured by threats of a groundless prosecution. The court, in distinguishing that case from *Roll v. Raguet*, *supra*, says, that in the latter, "Raguet agreed that he would not only not prosecute, but would use his influence to prevent a prosecution, and that he would not appear as a witness against the accused." The doctrine of the *Roll Case* is recognized, but in holding that it did not apply to the *James Case*, the court says: "that James was entirely innocent of the crime charged against him, and that was known to all parties concerned; that the charge was got up merely for the purpose of extorting money from him by operating upon his fears, and that fearing the consequence of the prosecution, notwithstanding his innocence, he executed the note and mortgage." And further, that "a true public policy requires that all groundless prosecutions should, if possible, be prevented, and that every facility shall be afforded to the innocent to escape from such a calamity; and we think an innocent party may, with great propriety, ask to be relieved from the consequences of a groundless charge." While this case does not overrule that of *Moore v. Adams*, *supra*, or even refer to it, we regard it as containing important qualifications of the doctrine of that case, which are sustained by well considered adjudications elsewhere; among them, *Heckman v. Swartz*, 50 Wis. 267; *Atkinson v. Denby*, 6 Hurlst. & N. 778; 7 Hurlst. & N. 934, 30 L. J. Exch. 361; *Hullhorst v. Scharner*, 15 Neb. 57.

A party, who in the free exercise of his faculties enters into an unlawful agreement, does not stand in precisely the same position as one who executes such a contract under duress. There is no contract without the consent of the parties to its terms, and there is no consent when the free agency of one

party is overcome; and it can be of no practical consequence whether it be overcome through fear of loss of life, or of limb, or through fear of imprisonment. The latter may be as potent as either of the others, and with some individuals more so. Nor, can we think a sound rule requires that the threat of either should, in all cases, be such as would operate upon persons of ordinary firmness, and inspire in them a just fear. The question in each case must be, whether the person threatened was deprived of his freedom of will; and that is a question of fact, in the determination of which regard should be had to the nature of the threats, the sex, age, and condition of life of the party, and the attending circumstances. In the proper application of the rule to the record before us, we are not prepared to say the jury was not authorized to find that the agreement relied on as a defense was procured from the plaintiff by duress, and therefore void. In that event, she was not *in pari delicto*, and under the authority of *James v. Roberts, supra*, might, if necessary, have maintained an action to set it aside. But, as has already been shown, that was unnecessary; the plaintiff might, as she did, resist the agreement on the ground that it was illegal, when set up in defense to her action. Another objection made to that part of the charge we have been considering is, that it was misleading, in that it implied the plaintiff was guilty of arson, and, in effect, required the jury to find in her favor notwithstanding she burned the property. The charge will not bear that construction. To render a contract void on the ground that its consideration was the suppression of a prosecution, the crime charged need not in fact have been committed. It was not pleaded as a defense, that the plaintiff burned the property, nor does that claim appear to have been made, in any way, on the trial. The fact that no such defense was made, may be regarded as an admission in the case that there was no foundation for it; and though that may have inured to the plaintiff's advantage, it is not probable the jury was misled, as counsel for the plaintiff in error suppose. And again, it is said, there was no evidence in the case to which the charge was applicable. We have examined the evidence, and think it was sufficient to authorize the charge given.

The only other question deemed of sufficient importance to be noticed in the report arises out of the refusal of the court to give to the jury an instruction requested by the defendant, the substance of which is, that the plaintiff could not recover because she had not paid or tendered back the money received under the alleged compromise agreement. It is contended that a party who would rescind a contract must restore to the other what has been received from him; and such is undoubtedly the general rule. It is not, however, without exceptions, one of which is found in the case of *Bebout v. Bodle*, 38 Ohio St. 500, in which this court held that, "where a principal debtor, by falsely and fraudulently representing to the creditor that his surety has consented to an extension

of time for payment, procures from the creditor an agreement for such extension in consideration that interest be paid, such agreement is, as to the creditor, fraudulent, and he may, upon discovery of such fraud, even after the period of extension has expired, repudiate such agreement and sue upon the original contract without refunding or tendering back the interest paid under such invalid agreement." In the opinion of the court by Longworth, J., it is said: "It is further argued that in order to enable plaintiff to repudiate the contract she was bound to refund to William the money paid as its consideration, or at least tender it back. This cannot be true. This sum, which was the interest covering the period of extension, during which the principal remained actually unpaid, was due to the plaintiff from William, irrespective of the question whether the agreement was valid or invalid. We can see no reason why plaintiff should be compelled to pay to this defendant money which was her own in either event, and to which he could not in any aspect of the case be entitled."

The principle of that case, applied to this one, rendered it unnecessary for the plaintiff to return to the defendant the \$575 she had received, before commencing her action. The property insured having been totally destroyed, the sum due on the policy was, under the provisions of our statute heretofore referred to, as certainly fixed at the amount for which the policy was in force when the fire occurred, as if it had been evidenced by the company's note; and she was, therefore, when she brought her action, entitled to receive from the defendant, in the absence of any valid defense, the sum of \$1185. No defense was made except that based on the alleged compromise, under which, it is conceded, she was entitled to the sum paid her; and with that defense determined in her favor, a much larger sum was justly due her; so that the sum paid was owing to her in any event, and no good reason appears why it should have been returned to the defendant. The plaintiff credited the amount on the policy and sued for the balance, thus giving the defendant the full benefit of it, which was equivalent to its restoration. *Allerton v. Allerton*, 50 N. Y. 670. Besides, the contract being void because resting upon an illegal consideration, its repudiation by one party does not give the other a right to have restored to him what he parted with under it; nor does the retaining by the party of what he has received, amount to a ratification of the contract by him. Such contracts have no validity from the beginning, are capable of receiving none by any ratification, however deliberately and formally made; for any attempted ratification must necessarily be as ineffectual as the original contract, because as illegal. The law does not recognize it to be the right of parties to contracts of that nature, to either have them enforced, or have a return of what has been parted with in their performance; it denies both; and hence, there can be no proper application in such cases, of the rules which

govern the rescission of contracts. There is nothing to rescind. The cases from which counsel for plaintiff in error have extensively quoted, are those in which it appears the contract was rescinded, or a rescission sought,

on the ground of fraud, and they have no bearing on this case.

We find no error in the record, and accordingly the judgment is affirmed.

## MASSACHUSETTS SUPREME JUDICIAL COURT

Louisa A. MILLER, Admx., etc., of Herbert W. Miller, Deceased, *Appt.*,  
v.

E. A. HYDE.

(.....Mass.....)

1. The title to the property is not transferred by the entry of judgment in favor of the plaintiff in trover, but remains in him until he has received actual satisfaction.
2. Replevin of a horse is not defeated on the ground that plaintiff has elected another remedy by a prior attachment of the property in an action of trover and judgment against one of the defendants therein, after which the horse was taken in execution, but, before satisfaction of the judgment, was retaken by one of the defendants in a replevin action which is still pending in another state, but to which the present defendant is not a party.
3. The plaintiff in an action of replevin is not estopped by a former attachment or levy, where the other party has not changed his position or course of conduct relying thereon.

(Holmes, J., dissents from proposition 1.)

(Field, Ch. J., and Knowlton, J., dissent from proposition 2.)

(June 19, 1894.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Middlesex County in favor of defendant in a suit brought to recover possession of a horse. *Reversed.*

The case was presented to the court upon an agreed statement of facts which was as follows:

This is an action of replevin to recover possession of a horse known as the "Bull". The plaintiff is the widow and administratrix of the estate of Herbert W. Miller, late of Boston, Mass. The said Herbert W. Miller was by business a stable keeper, and was also interested in the trotting of horses. On or about July 12, 1890, the said Miller in his lifetime intrusted to one George Bryden, of Hartford, Conn., a blank check to be used in the purchase of the said horse known as the "Bull," and a few days thereafter the said Bryden, as the agent and for the benefit of said Miller, purchased said horse, and paid for it with money obtained on said check. Said horse was kept, in company with other

horses also belonging to said Miller, in a barn rented for that purpose by said Miller in Hartford, Conn., and there remained until demanded by the plaintiff herein. The said Miller died in Boston, September 14, 1890, and in the following November the plaintiff herein was duly qualified as the administratrix of his estate in Massachusetts, and shortly thereafter, on or about the 18th day of November, 1890, she went to Hartford, and made a demand on said Bryden for said horse, but Bryden refused to deliver the horse, and claimed to own a half interest therein. The affairs of the said Miller were found to be in great confusion, and the plaintiff was without means of her own, and was harassed by lawsuits in Boston, but in due course of time she was appointed administratrix of the estate of said Miller in Hartford county, Conn., by the probate court of said county, and, shortly after, his estate was declared insolvent by said probate court. Meantime, on or about March 31, 1891, the said Bryden sold said horse the "Bull," as his own property, to Joseph C. Davenport, of Hartford, Conn., and Ada L. Hyde, of Brookline, Conn., for the sum of \$1,500, and gave a bill of sale of said horse to the said Davenport and Hyde, and the said Davenport gave to the said Bryden his check for \$1,285, which check was duly paid. In November, 1891, after her appointment as administratrix in said Hartford county, the plaintiff, being a stranger in Connecticut, and being unable to furnish a bond in Connecticut sufficient to enable her to replevin said horse, brought an action for the conversion of said horse against the said Bryden and Joseph C. Davenport, E. A. Hyde and John Shillinglaw, the horse being then in the possession of said three last-named defendants, and said horse was attached in said suit. Said action was brought to trial in the court of common pleas of Hartford county at the March term of 1892, and the court found for plaintiff as against the defendant Bryden in the sum of \$1,000, fixing the date of conversion at the time of the demand on Bryden in November, 1890, and in favor of the defendants Hyde, Davenport, and Shillinglaw on the ground that said three last-named defendants did not appear to have anything to do with said horse until some months after said conversion by said Bryden. The defendant Bryden was worthless and

NOTE.—The above case presents a peculiar illustration of the difficulty in determining the law as to election of remedies. See on this subject generally, *Fowler v. Bowery Sav. Bank* (N. Y.) 4 L. R. A. 145, and note; *Conrow v. Little* (N. Y.) 5 L. R. A. 408, and note; *Terry v. Munger* (N. Y.) 8 L. R. A. 35 L. R. A.

216, and note; *Crossman v. Universal Rubber Co.* (N. Y.) 12 L. R. A. 91, and note; *Mills v. Parkhurst* (N. Y.) 13 L. R. A. 472, and note.

As to effect of election of remedies in case of fraudulent purchase, see *Union Cent. L. Ins. Co. v. Soheldler* (Ind.) 15 L. R. A. 80, and note.

without property. Execution against him was taken out on said judgment by the said plaintiff, and placed in the hands of James R. Graham, a deputy sheriff for said Hartford county. After demand on said execution on said Bryden by said sheriff, which demand was not complied with, the said sheriff levied said execution by direction of the plaintiff's attorney on the said horse, the "Bull," and proceeded to advertise said horse for sale at public auction. The said sheriff was in the act of selling said horse on said execution, but before it was sold it was taken from him by John M. Foote, Jr., a deputy sheriff of said county, under a writ of replevin in favor of the said Joseph C. Davenport, which suit of replevin at the time of the bringing of this suit was still pending in said Hartford county, Conn. The said Davenport gave bond in said replevin suit, and took possession of the said horse, the "Bull," and later, in August, 1892, intrusted him to the said E. A. Hyde, who brought the horse to Massachusetts, and entered it in his own name for the races at Mystic Park, in Medford, Mass., and, while said horse was at said Mystic Park, he was replevied by the plaintiff herein under a replevin writ directed to the said Hyde. The judgment entered against said Bryden in favor of the plaintiff as aforesaid has not been satisfied.

**Messrs. Elder, Wait & Whitman**, for appellant:

The fact that the plaintiff has recovered a judgment in trover which is still unsatisfied does not bar an action of replevin.

*Atwater v. Tupper*, 45 Conn. 144, 29 Am. Rep. 674; *Turner v. Brock*, 6 Helsk. 50; *Panuzem v. Burr*, 151 Mass. 386; *Lovejoy v. Murray*, 70 U. S. 8 Wall. 1, 18 L. ed. 129; *Elliot v. Hayden*, 104 Mass. 180; *Byers v. Franklin Coal Co.* 106 Mass. 181; *Lord v. Bigelow*, 124 Mass. 185; *Greenfield v. Wilson*, 13 Gray, 384; *Moore v. Loring*, 106 Mass. 455; *Miller's River Nat. Bank v. Jefferson*, 138 Mass. 111; *Brinmead v. Harrison*, L. R. 6 C. P. 584, L. R. 7 C. P. 547; *Smith v. Smith*, 51 N. H. 571.

Has the plaintiff lost any right or title by the action of her counsel in causing the horse to be attached in the suit against Bryden?

Surely it would be a reproach to the law if the poverty or friendlessness of a plaintiff should act to deprive her of a right which she was striving to maintain, or could be construed into a waiver or an estoppel.

The plaintiff has done no act to waive or ratify the tort. On the contrary, all her suits have been in tort, and, as was said by Bovill, *Ch. J.*, this "is a conclusive election the other way."

The fact of the attachment of the specific property is immaterial.

*Bailey v. Hervey*, 135 Mass. 172.

There can be no waiver. In *Crafts v. Bel-den*, 99 Mass. 585, Foster, J., said: "A waiver is an intentional relinquishment of a known right."

In *Connihan v. Thompson*, 111 Mass. 270, it was held that a purchaser of land is not estopped to bring a bill for specific performance by the fact that he has brought a suit at law

against the vendor for damages and attached the land.

The defendant cannot make out the element of intent on the part of the plaintiff necessary to constitute an election, or waiver, or estoppel *in pais* from the agreed facts.

*Bradley v. Brigham*, 3 L. R. A. 507, 149 Mass. 141; *Dean v. Yates*, 23 Ohio St. 383; *Browning v. Banoroff*, 8 Met. 278.

The pendency of the replevin suit in Connecticut between Davenport and the deputy sheriff is no bar to the present action. The pendency of a suit in another jurisdiction, even if it is between the same parties as in the suit where the point is raised, is no bar to the prosecution of said last named action.

*Newell v. Newton*, 10 Pick. 471; *Cott v. Part-ridge*, 7 Met. 574; *Scott v. Rand*, 118 Mass. 215; *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Johns. 99.

One whose property has been replevied by a writ against his agent or his bailee can retake it by replevin from the plaintiff in the first action even during the pendency of that action.

*White v. Dolliver*, 118 Mass. 400, 18 Am. Rep. 502.

In Connecticut cross-replevin suits between the same parties seem allowable.

*Rosworth v. Troubridge*, 45 Conn. 161; *Troubridge v. Rosworth*, 45 Conn. 166.

**Mr. J. H. Morrison**, for appellee:

The suit instituted by the plaintiff, Miller, against Bryden is an absolute election on her part and forever bars her from maintaining any other action in respect to said horse.

*Bradley v. Brigham*, 3 L. R. A. 507, 149 Mass. 144; *Connihan v. Thompson*, 111 Mass. 272; *Butler v. Hildreth*, 5 Met. 49.

The plaintiff in the case at bar made a positive, absolute election when she brought her action for conversion, and the question of the want of satisfaction of the judgment obtained therein cannot be pleaded, as it is immaterial whether judgment was or was not satisfied if an election was made by plaintiff.

*Butler v. Hildreth*, and *Bradley v. Brigham*, *supra*; *Connihan v. Thompson*, 111 Mass. 270; *Smith v. Baker*, L. R. 8 C. P. 350; *Lythgoe v. Vernon*, 5 Hurlst. & N. 180.

This action cannot be maintained while the action of replevin is pending, in which the plaintiff in this action is the actual defendant and the defendant in this action is the actual plaintiff, and the title to the same property is the question involved.

*Portland Bank v. Skidde*, 6 Mass. 426, 4 Am. Dec. 151; *Lockwood v. Perry*, 9 Met. 440; *Gordon v. Jenney*, 16 Mass. 485; *White v. Dolliver*, 118 Mass. 400, 18 Am. Rep. 502.

**Barker, J.**, delivered the opinion of the court:

The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her husband's estate, she was the owner when she brought trover in Connecticut against Bryden, the bailee who had wrongfully usurped dominion and sold and delivered the horse to Davenport. As the horse was in Connecticut and the action of trover was in the courts of

that state, the effect of the suit upon her title would be determined by the law of the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own. Whether a plaintiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this court. Assuming that, in early times, title to the chattel was transferred to the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction. See *Atwater v. Tupper*, 45 Conn. 144, 29 Am. Rep. 674; *Turner v. Brook*, 6 Heisk. 50; *Loojoy v. Murray*, 70 U. S. 8 Wall. 1, 18 L. ed. 129; *Ex parte Drake*, L. R. 5 Ch. Div. 866; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; 1 Greenl. Ev. § 533, and *note*. And the law has been commonly so administered by our own trial courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law. Whenever the title passes, as there has been no sale or gift and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms and no election in terms to relinquish his title; but the election is inferred by the law, to prevent injustice. Formerly this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the court to enforce its collection out of the wrongdoer's estate or by taking his person; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the chattel, and although the writ might contain a *capias*; because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice rather than an end in themselves. When it is seen that the practical result of a form of action is a failure of justice, the courts will make such changes as are necessary to do justice. If the entry of judgment in trover usually gave the judgment creditor but an empty right, it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that, without some actual satisfaction, the inference of an election would not be drawn has been shown by

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experience to be necessary to the administration of justice, and has been generally acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the entry of judgment, but is transferred by actual satisfaction. Trover is but a tentative attempt to obtain justice for a wrong, and, until pursued so far that it has given actual satisfaction, ought not to bar the plaintiff from asserting his title. The present doctrine is consistent with the general principle stated by Lord Ellenborough in *Drake v. Mitchell*, 8 East, 251, and quoted in *Vanuzem v. Burr*, 151 Mass. 386, 389, as approved in *Lord v. Bigelow*, 124 Mass. 185, that "a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party." Whether the holder of an unsatisfied judgment in trover can, without a fresh taking, maintain replevin against the same defendant, or is restricted to one action against the same person for a single tort, we do not now decide. See *Bennett v. Hood*, 1 Allen, 47, 79 Am. Dec. 705; *Trask v. Hartford & N. H. R. Co.* 2 Allen, 381; *Bliss v. New York Cent. & H. R. R. Co.* 160 Mass. 447. If he is so restricted, it is not because the ownership of the chattel has been transferred. But the present plaintiff has done more than to take judgment in trover. In her action of trover she caused the horse to be attached as property of Bryden, and, since obtaining judgment, she has caused the horse to be seized in execution of the judgment as his property, and to be kept and offered for sale on the execution until, as it was about to be sold, it was replevied by Davenport from the officer in a suit between them which is still pending in Connecticut. That suit is not a bar to this action, because it is not between the same parties. *White v. Dolliver*, 118 Mass. 400, 18 Am. Rep. 502; *Newell v. Newton*, 10 Pick. 470. But we must still inquire whether, assuming that the plaintiff's property in the horse was not transferred by her judgment in trover, it was transferred by that judgment taken in connection with the facts of the attachment and levy, and also whether she is estopped by the attachment and the levy from asserting her title in this action.

In the first place, the doctrine that a mortgagee of personality who attaches the mortgaged goods on a writ against the mortgagor cannot afterwards enforce his mortgage is not in point. The mortgagee is not the owner, but has merely a lien, and may well be held to relinquish that lien when by the attachment he establishes another. But if the plaintiff has actual ownership, and thus the full right to do with his own property as he may choose, merely procuring it to be attached on mesne process, or seized on execution as the property of another, does not work a change of ownership. The owner does not sell or give away his goods. In cases which are likely to occasion such conduct there usually is, as in the present case, a disputed title; and it is with the hope of avoiding litigation over it that the real owner consents that the chattel shall for a special purpose only be treated as the property of another.



This is "consistent with an intention ultimately to assert title should circumstances render it desirable for him so to do;" and he may well wait to see the issue, which may be such as to avoid the litigation of the question of title. See *Edmunds v. Hill*, 183 Mass. 445, 446; *Bursley v. Hamilton*, 15 Pick. 40, 43, 25 Am. Dec. 423; *Johns v. Church*, 13 Pick. 557, 23 Am. Dec. 351; *Mackay v. Holland*, 4 Met. 69, 74; *Dewey v. Field*, Id. 381, 384, 38 Am. Dec. 376. Nor is there any good reason why such a use of his own property by a plaintiff in trover should be held to divest him of his ownership when it would not have that effect in other forms of action. In trover he is in legal effect asserting by his suit that the title is and will remain in himself until he receives satisfaction on a judgment, and his subjection of the chattel to attachment or to seizure on execution is simply a use which he chooses to make of his own property, which does not divest him of title, or hamper him in the subsequent assertion of his ownership except by the rules of estoppel. The case of *Ex parte Drake*, above cited, is an authority to the point that a plaintiff who has brought an action of detinue, and taken judgment both for the detention and the value of the chattel, and has also proved his judgment in bankruptcy after having had the chattel seized on execution as the defendant's property, may nevertheless assert his ownership and have process to restore to him the chattel in specie. In such cases courts look to substance rather than form, and do not by inferring an election or a waiver deprive of his property a plaintiff who has unfortunately resorted to some futile method of procuring redress. In the present case, Davenport had bought the horse of Bryden before the attachment was made, and therefore the attachment was a denial of his ownership as well as an assertion of her own title by the plaintiff. The natural construction to be put upon her conduct in attaching and beginning a levy upon her own horse as the property of Bryden in a suit asserting her ownership is that, while she contended that in fact the horse was her own, she consented that, if litigation with Davenport as to the true state of title could be avoided by so selling the horse that the proceeds of the sale should be applied upon her claim for damages, she would in that event no longer assert her paramount title. Her implied offer not having been accepted, and Davenport having rendered impossible the accomplishment of her plan to avoid further litigation, she could thereupon say that all which had gone before was provisional upon the completion of the levy, and could enforce her right of property by any proper action against Davenport, or any one who might thereafter take wrongful possession of her horse, unless barred by the rules of estoppel.

Upon the question of estoppel, it is material to the decision of the present case to consider only whether she is estopped as to the present defendant or his principal, Davenport. Whether she has rendered Bryden or the officer who made the attachment or the levy in the Bryden suit liable to costs, expenses, or chance of loss is not material upon 25 L. R. A.

the question whether she is barred by the doctrines of estoppel from maintaining the present action. She is now prosecuting one of several successive wrongdoers for a fresh interference with the possession of her property, and neither the present defendant, Hyde, nor Davenport, for whom he claims to be acting as agent, has done or suffered anything or been put to any liability by reason of which the plaintiff should be estopped from asserting her title. Upon the facts, Davenport, in taking the horse in replevin, did not rely upon the Bryden attachment or levy, but acted in denial of their validity; and Hyde is not shown to have been influenced by them in consenting to become Davenport's agent in keeping the horse, or in any manner. Neither is shown to have changed his position or course of conduct, relying upon the plaintiff's action in causing the attachment or the levy, and she is not estopped by it from maintaining the present action. In the opinion of a majority of the court, the result must be: *Judgment set aside, and judgment for plaintiff ordered.*

#### Knowlton, J., dissenting:

I am of opinion that the judgment in this case should be for the defendant. It is a general rule of law that when one is entitled to either of two inconsistent remedies for a wrong done him, the pursuit of one of them so far as to affect the interests of the other party is conclusive election, and a waiver of the other. *Hooker v. Olmstead*, 6 Pick. 481; *Butler v. Hildreth*, 5 Met. 49-53; *Arnold v. Richmond Iron Works*, 1 Gray, 434-440; *Connihan v. Thompson*, 111 Mass. 270; *Washburn v. Great Western Ins. Co.* 114 Mass. 175; *Ormsby v. Dearborn*, 116 Mass. 386; *Seavey v. Potter*, 121 Mass. 297; *Bailey v. Hervey*, 135 Mass. 172-174; *Goodyear Dental Vulcanite Co. v. Cadue*, 144 Mass. 85, 86; *Raphael v. Reinsteins*, 154 Mass. 178. It is under this rule that the owner of property wrongfully taken by another is held to be precluded from claiming it after he has elected to recover the value of it from the wrongdoer. The property passes, not because there has been a sale, but because the owner has elected to receive instead of it that which represents it, and because it would be unjust to permit him to take the property after having chosen the money which is its equivalent. The principal question in cases of this kind is, At what stage of the proceedings shall the owner be deemed to have made an election that binds him? On principle, and as a general rule, he should be bound by the election he makes if in making it he goes so far as to affect the rights or interests of the other party. It would be unjust, when he may proceed only in one or the other of two opposite directions, that he should go forward in one direction in such a way as materially to affect the other party, and then turn backward and go on in the other, and compel his adversary to satisfy him in a different way. In very early cases it was held that the owner of property unlawfully taken makes a conclusive election of his remedy, which passes the property, as between the parties, when he takes judgment for the value of it against the

wrongdoer. He thereby puts his claim for property, of which he chooses to say that he has been divested, into the form of a debt apparent of record, for the satisfaction of which he may at any time have execution from the court. But, where nothing more is done than to take a judgment without security, there are considerations which have led, in many courts, to a modification of the rule in favor of the owner. Sometimes, when he brings his suit in trover, he is unable to find the property, and very often his judgment or the value of it cannot be made available. In taking judgment he merely puts in form, and settles by adjudication, a claim for the value of the property, to which he was entitled from the beginning, if he chose to enforce it. He does not otherwise disturb the defendant, or his property; and while it would, doubtless, be more logical to say that he is concluded by his election as soon as he has recovered judgment, it is perhaps a practical rule, which will more generally work out justice, to hold that if he does nothing more to collect the money, and if he proceeds within a reasonable time, he may still take the property as his own. But if, having fixed the liability of the defendant for a debt by taking judgment, he says by his conduct that he intends to collect the debt, and does that which affects the interest of the defendant in that particular, he should be deemed to have made his election conclusive.

The cases which say that the rights of the parties in regard to the title are fixed, not by taking judgment, but by obtaining satisfaction, cannot mean that one may take judgment for the full value of the property, and collect one half or two thirds of the amount, and may afterwards take and hold the property itself under his original title. Many of these cases were in jurisdiction where attachment on mesne process is not permitted, and where there is no security for a judgment when it is rendered. So far as I am aware, there is no case in which is considered the effect of taking judgment in a suit where there was an attachment which secured the collection of the judgment, or the effect of a partial satisfaction, or of a proceeding after judgment to enforce it by a levy on the property. It seems to me there is good ground for holding that when one undertakes to collect the value of his property by making an attachment to secure the judgment which he may obtain, and then prosecutes his claim to judgment, he has done that which affects the rights of the other party far more than the mere recovery of a judgment on an unsecured claim. But however that may be, when, after judgment, the plaintiff proceeds to obtain satisfaction by a levy on the defendant's property,—and much more when he levies on the property, for the value of which he obtained judgment,—and advertises it for sale as the property of the defendant, he should be held to have fixed his rights, and the rights of the other party, in regard to the title, beyond his power to change them. By taking the defendant's property to satisfy the execution, he subjects him to the legal costs and expenses attendant upon the levy, and deprives him of what otherwise he would have. Even if he

afterwards returns the property, he puts upon him the risk of loss or depreciation in value while it is held. If the property had not been taken on execution, the defendants might have negotiated to obtain the means of satisfying the execution by disposing of the property, or he might have attempted to satisfy it in some other way. He may have relaxed his efforts, relying on the levy; and if the plaintiff is permitted to abandon the levy, and proceed in another way, he may ultimately suffer loss on account of what the plaintiff did. This is equally true whether the property is that for which the plaintiff recovered his judgment or not; and, if it is the same, the plaintiff's act is a distinct and positive assertion that the property is the defendant's by reason of his judgment, and of his purpose to collect the judgment, and to apply the proceeds of the property in the satisfaction of it. Unless the rule stated at the beginning of this opinion is to be abrogated altogether, it must be held that when a plaintiff has elected to take judgment for the full value of property converted, and has then levied the execution upon property of the defendant which is subject to be taken on execution,—especially if it is the property converted,—he is thereby precluded from reversing his election, and taking the converted property under his original title. The case of *Ex parte Drake*, L. R. 5 Ch. Div. 866, cited in the opinion of the majority, was an action of detinue, where, by the terms of the judgment, the plaintiff was to have either the property, or the ascertained value of it. If the plaintiff cannot abandon her judgment, and levy and reclaim the horse, as against Bryden, she cannot as against this defendant, who is in privity with Bryden, through Davenport, who is a bona fide purchaser from Bryden. So far as the pending proceedings in Connecticut, under the levy and the subsequent replevin suit there, affect the title, they are binding on the plaintiff here; for the officer was acting in enforcement of her rights, by her direction, and she is therefore in privity with him. His relation to her is very different from that of a mere bailee.

The Chief Justice concurs in this opinion.

Holmes, J., dissenting:

As the judges are not unanimous, it becomes necessary for me to state my views, which otherwise I should not do, as they have not persuaded my brethren.

I am of opinion that the plaintiff ought to be barred in this action by her recovery of judgment in trover for the same horse. I am aware that the doctrine that title passes by judgment without satisfaction is not in fashion, but I never have been able to understand any other. It has always seemed to me that one whose property has been converted has an election between two courses,—that he may have the thing back, or he may have its value in damages, but that he cannot have both; that when he chooses one he necessarily gives up the other; and that by taking a judgment for the value he does choose one conclusively. He cannot have a right to the

value of the thing, effectual or ineffectual, and a right to the thing, at the same time. The defendant is estopped by the judgment to deny the plaintiff's right to the value of the thing. Usually, estoppels by judgment are mutual. It would seem to follow that the plaintiff also is estopped to deny his right to the value of the thing, and therefore is estopped to set up an inconsistent claim. In general, an election is determined by judgment. *Butler v. Hildreth*, 5 Met. 49; *Bailey v. Hervey*, 185 Mass. 172, 174; *Goodyear Dental Vulcanite Co. v. Oaduo*, 144 Mass. 88, 86; *Raphael v. Reinstein*, 154 Mass. 178, 179. I know of no reason why a judgment should be less conclusive in this case than any other. Of course, I am speaking of a judgment for the value of the chattel, not for one giving nominal damages for the taking. The argument from election is adopted in *White v. Philbrick*, 5 Me. 147, 150, 17 Am. Dec. 214, which, so far as I know, is still the law of Maine, notwithstanding the remark in *Murray v. Lovejoy*, 2 Cliff. 191, 198, Fed. Cas. No. 2,963. See also Shaw, *Ch. J.*, in *Butler v. Hildreth*, 5 Met. 49, 58.

The most conspicuous cases which have taken a different view speak of the hardship of a man's losing his property without being paid for it, and sometimes cite the dictum in Jenk. (4th Cent.) Case 88, "*Solutio pretii emptiois loco habetur*," which is dogma, not reasoning, or, if reasoning, is based on the false analogy of a sale. But they leave the argument which I have stated unanswered, not, as I think, because the judges deemed it unworthy of answer, or met by paramount considerations of policy, but because they did not have either that, or a clue to the early cases, before their mind. *Lovejoy v. Murray*, 70 U. S. 8 Wall. 1, 17, 18 L. ed. 129, 184; *Brinsmead v. Harrison*, L.R. 6 C. P. 584, 587, L. R. 7 C. P. 547, 554. It is not the practice of the English judges to overrule the common law because they disapprove it, and to do so without discussion. In *Brinsmead v. Harrison*, Mr. Justice Willes thought he was proving that the common law always had been in accord with his position. So far as the question of policy goes, it does not seem to me that the possibility—it is only the possibility—of an election turning out to have been unwise is a sufficient reason for breaking in upon a principle which must be admitted to be sound on the whole, and for overthrowing the doctrine of the common law by a judicial fiat. I am not informed of any statistics which establish that judgments for money usually give the judgment creditor only an empty right.

That the view which I hold is the view of the common law, I think, may be proved by considering what was the theory on which the remedies of trespass and replevin were given. In *Y. B. 19 Hen. VI. 65*, pl. 5, Newton says: "If you had taken my chattels, it is at my choice to sue replevin, which shows that the property is in me, or to sue a writ of trespass, which shows that the property is in the taker; and so it is at my will to waive the property or not." In 6 Hen. VII. 8, pl. 4, Vavisor uses similar language, and adds: "And so it is of goods taken.

One may divest the property out of himself, if he will, by proceedings in trespass, or demand property by replevin or writ of detinue," if he prefers. There is no doubt that the old law was that replevin affirms property in the plaintiff, and trespass disaffirms it, and that the plaintiff has election. Bro. "Trespass," pl. 184; 18 Vin. Abr. 69c; *Anderson and Warberton, JJ.*, in *Bishop v. Montague*, Cro. Eliz. 824. The proposition is made clearer when it is remembered that a tortious possession—at least, if not felonious—carried with it a title by wrong, in the case of chattels, as well as in the case of a disseisin of land, as appears from the page of Viner just cited, and as has been shown more fully by the learned researches of Prof. Ames. 8 Harvard Law Rev. 23. See Id. 826. I do not regard that as a necessary doctrine, or as the law of Massachusetts; but it was the common law, and it fixed the relations of trespass and replevin to each other. Trespass, and, on the same principle, trover, proceed on the footing of affirming property in the defendant, and of ratifying the act of the defendant which already has affirmed it. I do not see on what other ground a judgment for the value can be justified. If the title still is in doubt, or remains in the plaintiff, the defendant ought not to be charged for anything but the tortious taking. Again, cannot the plaintiff take the converted chattel on execution? And on what principle can he do so, if it does not yet belong to the defendant?

I say but a word as to the practical difficulties of the prevailing rule. No doubt they can be met in one way or another. Suppose the plaintiff, after judgment, were to retake the chattel by his own act. It would strike me as odd to say that this satisfied the judgment, and as impossible to say that it satisfied the whole judgment, which was for the tort, as well as for the value of the property. Yet, on the view which I oppose, I presume that the judgment could not be collected. See *Coombs v. Sansom*, 1 Dowl. & R. 201.

It seems to me that the opinion which I hold was the prevailing one in England until *Brinsmead v. Harrison*, *supra*. *Bishop v. Montague*, *supra*, Fenner, J., in *Boome v. Wootton*, Cro. Jac. 73, 74, Yelv. 67, Moore, 762; *Adams v. Broughton*, 2 Strange, 1078, Andr. 18, 19; *Buckland v. Johnson*, 15 C. B. 145, 157, 162, 163; Serjeant James Manning's note to *Barnett v. Brandao*, 6 Man. & G. 640. See *Lamine v. Dorrell*, 2 Ld. Raym. 1216, 1217. And I should add that I see a relic of the ancient and true doctrine in the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion. *Hepburn v. Sewell*, 5 Harr. & J. 211, 9 Am. Dec. 512; *Smith v. Smith*, 51 N. H. 571, 50 N. H. 212. Compare *Atwater v. Tupper*, 45 Conn. 144, 148, 29 Am. Rep. 674.

The only authorities binding upon us are the ancient evidences of the common law, as it was before the Revolution, and our own decisions. I have shown what I think was the common law. Our own decisions leave the question open to be decided in accordance

with it. *Campbell v. Phelps*, 1 Pick. 62, 65, 70, 11 Am. Dec. 189; *Bennett v. Hood*, 1 Allen, 47, 79 Am. Dec. 705. Many cases in other states are collected in Freeman on Judgments, 4th ed. § 287.

If I am right in my general views, they apply to this case. The plaintiff recovered her judgment in Connecticut, to be sure, as ancillary administrator there; but the horse was there, and she was entitled to it there,

so that her judgment recovered there passed the title. Like any other transfer of a chattel, valid in the place where it was made, and where the chattel was situated, it will be respected elsewhere. The Connecticut law was not put in evidence, and therefore we must presume that a judgment there has whatever effect we attribute to it on the principles of the common law.

## SOUTH CAROLINA SUPREME COURT.

C. MOYER, *Respt.*,

v.

EAST SHORE TERMINAL CO., *Appt.*

(.....S. C.....)

**Notice of the by-laws of a corporation restricting the right of any officer to**

**make contracts of employment to a period less than one year is not chargeable to one who makes a contract for services to the corporation with a general manager of the company who has been given absolute charge of its business at the place of contract.**

(April 20, 1894.)

*NORM.—Effect of corporate by-laws as notice.*

An attempt to ascertain from an examination and comparison of the treatises on corporations what is the effect of notice, at least as to third persons, of the by-laws of a corporation, will result in considerable confusion.

One of the leading text-books on the subject says: "Persons dealing with the officers or agents of a corporation are usually chargeable with notice of the authority conferred upon such officers and agents in the by-laws, but not to any greater extent."

Another says: "It is a common doctrine that persons dealing with the agents and officers of a corporation are chargeable with notice, not only of the authority conferred upon them, but of the restrictions and limitations of the same contained in the by-laws;" but afterwards adds: "There is a distinction made as to notice of the authority conferred by by-laws, between by-laws of the corporation conferring or restricting such authority, and the by-laws of the directors."

Another stating the rule that persons dealing with the agents and officers of a corporation are chargeable with notice of the authority conferred upon them, says: "When the authority is specifically given in the by-laws, it cannot be inferred by virtue of an office."

On the other hand, another leading work on corporations says: "There is no general rule compelling persons dealing with the corporation, at their peril, to take notice of its by-laws. If a corporation appoints an agent of a class having functions and powers according to the general custom, a person dealing with such agent is not affected by a by-law restricting the powers which would ordinarily belong to an agent of that class, in the absence of actual notice of the by-law."

And another important work on the subject in one place says: "Rules and regulations of a corporation that no contracts shall be binding upon it, which are not in writing signed by its president, cannot affect contracts made by agents of the corporation with persons having no notice of the rule," while in a different place it says: "Persons, although not members of the company, who engage in business transactions with its officers, are affected with notice of limitations upon their powers prescribed in the corporate by-laws."

This divergence and disagreement of text-books is, to a considerable extent, explained by the conflicting statements to be found in the opinions of 25 L. R. A.

the courts. But, as will appear from the analysis and comparison of the decisions which follow, the doctrine of the courts may now be regarded as substantially settled without conflict.

*As to members of the corporation.*

It may be said to be a general rule that the officers of a corporation are presumed to know its by-laws. Thus, an officer is presumed to know of a by-law adopted before his appointment which reserves the right to remove an officer at pleasure. *Hunter v. New Orleans Sun Mut. Ins. Co.* 26 La. Ann. 12.

So the secretary of a corporation, who had been long in its service, was held chargeable with notice of a by-law of this kind which was printed in a book of by-laws in which he was named as secretary. *Douglas v. Merchants Ins. Co.* 7 L. R. A. 822, 118 N. Y. 424.

So the by-laws of a bank are admissible in evidence against a cashier whose duties were therein prescribed and who had access to them, to show his liability, although he was not one of the corporators. *Bank of Wilmington v. Wollaston*, 3 Har. (Del.) 90.

So the by-laws of a land and loan company containing the statement of a member's shares, payments, etc., was held admissible against him. *Frank v. Morrison*, 58 Md. 423.

But a shareholder in a telegraph company is not chargeable with notice of a resolution of a board of directors limiting its liability in respect to messages. *Pearse v. Western U. Telegr. Co.* 124 N. Y. 256. The court in this case said: "A shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers."

*As to lien on stock.*

In the case of *Brent v. Bank of Washington*, 35 U. S. 10 Pet. 614, 9 L. ed. 554, in a discussion as to the lien of a bank on its stock with respect to a claim of the United States to priority of its claim against the stockholder, the court said: "Every stockholder who draws or indorses a note to procure a loan from the bank is bound to know the terms of the charter and by-laws," and the lien of the bank was upheld.

So it is generally held that the by-laws of a bank reserving the lien on stock for indebtedness to the bank, is valid as to the members of the corporation.

**A** PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Charleston County in favor of plaintiff in an action brought to recover damages for breach of an employment contract. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Mitchell & Smith* for appellant.

*Mr. J. N. Nathans*, for respondent:

Corporations can only act through agents, and third parties are justified in dealing with such agents on the assumption that they are invested with all the powers within the apparent scope of their authority. The law with regard to the powers and authority of agents of corporations is the same as that between individuals and their agents. The power of a general agent to contract within his apparent authority cannot be limited by secret instructions of his principal, and by-laws not known to third parties cannot be invoked to destroy rights acquired under the exercise of an apparent authority, with which the agent has been invested.

*Morawetz, Priv. Corp. § 598; Walker v. Wilmington, C. & A. R. Co. 26 S. C. 85; McCreery v. Garvin, 89 S. C. 875.*

Under any circumstances as against the plaintiff without some evidence on defendant's part of notice to him of such by-law it is no defense.

1 Wood, Railway Law, p. 441.

As from the very business of a railroad corporation, it is impossible to conduct it without these intermediate agencies, the authority of direct agents to delegate certain of the powers to such intermediate agents is conclusively presumed.

1 Wood, Railway Law, p. 444.

The appointment of subagents was clearly within the authority of a general manager "who was to have absolute charge," and plaintiff was not bound even to look beyond the apparent authority with which Gaddis was invested.

*Morawetz, Priv. Corp. § 598; Stickley v. Mobile Ins. Co. 87 S. C. 68.*

*Tuttle v. Walton, 1 Ga. 49, Atchison County Bank v. Duffee, 118 Mo. 431.*

And the by-law reserving such a lien when printed on the stock is notice to any one who takes the stock. *State Sav. Asso. v. Nixon-Jones Printing Co. 25 Mo. App. 642.*

But bona fide purchasers of stock without notice of such a by-law are not charged with constructive notice of it. *Anglo-California Bank v. Grangers Bank, 63 Cal. 359; Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 380; Driscoll v. West Bradley & Cary Mfg. Co. 59 N. Y. 109; Planters & M. Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585.* These cases are all cases of by-laws of banks except that of *Driscoll v. West Bradley & Cary Mfg. Co.*, which was a case of a manufacturing corporation.

Members of a mutual insurance company and benefit society are bound to take notice of its existing by-laws affecting their interest. *Pfister v. Gerwig, 122 Ind. 567; Supreme Lodge, K. of P. v. Knight, 8 L. R. A. 409, 117 Ind. 499; Holland v. Taylor, 111 Ind. 121; Bauer v. Samson Lodge, K. of P. 102 Ind. 282; Supreme Commandery Knights of the Golden Rule v. Atsworth, 71 Ala. 436, 46 Am. Rep. 332; Treadway v. Hamilton Mut. Ins. Co. 29 Conn. 66; Coles v. Iowa State Mut. Ins. Co. 18 Iowa. 425; Walsh v. Aetna L. Ins. Co. 30 Iowa. 145, 6 Am. Rep. 464; Mitchell v. Lycoming Mut. Ins. Co. 51 Pa. 402.*

The same was held in *Simeral v. Dubuque Mut. F. Ins. Co., 18 Iowa, 519*, with respect to by-laws referred to in the policy.

But in *Kingsley v. New England Mut. F. Ins. Co., 8 Cush. 393*, it was held that the by-laws of a mutual fire insurance company related to notice of laws which were not referred to in the policy, were not a part of it and were not binding on the policy-holder.

So far as by-laws assume to affect the contract of insurance it would seem that, as in this case, they should be held to form no part of the contract if they were not referred to in the policy when this purported to be complete on its face.

So in *Miller v. Hillsborough Mut. F. Assur. Asso., 44 N. J. Eq. 224*, it was held that a member of a mutual fire insurance company, whose policy recites that the annexed by-laws are conditions of insurance, is entitled to suppose that these are all the by-laws which affect it, and that an undisclosed by-law as to the effect of non-occupancy cannot be allowed to operate against him, and that the policy may be reformed in equity excluding from it that by-law in order that the company may become liable thereon according to its constitution and by-laws.

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*As to the public generally.*

In *Cummings v. Webster, 43 Me. 197*, it is said that a by-law in pursuance of a charter of a corporation is equally binding in law on the members of the corporation and all others acquainted with its method of doing business; but the question how far the by-law is constructive notice to persons doing business with the corporation is the one on which the conflict is found in the text-books, and which has appeared to some extent in the decisions of the courts.

The general rule is laid down in *Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 380*, that no person not a member of a corporation can be affected in any of his rights by a corporate by-law of which he has no notice, and that he is not bound by any secret limitations or restrictions placed on the powers of an officer, by by-law or otherwise.

And in England it has been held that a mere by-law of which no public notice has been given, and which may be altered from time to time, is not binding on third persons without notice. *Re Asiatic Bkg. Corp. L. R. 4 Ch. App. 252.*

So in Massachusetts, a leading case lays down the rule that the powers of officers of manufacturing and trading companies cannot be limited to special or enumerated powers contained in by-laws which are not known to persons dealing with them, but that such officers may be presumed to have the authority implied by their designations. *Fay v. Noble, 12 Cush. 1.*

So in Illinois by several cases the same doctrine is fairly established. Thus in *Smith v. Smith, 63 Ill. 490*, it is held that by-laws being private and accessible only to the officers of the corporation, are not constructive notice to other persons, and, therefore, a by-law requiring that the secretary should counter-sign a deed of the corporation was held not to make such signature absolutely necessary to the validity of the deed.

So in *Wait v. Smith, 92 Ill. 355*, a stranger to a railroad company was held not bound to know its by-laws as to the power of officers to create obligations, and that his subsequent membership in the company did not have any retroactive effect in making the by-laws constructive notice.

Again, in *Union Mut. L. Ins. Co. v. White, 106 Ill. 67*, third persons are held not bound to know of a by-law limiting the apparent power of the president of a foreign corporation acting as its general agent.

In South Carolina the same doctrine is adopted not only in the main case but in the case of *Walker*

If the alleged by-law could not affect plaintiff's right to recover, it is clear that there was no error in excluding it.

Morawetz, Priv. Corp. § 616.

McIver, *Ch. J.*, delivered the opinion of the court:

The only question made by this appeal is whether his honor *Judge Izlar*, erred in ruling certain testimony offered by defendant (appellant) to be incompetent. For a proper understanding of this question it will be necessary to make a brief statement of the nature of the action and of the testimony adduced by the plaintiff to sustain his claim. In the second paragraph of the complaint the plaintiff alleges substantially that on the 28d July, 1891, he was employed by the defendant as agent, by the year, at a salary of \$1,800 per year, payable monthly. In the third paragraph the allegation substantially is that on the day named plaintiff entered upon his duties, and duly discharged the same until the 18th of November, 1891, and was then, and always thereafter until the 28d July, 1892, ready and willing to perform said duties; fourth, that on the 18th of November, 1891, the defendant refused, and continues to refuse, to allow plaintiff to discharge the duties of his employment; and judgment is demanded for the balance due him on his salary up to the 28d July, 1892. In the answer, defendant denies the allegations contained in the second and third

paragraphs of the complaint; and in answer to the fourth paragraph of the complaint defendant says that the employment of defendant was duly terminated on the 1st of December, 1891. So that the only issue was whether plaintiff was employed by the year, and entitled to his salary up to the end of the year terminating on the 23d of July, 1892. The plaintiff, without objection, offered testimony tending to show that he was employed by Gaddis, the general manager of the defendant company, on the 28d of July, 1890, by the year, to serve the company as agent, at the salary stated in the complaint; that he continued in such employment up to the 18th of November, 1891, when the defendant company refused to allow him to continue such service; that on the 20th of October, 1891, one Swanitz, who seems to have been the consulting engineer of the company, asked plaintiff for his resignation, which he declined to give; that a few days after Swanitz offered to employ plaintiff as bookkeeper at a salary of \$75 per month if he would resign his position as agent, which was likewise declined; that on the 31st October, 1891, plaintiff was formally notified in writing, signed by the vice-president of the company, and countersigned by said Swanitz, as consulting engineer, that he was discharged for cause; that Gaddis, who appointed plaintiff as agent, when applied to to become the general manager of the company, by a letter from the president of the company, writ-

v. Wilmington, C. & A. R. Co., 26 S. C. 80, where the regulation of a corporation forbidding agents to make contracts except in writing, signed by the president of the company, was held not binding on persons who had no notice thereof, to defeat the purchase by a railroad road-master of material needed for the road.

In Missouri also, a similar by-law of a manufacturing company limiting the power of its officers to buy property costing more than \$25, without authority of the board of directors, was held not binding on a vendor of goods used in the business, who had no notice of the by-law. *TenBroek v. Winn Boller Compound Co.* 20 Mo. App. 19.

So in Colorado a by-law forbidding the contracting of any debt except by order of the board of directors is held not to bind a person who is not a member of the corporation, and who has no notice of the by-law. *Arapahoe Cattle & Land Co. v. Stevens*, 18 Colo. 584. This was a case where compensation was claimed for services in procuring the loan of money to the corporation that was used to pay on a purchase of property which the president and secretary of the company, who employed the services, had power to make. Although the court considers that the by-law does not necessarily apply, it states the general rule that persons who are not members of a corporation are not bound by a by-law of which they have no notice.

The failure to comply with the by-law in calling a meeting of the board of directors of a corporation will not defeat a deed of trust made at such meeting to a third person. *Samuel v. Holladay*, 1 Woolw. C. C. 400, *McCahon*, 214.

And where a corporation has accepted the benefits of a purchase with knowledge of the facts, it cannot set up in defense of a claim for the purchase price, that it had been made in violation of a by-law prohibiting such purchase without authority of the board. *Donovan v. Halsey Fire Engine Co.* 58 Mich. 38. In such a case as this, the court clearly regards the subsequent ratification

as sufficient to create an implied assumpsit, irrespective of the validity of the purchase in the first place.

But while the above cases agree in doctrine and establish the law in their respective jurisdictions, some Virginia and New York cases have been regarded as establishing the directly contrary doctrine. Thus in *Boocock v. Alleghany Coal & Iron Co.*, 82 Va. 913, it is declared that a person dealing with a corporation through an agent is bound to take notice of its charter and by-laws and ways of doing business.

So in *Haden v. Farmers & Mechanics F. Assn.*, 80 Va. 691, it is said that a person must take notice of the charter, constitution, and by-laws of a corporation with which he makes a contract.

But in each of these cases the decision was in effect as to the power of an agent, and did not particularly involve the effect of a by-law limiting the apparent and usual power of such agent. That is, the cases in reality only decided, on this point, that a valid contract cannot be made by an agent of a corporation in excess of his authority. They do not involve or decide the question as to the effect of a corporate by-law to cut down or limit the power which the agent would ordinarily possess.

The more serious opposition to the doctrine of the cases above cited, which deny that a by-law is a notice to strangers, is found in a series of New York cases which have been largely cited in support of the opposite doctrine. The leading case among them was that of *Adrian v. Roome*, 52 Barb. 411, which declared that there was no grant of power in the name by which an officer was designated, especially when the authority of the officer was specified in the by-laws.

The same proposition was declared in *Dabney v. Stevens*, 10 Abb. Pr. N. S. 38, the former case applying the rule to the superintendent of a manufacturing company, and the latter to the president of such a company, holding that the powers of

ten from New York, where the office of the company seems to have been located, was told in said letter, among other things: "You are to have absolute charge there," and in a short time afterwards he received his appointment in writing, signed, "East Shore Terminal Company, by Geo. A. Evans, President." After this testimony, and other, which it is not deemed necessary to state, was offered, the plaintiff closed, and the defendant, in offering its testimony, which is not set out in the "case," offered in evidence the by-laws of the East Shore Terminal Company, "to prove that no officer of the company, except the board of directors, was authorized to make contracts for service for the period of a year." To the evidence thus offered plaintiff's counsel objected, and the court sustained the objection, to which ruling defendant duly excepted, and the only question is as to the correctness of such ruling.

It seems to be conceded in the argument of counsel for appellant that a stranger in dealing with a corporation is not bound to inquire into the by-laws of such corporation in order to ascertain whether the officer or agent with whom he is dealing has authority to act; but whether conceded or not, the case of *Walker v. Wilmington, C. & A. R. Co.*, 26 S. C. 60, is sufficient authority to sustain that proposition, for as was said in that case: "Now,

it is well settled that a corporation may contract and be contracted with through an agent, whose authority may be implied from facts and circumstances showing recognition or ratification by the corporation. Indeed, it seems that the same presumptions are applicable, in this respect, to corporations as to natural persons." See, also, to same effect, *McCreary v. Garvin*, 89 S. C. 875, likewise cited by counsel for respondents. But it is contended that the plaintiff here is not a stranger, but is an employé of the company, and therefore bound to take notice of the by-laws of the company. While it may be quite true that the plaintiff is not now a stranger, yet he certainly was so when he entered into the contract upon which this action was based, with the general manager of the company, who, when he was appointed, was told by the president of the company, "You are to have absolute charge there," and who, therefore, plaintiff had a right to assume, was invested with full authority in the premises. And when to this are added the facts that the plaintiff entered upon the work for which he was employed, and continued to discharge the duties of his office for more than a year without any demur or complaint upon the part of the company or any of its officers or agents, until after a considerable portion of the second year had elapsed; and when the company, by its

such officers were limited by the by-laws, even in respect to their dealings with third persons who had no notice of the by-law.

The same doctrine in substance is declared in *DeBost v. Albert-Palmer Co.*, 35 Hun, 386; *Kisley v. Indianapolis, B. & W. R. Co.*, 1 Hun, 202; *Smith v. Co-operative Dress Asso.*, 12 Daly, 304; *Westerfield v. Radde*, 7 Daly, 326; *Bohm v. Loewer's Gambrinius Brew. Co.*, 30 N. Y. S. R. 424; *Rathburn v. Snow*, 22 N. Y. S. R. 227,—all of which adopt in substance the rule that the powers of corporate officers and agents are limited by the by-laws, even as to third persons without notice of the by-laws.

In *Bohm v. Loewer's Gambrinius Brew. Co.*, *supra*, a by-law requiring that every contract of \$500 or more must be in writing, executed by both president and treasurer, and attested by the seal of the corporation, was held effectual to defeat a lease in which the rent agreed upon was more than \$500, and which was signed by the president alone without seal. The court held that the lessor was chargeable with notice of the by-law.

So in *Rathburn v. Snow*, *supra*, a by-law to the effect that no debts or obligations should be contracted by any officer or agent, unless by express authority given by a majority of a board of trustees at a meeting, was held binding on one who made a sale to the superintendent of the company, where he had not been expressly authorized in this manner.

But all these New York cases were decided by courts whose decisions were subject to review in the court of appeals; and on appeal from the decision in *Rathburn v. Snow*, *supra*, the court of appeals, in 10 L. R. A. 365, 123 N. Y. 343, fully adopted the contrary doctrine. It said: "By-laws of business corporations are, as to third persons, private regulations, binding as between the corporation and its members or third persons, having knowledge of them, but of no force as limitations, *per se*, as to third persons of an authority which, except for the by-laws, would be construed as within the apparent scope of the agency." The 25 L. R. A.

court made no reference to the contrary decisions of the lower courts of the state, and did not intimate that the question was doubtful or disputed, but cited in support of the proposition above quoted the case of *Fay v. Noble*, 12 Cush. 1, and other authorities.

This decision substantially secures unanimity of doctrine on this subject, as the Virginia cases above referred to do not really decide anything to the contrary, and it may be presumed that no court will hereafter hold that private by-laws of a corporation are notice to strangers, unless it does so on the supposed authority of cases which are now overruled.

In the case of *Martin v. Niagara Falls Paper Mfg. Co.*, 44 Hun, 132, a by-law providing that the secretary should sign all contracts of the corporation was construed to be a designation of his powers, and not to make his signature an absolute condition of the validity of a contract by the corporation.

Again, in *Marine Bank of Buffalo v. Butler Colliery Co.*, 23 N. Y. S. R. 312, where a by-law, never published to the world, had been habitually disregarded by the corporation, the court held that it could not set up the by-law to countervail authority which had been publicly conferred by letter.

The by-law of a bridge company as to a penalty for fast riding or driving, which had not been posted on the bridge, as required by statute, was held not binding on any person who had not actual notice of it. *Worcester v. Essex Merrimac Bridge Corp.*, 7 Gray, 457.

So it was considered by the court but not actually decided, that a by-law of a railroad company, as to liability for baggage, would not bind the passenger without notice, or posting of the by-law at stations. *Great Western R. Co. v. Goodman*, 11 Eng. L. & Eq. 546, 16 Jur. 862.

The fact that a savings bank depositor could not read a rule of the company printed in its pass-book was held not to defeat its effect as notice to him. *Burrill v. Dollar Sav. Bank*, 23 Pa. 124, 38 Am. Rep. 609.

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attempt to obtain from the plaintiff the resignation of his office, and by its threat of discharge for cause, had thereby practically recognized the legality of the appointment made by the general manager (for it would be absurd to ask for the resignation of an office which had never been conferred, or to discharge for cause a person from an office which he never held), it seems to us that it is too late now for the company to attempt to shield itself from the performance of a contract made by its general manager with a subordinate official, who was apparently invested with the authority to act for the company,—“You are to have absolute charge there,” by interposing a provision in its by-laws, which had never been communicated to the general manager or to the plaintiff, forbidding the making of such contract. We think, therefore, that there was

no error on the part of the circuit judge in refusing to admit the by-laws as testimony in this case. We are not prepared to admit that the by-laws of a corporation, which have never been published or communicated to its subordinate officers or employes, are competent evidence against such subordinates in any case. The by-laws of a corporation are usually in the possession and under the control of the corporation, and, until proper measures are taken to inform the subordinates and employes of their contents, we do not see how they can be held bound by provisions of the by-laws, of which they have never been informed.

*The judgment of this court is that the judgment of the Circuit Court be affirmed.*

McGowan and Pope, JJ., concur.

### TEXAS SUPREME COURT.

TEXAS & PACIFIC R. CO., *Appt.*,

v.

Nancy J. GAY *et al.*

(38 Tex. 571.)

1. A circuit court of the United States in Louisiana has no jurisdiction over property in Texas such as confers upon it power to appoint a receiver of a railroad in Texas which is the property of a corporation created by congress.
2. A person appointed receiver of a railroad by a court without jurisdiction, if permitted by the railroad company to take possession and operate the road, is merely the agent of the company which is liable for his negligence.
3. A statute declaring that no receiver shall be appointed on petition of the owner of the property is but a legislative declaration of the rule of equity.
4. A railroad receiver appointed by collusion of the parties to the suit is no more than an agent or superintendent of the railroad company for whose acts the company is liable, although the law would not have made the company liable for his acts if he had been lawfully appointed.
5. No estoppel against showing that a receiver was really the agent of a railroad company because collusively appointed is created, so as to prevent charging the railroad company with his negligence by making a contract of employment with him as receiver.
6. Fraudulent concealment of a cause of action takes the case out of the bar of the statutes of limitation unless plaintiff's failure to discover the facts is due to his negligence.
7. Failure to state the law on an issue is not ground for reversal if no instruction on that question is requested.

(April 30, 1894.)

QUESTIONS CERTIFIED by the Court of Civil Appeals for the Second Supreme Judicial District for the opinion of the Supreme Court which arose upon appeal by defendant from a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate. *Answers returned favorable to appellees.*

The facts are stated in the opinion.

*Messrs. Finch & Thompson and Stedman & Thompson* for appellant.

*Messrs. Ball, Wynne & McCart* for appellees.

*Stayton, Ch. J.*, delivered the opinion of the court:

This action was brought by the wife and minor child of John M. Gay to recover from John C. Brown, as receiver for the Texas & Pacific Railway Company, damages for an injury received by him while in employment of the receiver, which resulted in his death. At the time the action was brought, John C. Brown was operating the Texas & Pacific Railway as receiver under appointment made by the circuit court of the United States sitting for the eastern district of the state of Louisiana, but pending the litigation the receiver was discharged. After the discharge of the receiver with pleadings setting up that fact, a judgment was rendered against him which, on appeal, was reversed. *Brown v. Gay*, 76 Tex. 444. After this the pleadings were amended, and thereby the Texas & Pacific Railway Company was made a defendant, but this did not occur until more than one year had elapsed after the death of John M. Gay. The pleadings show a state of facts which would have entitled John M. Gay to have maintained his action against the railway company for the injury had he lived; but, as it has been held that actions for injuries resulting in death could not be

NOTE.—Annotation could add little to the value of the above opinion upon the question of the jurisdiction of United States circuit courts. That the powers of a receiver are ordinarily limited to 25 L. R. A.

the jurisdiction of the court appointing him, see note to *Re Schuyler's Steam Tow-Boat Co. (M. T.)* 30 L. R. A. 381.



maintained against receivers under the law as it was when the injury and death in question occurred, questions have been certified to this court under pleadings and a judgment against the railway company which make them pertinent. The questions will be considered in their order:

"First. Did the circuit court of the United States for the district of Louisiana have jurisdiction to take possession, through a receiver, of that part of the road situated in the state and northern district of Texas?" The Texas Pacific Railroad Company was chartered by an Act of Congress approved March 3, 1871, by which it was "empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, state of Texas; thence by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona to a point on the Rio Colorado, at or near the southeastern boundary of the state of California; thence by the most direct and eligible route to San Diego, California, to Ship's channel, in the Bay of San Diego, in the state of California." Act 1871, § 1. By the fourth section of the Act the company was empowered "to purchase the stock, land grants, franchises and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by congressional, state or territorial authority, on the route prescribed in the first section of this Act." The ninth section of the Act provided for a grant of lands to the company for so much of its road as was to be constructed through the territories of the United States and the state of California. The twenty-second section of the Act provided "that the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the state of Louisiana, shall have the right to connect, by the most eligible route to be selected by said company, with the said Texas Pacific Railroad at its eastern terminus, and shall have the right-of-way through the public lands to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by way of Alexandria in said state to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile in the state of Louisiana, as are by this act granted in the state of California to said Texas Pacific Railroad Company." The seventeenth section of the Act required the construction of the road to commence "simultaneously at San Diego in the state of California and from a point at or near Marshall, Texas, as hereinbefore described, and so prosecute the same as to have at least fifty consecutive miles of railroad from each of said points complete

and in running order within two years after the passage of this act; and to so continue to construct each year thereafter a sufficient number of miles to secure the completion of the whole line from the aforesaid point on the eastern boundary of the state of Texas to the Bay of San Diego, in the state of California, as aforesaid, within ten years after the passage of this act." Congress passed a supplementary act, which was approved on May 2, 1872, and the first section of that changed the name of the corporation to the "Texas & Pacific Railway Company." The fifth section declared "that the said Texas & Pacific Railway Company shall commence the construction of its road at or near Marshall, Texas, and proceed with its construction under the original act and this supplement, or in pursuance of the authority derived from any consolidation as aforesaid, westerly from a point near Marshall, and towards San Diego in the state of California, on the line authorized by the original act, and so prosecute the same as to have at least one hundred consecutive miles of railroad from said point complete and in running order within two years after the passage of this act; and so continue to construct each year thereafter, a sufficient number of miles, not less than one hundred, to secure the completion of the whole line, from the aforesaid point on the eastern boundary of the state of Texas to the Bay of San Diego in the state of California, as aforesaid, within ten years after the passage of this act; and the said road from Marshall, Texas, throughout the length thereof, shall be of uniform gauge." After providing for construction from San Diego eastward, the section contains the following: "Provided, that said Texas & Pacific Railway Company shall be and is hereby authorized and required to construct, maintain, control and operate a road between Marshall, Texas, and Shreveport, Louisiana, or control and operate any existing road between said points of the same gauge as the said Texas & Pacific Railroad; and that all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to the same privileges for the transaction of business in connection with the said Texas & Pacific Railway as are granted to roads intersecting therewith: provided further, that nothing herein shall be construed as changing the terminus of said Texas & Pacific Railway from Marshall as provided in the original act." The Southern Pacific Railroad Company was chartered by the laws of this state, and was empowered to construct, own, and operate a railway from the eastern boundary of Texas to El Paso. Special Laws 1852, p. 197; Special Laws 1856, p. 76; Special Laws 1860, p. 180. The Southern Transcontinental Railway Company was also chartered under the laws of this state, and empowered to construct a railway from a point on the eastern boundary of Texas to its western boundary. Special Laws 1870, p. 40; Special Laws 1871, p. 92. These corporations were authorized to consolidate with the Texas & Pacific Railway Company. Special Laws 1871, p. 499. Under this, and the act of congress before

referred to, the consolidation of these roads was effected, and congress, by an act approved June 23, 1874, ratified the consolidation, and declared that the "roads so merged as aforesaid shall for that and all other purposes be deemed and taken to be a part of the said Texas & Pacific Railway, and shall hereafter be subject to all the provisions and limitations of the act of congress incorporating said company and of the supplement thereto."

These are the laws under and by virtue of which the Texas & Pacific Railway Company exists, and it is evident from these that the eastern terminus of that road is at the eastern line of the state of Texas, and that no part of it is in the state of Louisiana. It is true that the supplementary act, as well as the original, contemplated that, through some other road, connection between the terminus of the Texas & Pacific Railway and Shreveport, in the state of Louisiana, should be made, and to that end the later act required that company to make such a connection through a good road to be built, controlled, and operated by it, or by some existing road between those points of which it might be able to obtain control; but that act expressly declares that "nothing herein shall be construed as changing the terminus of said Texas & Pacific Railway from Marshall, as provided in the original act." Both acts proceed upon the seeming assumption that the town of Marshall was at the eastern boundary of the state of Texas; but in view of the questions submitted it is immaterial whether the terminus be at one place or the other, for they are both in this state. The original act evidently contemplated that there would be a connection between the eastern terminus of the Texas & Pacific Railway and the Mississippi river, through the New Orleans, Baton Rouge & Vicksburg Railroad, and to that end, and to secure that, provided for a grant to that company of public lands situated in Louisiana, but no grant of public lands was contemplated for any road the Texas & Pacific Railway Company might construct from its eastern terminus to Shreveport. Congress had power to authorize the Texas & Pacific Railway Company to construct a railway other than that which it declared should be the Texas & Pacific Railway, and to operate and control it, and at the same time to declare that the one should not be part of the other. Where the terminus of a railway is, under the terms of its charter, there it necessarily exists, in fact as well as in law, and the fact that the company may be authorized to construct and operate a railway beyond that terminus cannot make the two one. A case is not presented in which one railway, under the terms of its charter, extends through or into two or more states, in one of which a receiver over the entire road was appointed by a court sitting in a state in which part of the road was; but the case is one in which a receiver was appointed by a circuit court of the United States sitting in and for the eastern district of Louisiana, to take possession of, operate, and control a railway, no part of which was in the state of Louisiana. The appointment of a receiver

by a court of general jurisdiction ought to be held conclusive of the power of the court to make the appointment when that is called in question collaterally, unless it appears that in the particular case the court was without jurisdiction. Jurisdiction must depend on the laws creating the court and prescribing its powers, and, if it attempts to exercise a power not thus conferred, its judgments and decrees are not binding, even upon parties, and may be declared inoperative by any other tribunal in which effect is sought to be given to them. If the fact on which jurisdiction depends is determined by law, then resort to presumptions ordinarily indulged in favor of the power of a court of general jurisdiction which has assumed to act in a given case is neither necessary nor admissible. In the matter now under consideration it appears, through a positive law creating the Texas & Pacific Railway Company and fixing the locality of its road, that no part of that extends into the state of Louisiana; and the inquiry is presented whether the circuit court of the United States, sitting in a district in that state, has jurisdiction to appoint a receiver with power to take possession of a railway situated in this state, and to control and operate it under its orders. The importance of avoiding conflict between the courts of the United States and the state courts cannot be over-estimated; but such harmony as should exist between them will be most surely preserved if strict regard by each for its own jurisdiction be observed, for usurpation of power by either will necessarily bring conflict. Where one has assumed the power to act in a given case, every lawful presumption that it did not act without jurisdiction ought to be indulged; but, when it is clear that either has acted without lawful power, the other, when called upon to adjudicate the rights of litigants, cannot refuse to make inquiry, even as to jurisdiction of the other, when this becomes necessary to the determination of the question before it, without surrendering power conferred upon them for the preservation of the rights of litigants before them.

For present purposes it will be assumed that the Texas & Pacific Railway Company exists by reason of its incorporation by acts of congress, and that this is not affected by reason of its consolidation with corporations created under the laws of this state and the acquisition of rights through consolidation. The Texas & Pacific Railway Company having been incorporated by acts of congress, it is probably true that the circuit courts of the United States would not have jurisdiction of controversies between it and others on the ground of diverse citizenship. *Hepburn v. Elzey*, 6 U. S. 2 Cranch, 445, 2 L. ed. 332; *New Orleans v. Winter*, 14 U. S. 1 Wheat. 91, 4 L. ed. 44. It has, however, been held, in effect, that such courts have jurisdiction over litigation to which such corporations are parties, on the ground that they were so chartered, and without reference to the character of the questions on which the rights of litigants may depend. *Texas & P. R. Co. v. Kirk*, 115 U. S. 2, 29 L. ed. 819. In a case in which such a corporation

is a party, jurisdiction of a circuit court of the United States ought to be presumed, if the action be not one local in its nature, or the relief sought, in whole or in part, be not such as can be given only by a court sitting where property is situated, through which the court's judgment may be enforced. The purpose for which the suit was brought in Louisiana by the Missouri Pacific Railway Company against the Texas & Pacific Railway Company is not fully set out in the statements made in connection with the questions certified; but it appears therefrom to have been such in form as it should be presumed made it proper for some court to appoint a receiver with power to take possession of the railway and property necessary to its operation belonging to the latter, and these to control and operate under its orders. Under circumstances somewhat various, receivers may be appointed, but this can never be lawfully done unless deemed necessary for the preservation of property, the preservation or enforcement of rights of persons having claims against it, or to have it applied to some lawful purpose from which it has been, or is likely to be, diverted if the court does not take possession of it through a receiver, and so cause it to be applied or managed as may be deemed by the court most beneficial to all persons interested, having due regard for fixed rights. The intention of congress, as a general rule, to limit the jurisdiction of circuit courts of the United States to powers and things within the district in which the court sits, as well as to restrict their process, whether original or final, to the same territory, is manifested by several statutes. It is provided that, "except in the cases provided for in the next three sections, no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and except in the said cases provided by the preceding sections, no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process, in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ." Rev. Stat. § 739. That was amended by the Act of congress approved March 3, 1867, which was corrected by the Act approved August 13, 1888; and the amendment, without changing the other parts of the statute, withdraws the right to maintain an action in a district in which a defendant is found at the time of serving the writ, and adds that, "when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit may be brought only in the district of the residence of either the plaintiff or the defendant." This statute furnishes now the general rule. The exceptions referred to are as follows: "When a state contains more than one district, every suit not of local nature in the circuit or district courts thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued

against the defendants, directed to the marshal of any other district in which any defendant resides." The section further provides that on "judgment or decree rendered therein execution may be issued directed to the marshal of any district in the same state." Rev. Stat. § 740. "In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides." Id. § 741. "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the circuit or district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause meane or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted." Id. § 742.

These laws are, in express terms, made applicable only to circuit or district courts sitting in different districts in the same state, and have no application whatever either to jurisdiction or process of a circuit court sitting in one state, in reference to persons or property situated in another state. Circuit courts of the United States having only such jurisdiction as congress has conferred upon them, those statutes bear evidence of a broad recognition by congress, not only of the impropriety of permitting the adjudication of rights to or in reference to property situated in one state by a court sitting in another, but also of the propriety of having the rights of citizens adjudicated by courts sitting in the states of which they are citizens or inhabitants. The act of congress further provides that "when any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought is not an inhabitant or not found within said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill at a certain day, therein to be designated; and the said order shall be served on such absent defendant, if practicable, wherever found, or, when such personal service is not practicable, shall be published in such manner as the court shall direct." Rev. Stat. § 738. The statute further provides that under such citation the court may adjudicate the pending matter, but that "the said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only." The proceeding here contemplated is essentially one *in rem*, and might frequently be applicable in cases in which appointment of a receiver would be proper, or even necessary; and it authorizes the process of the court to run beyond the district, or even beyond the state, in which the court is suing it sits, for the sole purpose of giving notice to a defendant. The act last referred

to was amended by an Act approved March 3, 1876, whereby the same rule was also made applicable to suits "to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought;" and it further provided, "when a part of the said real or personal property against which such proceedings shall be taken shall be within another district but within the same state, suit may be brought in either district in said state." This law, however, applies only to courts sitting in a district in which the property is wholly or partly situated, against which some claim specified in the act is asserted, and would not authorize the maintenance of such a suit or such use of process where the property, real or personal, is situated partly in one and partly in another district, unless both districts be in the same state. Here we have a broad recognition of the rule that property, whether real or personal, can be affected only by judgments or decrees of courts sitting within the state in which the property is situated; that jurisdiction over that as well as over the litigants is essential; and that the former can exist only by reason of the fact that the property is situated within the territory over which the court is given jurisdiction, and the latter by service of process made in the manner prescribed by law. If there be any other act of congress under which, in litigation between persons, or between them and corporations, the process of a circuit court of the United States is authorized to run beyond the limits of the state in which the court is authorized to sit, attention has not been called to it. By an Act approved March 3, 1881, two judicial districts were created in the state of Louisiana, and the courts for the eastern district were thereby required to be held in New Orleans, while those for the western district were required to be held at four places named in the act, one of which was Shreveport. That act recognizes the fact that all suits of a local nature must be brought in the district in which the thing to which it relates is situated, and secures to every inhabitant of that state, who is a sole defendant, exemption from suit in a district other than that in which he resides. By Acts of August 8, 1888, the districts in Louisiana were subdivided, and, in cases in which there are defendants residing in different divisions, process is authorized to reach them; and, while these statutes have no direct bearing on the question presented, they show that congress deemed it necessary, even in such cases, to authorize process to run beyond the division in which the court issuing it sat. The rule that ordinarily a receiver, appointed by a court having jurisdiction to make the appointment, is an officer of that court, having only such power as the order of the court, under the general principles of law and due course of procedure, may confer upon him, or such as may be conferred upon him by statute; that his possession is the possession of the court, and property thus placed in his hands is *in custodia legis*,—is so fully recognized that citation of authorities in support of the rule seems unnecessary. Promi-

nent among the decisions so holding is the case of *Booth v. Clark*, 58 U. S. 17 How. 331, 15 L. ed. 167, and *Davis v. Gray*, 83 U. S. 16 Wall. 217, 21 L. ed. 453. From these considerations it must follow that a court cannot confer upon a receiver power outside of the territory over which it has jurisdiction, for its process cannot be effective beyond that, unless authorized by statute to reach to other territory within the limits of the country to which the court belongs; and, where the process of a court cannot go and be entitled to enforcement and respect, its officers cannot have power. *Northern Indiana R. Co. v. Michigan Cent. R. Co.* 56 U. S. 15 How. 242, 14 L. ed. 678; *Ableman v. Booth*, 62 U. S. 21 How. 524, 16 L. ed. 176; *Toland v. Sprague*, 87 U. S. 13 Pet. 328, 9 L. ed. 1104; *Pennyroy v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 287. In *Ableman v. Booth* it was truly said that "no judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence." Whether want of jurisdiction arises from the fact that the thing to be effected by judgment and process of a court is without its territorial jurisdiction, or without its jurisdiction for any other reason, is unimportant, for in either case the process is invalid because the court has not jurisdiction.

This brings us to the inquiry whether the circuit court for the United States, sitting in and for a district in the state of Louisiana, had jurisdiction to appoint a receiver, and through him to take possession and control of a railway, no part of which was in the state or district in which the court was authorized to sit, but of which a part, at least, was in this state. Such an inquiry must be determined by the laws of the United States creating circuit courts and determining their jurisdiction; and, without making further particular reference to the statutes regulating that matter, the decisions of the supreme court of the United States bearing on that question will be briefly noticed. As before said, the jurisdiction of that court over an action, transitory or personal in its nature, between the two railroad corporations, will be conceded, for if the defendant in that suit could not, for any reason, have been compelled to appear in that court, that was a matter it might waive. In *Toland v. Sprague*, *supra*, it was said: "The judiciary act has divided the United States into judicial districts. Within those districts, a circuit court is required to be holden. The circuit court of each district sits within and for that district, and is bound by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union. It has not done so. It has not in terms authorized any original civil process to run into any other district, with the single exception of sub-

pœnas for witnesses within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment is rendered,—one in favor of private persons in another district of the same state, and the other in favor of the United States in any part of the United States. We think that the opinion of the legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor." In *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 56 U. S. 15 How. 233, 14 L. ed. 674, it appeared that a railway company in Michigan, incorporated under the laws of that state, made an agreement with a railway company in, and incorporated by the laws of, Indiana, whereby the latter agreed that the former might build and operate a road in Indiana under the charter of the latter. Another railway company, also established by the law of Indiana, claimed the exclusive right to construct and operate a road in that part of Indiana, and it brought a suit in the circuit court of the United States for the district of Michigan against the Michigan road, in which injunction was sought to restrain that company from constructing a road under the contract, in violation of the exclusive right claimed by the plaintiff. In disposing of the case the court said: "In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract, suit may be brought in the circuit court where the defendant may be found. If sued out of the district in which he lives, under the decisions he may object, but this is a privilege which he may waive. Whenever the jurisdiction of the person will enable the circuit court to give effect to its judgment or decree, jurisdiction may be exercised. But whenever the subject-matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the circuit court sitting within it. An action of ejectment cannot be maintained in the district of Michigan, for land in any other district. Nor can an action of trespass *quare clausum fregit* be prosecuted, where the act complained of was not done in the district. Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the *locus in quo*." It was insisted in that case, as in others which will be hereafter considered, that the court having jurisdiction of the persons could enforce its judgment by acting upon them, which would seem to be true, as injunction only was sought, if there was no other obstacle to the exercise of such jurisdiction; but, after indicating the class of cases in which the court could thus enforce its judgments, the court said: "It will readily be admitted that no action at law could be sustained in the district of Michigan, on such ground, for injuries done in Indiana. No action of ejectment or for trespass on real property could have a more decided local character than the appropriate remedy for the injuries complained of. And is this

character changed by a bill in chancery? By such a procedure we acquire jurisdiction of the defendants; but, the subject-matter being local, it cannot be reached by a chancery jurisdiction exercised in the state of Michigan." A suit was brought in the circuit court for a district in Tennessee to cancel a contract for the sale of land in Mississippi, to recover money paid on the contract, and to enjoin the adverse party from enforcing it. The relief asked was granted, but the court attempted to establish a lien on the land in Mississippi, and directed it to be sold by persons acting under its appointment, to satisfy the judgment rendered in favor of the plaintiff; but on appeal it was held that "the court had no jurisdiction to decree a sale to be made of land lying in another state, by a master acting under its own authority," and that it had no power to create a lien on the land. *Boyce v. Grundy*, 84 U. S. 9 Pet. 289, 9 L. ed. 132. In *Mississippi & N. R. Co. v. Ward*, 67 U. S. 2 Black, 485, 17 L. ed. 811, it was held that a district court of the United States for the district of Iowa had not jurisdiction to abate as a public nuisance a bridge across the Mississippi river, the middle of that stream being the boundary between the states of Iowa and Illinois; and in the course of the opinion it was said: "Congress could extend the jurisdiction of the federal courts across the Mississippi river by enlarging the judicial districts on either side, or it could confer concurrent jurisdiction on adjoining districts, extending to trespassers and torts committed within the shores of the river; but the courts of justice cannot do it unless authorized by an act of congress."

The direct purpose of all judicial action is relief to a litigant, which cannot be given by a judgment or decree alone, but must be given, if at all, through the enforcement of the one or the other by appropriate process; and the highest test of the jurisdiction of a court in a given case is found in the answer to an inquiry whether it has lawful power thus to enforce its judgment or decree. This rule is thus clearly expressed by the court of appeals of Maryland: "It would be an idle thing in chancery to entertain jurisdiction of a matter not within its reach, and make a decree which it could have no power to enforce or to compel a compliance with. And the absence of that very power is a good test by which to try the question of jurisdiction. It would be a solecism to say that the chancellor has jurisdiction to decree *in rem*, where the thing against which the decree goes, and is alone the subject of and to be operated upon by it, is beyond the territorial jurisdiction of the chancery court, and not subject to its authority, and the decree, if passed, would itself be nugatory for the want of power or jurisdiction to give it effect." *White v. White*, 7 Gill & J. 210. There are classes of cases, however, in which courts of chancery may, through action on persons over whom they have jurisdiction, indirectly affect title to property, real or personal, situated in a state not within their jurisdiction. Such a jurisdiction, however, is tentative in character, and necessarily precarious, for it

depends for effect on obedience of a defendant, and may be defeated if he be unyielding. If, in the exercise of such jurisdiction, a foreign court, by imprisonment or like coercion, should compel a conveyance when, by the laws of the country where the property is, no right to a conveyance existed, then a court of the country having jurisdiction over the property might disregard a conveyance made under such circumstances. An eminent writer thus states the rule which has been recognized: "Where the subject-matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained, and remedy granted, which directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts towards it, and it is thus ultimately, but indirectly, affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership, and the like, may be brought in any state where jurisdiction of defendant's person is obtained, although the land or other subject-matter is situated in another state, or even in a foreign country. On the other hand, when the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the persons of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated." Pom. Eq. Jur. 1318; Whart. Conf. L. 288-293. This rule has been recognized by the Supreme Court of the United States and by the decisions of the state courts. *Massie v. Watts*, 10 U. S. 6 Cranch, 148, 3 L. ed. 181; *Caldwell v. Carrington*, 34 U. S. 9 Pet. 97, 9 L. ed. 64; *Watkins v. Holman*, 41 U. S. 16 Pet. 26, 10 L. ed. 874; *Northern Indiana R. Co. v. Michigan Cent. R. Co.* 58 U. S. 15 How. 243, 14 L. ed. 679; *Corbett v. Nutt*, 77 U. S. 10 Wall. 475, 19 L. ed. 979; *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed. 569; *Watts v. Waddale*, 81 U. S. 6 Pet. 389, 8 L. ed. 487; *White v. White*, 7 Gill & J. 211; *Vaughan v. Barclay*, 6 Whart. 392. In *Watkins v. Holman* it was said: "A court of chancery acting *in personam* may well decree the conveyance of land in any other state, and may enforce its decree by process against the defendant; but neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court." The property in controversy in that cause was situated in the state of Alabama, and the owner thereof sold one half of the property, and gave bond to make title, after which, without making title, he died. Administration was taken out on his estate in Massachusetts, and under an act of the legislature of Alabama the administratrix was authorized to sell the real estate situated in that state. The holder of the bond for title brought a suit in the su-

preme judicial court of Massachusetts, praying that court to empower the administratrix to make title to him, in accordance with the bond, and such an order was made and complied with. It was with reference to a deed made under such circumstances that the language above quoted was used. The case of *Corbett v. Nutt* was one which made it proper to inquire whether the supreme court of the District of Columbia had power to appoint a trustee for land in Virginia in place of a trustee in whom title had vested under a will, that person declining to accept the trust, and, in holding that the court had not such power, the same ruling was made as in *Watkins v. Holman*. Jurisdiction of courts of equity, even in the classes of cases referred to, exists only when the relief sought is such that it may be given by the act of the persons over whom the court exercises jurisdiction; and it is probably true that no decision made by an English or American court in modern times holds that such jurisdiction exists for the purpose of compelling a person, by conveyance or otherwise, to place property situated in a jurisdiction essentially foreign to it under the control of a court, in order that it may administer it through a receiver or otherwise. The law is thus stated by a distinguished elementary writer: "The claim, to affect foreign lands, must be strictly limited to those cases where the relief decreed can be entirely obtained through the parties' personal obedience. If it went beyond that, the assumption would not only be presumptuous, but ineffectual." Westlake, *Private International Law*, § 65. That *Judge Story*, to say the least, doubted the existence of such jurisdiction even with this limitation, is evident. *Story*, Conf. L. 543-545. This seems necessarily to be a correct limitation of the rule, for otherwise a court in one state would have power to acquire jurisdiction over lands situated in another. If a person be under contractual obligation to convey lands, a court of equity having jurisdiction over his person may compel him to make the necessary conveyance, although the land is in another state; but in such case the decree and process through which it is enforced create no right to the thing, and only enforce the specific right created by the contract. The same jurisdiction may be exercised when land is held in trust, whether this arises from contract, devise, or fraud; but in such cases the court simply compels the person over whom it has jurisdiction to pass to another title to the specific thing on account of a fixed right to it, existing when the suit was brought. If, however, the right or claim which a court in one state attempts to enforce against lands situated in another be one that arises from its decree and execution of its process, then the court is directly acting upon the thing over which it has not jurisdiction, and to such a case the rule cannot be applied. There are a few American cases which seem to hold that jurisdiction to compel a conveyance of land or other property situated in another state exists under facts last stated; and, while they have no direct application to the question certified, they are often cited to sustain the proposition

that a court sitting in one state has jurisdiction to appoint a receiver, and through him to take possession of real and personal property situated in another state. They will be briefly considered in view of that fact.

The subject-matter involved in *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207, was a continuous line of consolidated railway, situated in the states of Iowa and Missouri, and a circuit court of the United States for a district in Iowa, in foreclosure of a mortgage, directed a sale of the entire road by a master, the mortgagor and trustee, in whom it shows title was vested, being before the court. In the course of the opinion it was said: "It is here undoubtedly a recognized doctrine that a court of equity, sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True, it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In *McElrath v. Pittsburg & S. R. Co.* 55 Pa. 189, a bill for foreclosure of a mortgage, in which it appeared that a railroad company whose road was partly in Pennsylvania and partly in West Virginia had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, living within its jurisdiction, should sell and convey all the mortgaged property, as well that in the state of West Virginia as that in Pennsylvania. This case is directly in point and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter that the master was ordered to make the sale. This court might have ordered the trustee to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustee to make a deed to the purchaser in confirmation of the sale." Under similar facts the same ruling was made by the supreme court of errors of Connecticut in *Mead v. New York, H. & N. E. Co.* 45 Conn. 223.

There are a few legal propositions bearing on the question of the existence of such a jurisdiction to which the courts of the United States and of the several states all assent. One of these is that jurisdiction over real property exists only in the tribunals of the country in which it is situated, and that it cannot be taken possession of or sold under the order, license, or decree of a court having jurisdiction only in another state. *Wilkinson v. Leland*, 27 U. S. 2 Pet. 654, 7 L. ed. 552; *Watts v. Waddle*, 31 U. S. 6 Pet. 400, 8 L. ed. 442; *Boyce v. Grundy*, 34 U. S. 9 Pet. 275, 9 L. ed. 127; *Watkins v. Holman*, 41 U. S. 16 Pet. 26, 10 L. ed. 874; *Northern Indiana R. Co. v. Michigan Cent. R. Co.* 56 U. S. 15 How. 238, 14 L. ed. 674; 25 L. R. A.

*Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 453, 15 L. ed. 446; *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 495, 17 L. ed. 811; *Corbett v. Nutt*, 77 U. S. 10 Wall. 475, 19 L. ed. 979; *Reynolds v. Stockton*, 140 U. S. 272, 35 L. ed. 469; *Lewis v. Darling*, 57 U. S. 16 How. 13, 14 L. ed. 824; *Carpenter v. Strange*, 141 U. S. 105, 35 L. ed. 647.

A decree foreclosing a mortgage, and the process through which it may be enforced, act upon the mortgaged property directly. The sale, when made, is essentially a judicial sale, which has frequently been declared to be a sale by the court. In *Williamson v. Berry*, 49 U. S. 8 How. 546, 12 L. ed. 162, a judicial sale was defined to be "one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell;" and, unless the decree directs otherwise, the usual mode of procedure and the effect of each act are thus stated: "The usual mode of selling property under a decree or order in chancery is a direction that it shall be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private, by a person authorized to make it, but that the approbation of the master in either case completes the title. Before, however, a purchaser can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made either privately or at auction. The report then becomes the basis of a motion to the court, by the purchaser, that his purchase may be confirmed. Notice of the motion is given to the solicitor in the cause, and confirmation *nisi* is ordered by the court, to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale, in the manner that such confirmation has been ordered. We have been thus particular for the purpose of showing the office of the master in relation to a sale, and what is meant by subjecting a sale to the approval of a master, and to show that such a sale, until approved by the master and confirmed by the court, gives no title to a purchaser of an estate which he may have bargained to buy." In *Blossom v. Milwaukee & O. R. Co.*, 70 U. S. 8 Wall. 207, 18 L. ed. 46, in which sale under foreclosure of a mortgage came in question, it was said: "It is true that the marshal or master, as the case may be, is the officer of the court, and that as such his acts and proceedings are subject to the revision and control of the court. In sales directed by a court of chancery, says Judge Story, the whole business is transacted by a public officer under the guidance and superintendence of the court itself. Even after the sale is made, it is not final until a report is made to the court, and it is approved and confirmed."

Reference to these matters has been made



for the purpose of illustrating the proposition that judicial sales, whether made on foreclosure of mortgage or for some other purpose, are, in effect, sales made by the court directing the sale; and it is difficult to avoid the conclusion that the rule asserted in *Muller v. Dows*, and other cases cited, has no application in any case in which a sale of the thing is necessary before any person can become entitled to have it conveyed to him, for in such cases it is the decree, sale, confirmation, and payment of the purchase money which give the right to the conveyance; and all these for efficacy must depend on the jurisdiction of the court, through its decree and process, to act directly upon the thing. The fact that a person has executed a mortgage does not authorize any court to require him to convey the mortgaged property to the mortgagee or to any other person; nor does the fact that a mortgage gives power to a trustee named in it to sell the mortgaged property on failure of mortgagor to pay the sum so secured authorize him to convey on failure of mortgagor to make such payment; but in either case there must be a sale made under the mortgage before any person can become entitled to a conveyance. A deed is but evidence of a right, and, in case of judicial sales, a valid decree, sale by an authorized person, and confirmation are ordinarily essential to the right of a purchaser to a conveyance. These, and compliance with the terms of sale, create the right to a conveyance, and they can have no legal existence unless the court directing and confirming the sale had jurisdiction. The right of a purchaser at such sales rests on the fact that a sale was made in pursuance of decrees and orders made by a court in the exercise of lawful power over the thing sold, and not upon a prior right to the thing, which the court simply enforces by compelling the adverse party to make a conveyance which he ought to have made without coercion; and there is at least a seeming inconsistency in holding that a court has power to decree a sale of property, cause it to be sold by its own officer acting under its process, and to confirm the sale, but that to perfect the title of the purchaser it is necessary to compel the owner to make a conveyance. No case can arise, unless under exceptional legislation, in which a court having jurisdiction to decree the sale of property, and that to make under its own process, has not power to pass whatever title the defendant has without resort to any aid whatever from him. To lose jurisdiction to decree the sale of land and to sell it, although it be not situated within the territory over which the court has jurisdiction, on the proposition that the court has power, in a different but proper case, to compel a person before it to make a conveyance he is under obligation to make without reference to any action of the court, seems to us illogical, for the powers are not of the same character, nor the one in any respect dependent on the other. One is a power exercised directly on the person over whom the court has jurisdiction, while the other operates, if at all, as directly on the thing not within its jurisdiction; for if the decree

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directing the sale, and sale made under it, be not given full effect, the purchaser can have no right to a conveyance. Substance, and not form, ought to be regarded. No case can arise in which a court will have power to appoint a receiver unless there be property of which the court may take possession through its receiver; and if the property be immovable, or movable, but so connected with the immovable as are cars or other like property necessary to and used in operating a railway, then the suit in which a receiver to take possession of them may be appointed is necessarily one local in character, for in such case the court operates directly upon the thing. Such a proceeding is not one strictly *in rem*, but such is its nature; and, under general rules everywhere recognized, such proceedings can be had only where the thing to be taken into possession is within the territory within which the court has power to act. The line between actions termed "local" and "transitory" in some of the decided cases becomes shadowy; but in no case can a suit, the purpose of which is to subject certain property, whether real or personal, to payment of a debt, or to have it placed in possession of and under the control of a court for any purpose of administration, be termed other than a local action. The difference between local and transitory actions was thus stated in case of *Mostyn v. Fabrigas*, 1 Cowp. 161, by Lord Mansfield: "There is a formal and a substantial distinction as to locality of trials. I state them as different things. The substantial distinction is where the proceeding is *in rem*, and where the effect of the judgment cannot be had if it be laid in the wrong place. That is the case of all ejectments where the possession is to be delivered by the sheriff of the county; and, as trials in England are in particular counties, the officers are county officers; therefore the judgment could not have effect if the action was not laid in the proper county." It has sometimes been stated that the principles thus announced furnished simply a technical rule in reference to venue, and that they had no bearing on the more substantial question of jurisdiction, but the language of the great judge is not susceptible of such a construction.

The case of *British South Africa Co. v. Companhia De Mocambique* [1893] App. Cas. 602, decided in the house of lords in the year last past, sets all such questions at rest, so far as the English courts are concerned. The opinion in that case may be read with profit on the question of extraterritorial jurisdiction of the courts of that country, and it is not without value as to the general claim for equity jurisdiction already considered. The principles stated in *Mostyn v. Fabrigas*, *supra*, met with the approval of Chief Justice Marshall in *Livingston v. Jefferson*, 1 Brock. 209, Fed. Cas. No. 8,411; and, in deference to what he understood to be the difference between such actions at common law, he felt constrained to hold that an action of trespass *quarre clausum fregit* was a local action. In *Casey v. Adams*, 102 U. S. 86, 26 L. ed. 52, there was a fund in reference to which it became necessary to settle priorities between



creditors, and a question arose whether this should be done by the court where the fund was, or by a court-sitting in the parish where the national bank to which the fund belonged was situated. The act of congress permitted suits to be maintained against such associations in the county or parish in which the bank was located, and it was contended that the proceeding could be maintained only in that parish. In disposing of the question the court said: "The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribe generally where one should be sued included such suits as were local either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated. . . . The proceeding in this case was local in its nature. It related to property in the parish of La Fourche, which had been seized and sold under process from the district court of that parish."

Under the laws of this state, as well as from the nature of the property itself, a railroad—which includes the right of way, rails, and all other material placed thereon, or on other land used in connection therewith for permanent use, as well as all necessary structures, such as station houses for storage of freight and accommodation of passengers, water tanks, and like structures—must be deemed real estate or immovable property; but the rolling stock and other movable property of such a company is declared by the constitution to be personal property. Const. art. 10, § 4. Under the settled rules of law, can such property be taken possession of by a court having jurisdiction only in another state, if the property be situated in this? Looking to the relation of rolling stock and other movable property necessary to the operation of a railway, and to the public use of the entire property, the same reasons will be seen to apply for holding such property subject to seizure, possession, or sale only by a court having jurisdiction within the territory where the property is situated as apply to the seizure, possession, or sale of immovable property, even if it could be held that the same rule in this respect does not apply to movable as well as to immovable property. Whether the *lex rei sitæ* or the *lex domicilii* be applied to the movable property owned and used by the Texas & Pacific Railway Company is unimportant, for under neither was its *situs* in the state of Louisiana, unless there in fact; and if, in course of railway traffic, some of the movable property belonging to it was in fact in Louisiana when the receiver was appointed, that could not confer on the court making the appointment jurisdiction over property not so situated. The same result would necessarily follow even if, under the act of congress or some law of the state of Louisiana, the railway company had acquired and then possessed, in the state of Louisiana, property, movable or immovable, unless it be the law that ownership and possession of property in one state, with jurisdiction over the person of the

owner, is sufficient to confer upon a court, only having jurisdiction therein, power to take possession and control of other property situated in another state. The act of congress, as before seen, in effect declares that the eastern terminus of the Texas & Pacific Railway shall be at Marshall or at the eastern line of this state, and no railway east of that line constitutes a part of that, even though it may be owned and operated by that company. If, however, the Texas & Pacific Railway, as a continuous line under common ownership, extended into the district in which the circuit court making the appointment had jurisdiction, we do not see that, under the acts of congress before referred to, it would have jurisdiction to appoint a receiver, and, through him or otherwise, to take possession of that part of the railway situated in Texas, even if the decision in *Muller v. Dows* be correct when applied to the facts of that case; for that decision recognizes the law to be that the court "could not send its process into that other state, nor can it deliver possession of land in another jurisdiction." If that court would not have power to place a purchaser in possession, it certainly could not take possession through its receiver or otherwise, for the incapacity, in the one case as in the other, results from the absence of jurisdiction over the property. If it were the ownership of property which gives a court jurisdiction over it, then it would exist whenever the court has jurisdiction over the person of the owner; but, under the acts of congress, jurisdiction over property is not founded on ownership, but on the locality of the property, although ownership may become a controlling fact in settling the rights of parties. This being true, that a part of a connected and entire property may be within the jurisdiction of the court cannot confer upon it jurisdiction to take possession or otherwise deal directly with that part situated in a state within which the court has not jurisdiction. This is illustrated by the case of *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485, 17 L. ed. 811, and by other cases before referred to. If the railway corporation could have been compelled to convey its property here situated to the court's receiver,—a power which the president and directors of the company, or even its stockholders, could not exercise under the laws of this state,—this would not remove the difficulty as to jurisdiction; for, if the receiver could thus be clothed with title to the property, the disposition of it would rest on the decrees of the court appointing him, for these are the foundation of every judicial sale or disposition of property through a court, when not made on account of an existing right to property through which the person to whom it ought to be conveyed is entitled to it, without reference to the decrees of any court, and the receiver's possession would still be the possession of the court. Let the matter be obscured as it may, in such cases the court acts directly on the property,—sells it if it be sold, conveys it if it be conveyed, and possesses it if it be in any manner placed in the hands of its receiver.

In *Moseby v. Burrow*, 52 Tex. 396, it appears that a resident of the state of Arkansas brought an action in this state against a corporation in Tennessee whose property there was placed in the hands of a receiver by a chancery court of that state. The corporation had lands here, which were attached, after they had been conveyed to the receiver, under the order of the court that appointed him, by the officer of the corporation to whom the lands had been conveyed in trust for it; and in the action here the receiver asserted right to the land against the attaching creditor. The supreme court of this state refused to recognize his right, or the jurisdiction of the court that appointed him, to affect, in the manner attempted, lands situated in this state, and applied the rules announced in *Booth v. Clark*, 58 U. S. 17 How. 381, 15 L. ed. 187; and in other cases cited in the opinion. In *Morris v. Hand*, 70 Tex. 481, it appeared that Hand made a contract with Fox, such as could be specifically enforced, to convey lands in Texas; and, they both being residents of Montgomery county, in the state of New York, Fox obtained a decree from the supreme court of that county, directing Hand to make to him a conveyance or to pay a named sum of money, Hand did not comply with the decree, but was subsequently adjudged insane, and Brown was appointed committee of his estate, and, in pursuance of a decree directing him to do so, Brown conveyed the land to Fox. In a controversy here between the heirs of Hand and a person holding under the conveyance made by Brown, it was held to be "settled, without conflict of authority, that courts of one country or state have no authority, under any circumstances, to direct the title to real estate situated in a foreign state or country, or to direct the sale of such land to be made by any one occupying a fiduciary capacity." The opinion, however, recognized the rule that in proper cases such relief might be given through personal process against the person who had obligated himself to convey. Decisions doubtless may be found in which it was held in England, at an early day, that chancery courts of that country had power to appoint receivers and take possession, through them, of property in Ireland, in the colonies and in countries having no governmental connection with England; but, as said in *Booth v. Clark*, "orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the east." It would be useless to speculate upon the theories upon which the English courts proceeded in asserting such a jurisdiction; but, so far as we are advised, it has not been asserted or enforced in any recent case, and, except as permitted by acts of parliament, it probably would not be asserted, even within territory part of the British empire outside of England. As early as 1834, such a jurisdiction was denied by an Irish chancery court, which refused even to give to a decree rendered by a chancery court in England such prima facie effect as to permit it to be made the basis of a suit

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affecting property situated in Ireland, or to carry out its decree appointing a receiver to manage property there. While the opinion of the lord chancellor in the house of lords seemed to assert such jurisdiction in an English chancery court, that high tribunal, on appeal from the decree of the Irish court, remitted the entire case to that court for decision, and directed it to have a receiver appointed. *Houlditch v. Donagall*, 8 Bligh, N. S. 301. If, however, under the laws of England, chancery courts may exercise such jurisdiction over property situated in any part of the British empire, that would furnish no criterion by which to test the territorial jurisdiction of a circuit court of the United States, which can exist only when and where congress has conferred it. A circuit court of the United States for a district in Louisiana, unless it be conferred by some act of congress, has no greater power over property here than would have any court of Louisiana possessing general equity jurisdiction, and that Texas and Louisiana are in the same circuit is of no importance.

It is true that some of the circuit courts of the United States have asserted power to appoint receivers for continuous lines of railway extending through two or more states, and through them to take possession of such parts of railways as were without the state in which the courts were given jurisdiction; and some reference will be made to the cases, from which it will be seen that their rulings are not harmonious. In *Wilmer v. Atlantic & R. Air Line R. Co.*, 2 Woods, C. C. 417, Fed. Cas. No. 17,775, a receiver was appointed to take possession of a railway belonging to one corporation, extending into or through three states. The appointment was made by a circuit court in Georgia, and its ruling was based on the assumed power of the court, acting upon the owner, to compel submission to its jurisdiction. The only case cited in support of the ruling, other than such as assert the power of courts of equity already considered, was the case of *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1, which was a case in which it appears that the supreme court of Massachusetts, on original bill, appointed receivers of a road situated in and incorporated by the laws of that and other states; but no question was raised or considered as to the power of the court to do so, and the receivers were subsequently removed and the railway placed in the hands of trustees, who were entitled to its possession and management under the terms of the mortgage which it was the purpose of the bill to foreclose. While application for appointment of a receiver was pending in case of *Wilmer v. Atlantic & R. Air Line R. Co.*, a court of the state of Georgia appointed a receiver over so much of the road as was in that state, and like steps were taken by circuit courts of the United States in each of the other states through or into which the railroad ran. Application was made to the circuit court sitting in Georgia, by its receiver, for writ of assistance to put him in possession of so much of the road as was in possession of the receiver appointed by the state court; but no such relief seems to have

been asked as to other parts of the road, which were in the possession of a receiver appointed in the other states. The application was disposed of by an opinion written by *Circuit Justice* Bradley, in which it was held that the state court was entitled to possession because its possession was prior, notwithstanding action looking to the appointment of a receiver was first commenced in the circuit court. No question was raised or discussed as to the jurisdiction of the circuit court over so much of the road as was without the state of Georgia, but from the opinion, it is difficult to resist the conclusion that the eminent judge did, at least, entertain serious doubts of the power of the circuit court to appoint a receiver over so much of the road as was not in that state. In the case of *Wabash, St. L. & P. R. Co. v. Central Trust Co.*, a circuit court of the United States for the eastern district of Missouri appointed receivers over a railway which ran through the states of Missouri, Illinois, and Indiana, and into the states of Ohio, Michigan, and Iowa, who, under its orders, took possession of the entire road. The bill under which this was done was filed by the railway company, but subsequently the trustee in a general mortgage filed a cross bill asking foreclosure. 22 Fed. Rep. 272. Bills similar to that filed in the court in Missouri seem to have been filed in circuit courts in Illinois, and perhaps in other states, for the purpose of having, as seems to have been usual at the time, the same receivers appointed in each jurisdiction, and this was done; but, as is to be inferred from a case hereafter to be noticed, this was not done for the purpose of having the property situated in Illinois administered by the circuit courts sitting in that state, but for the purpose of giving effect to the appointment made by the circuit court in Missouri. After these transactions occurred, bondholders brought suits in the circuit court of the United States for the northern district in Illinois to foreclose mortgages held to secure the bonds held by them, in which it was asked that the receivers appointed by the circuit court for Missouri should be removed, and some other person appointed. The court entertained jurisdiction over so much of the property as was within the district, removed the receivers theretofore appointed by the circuit court in Missouri, and appointed another, but refused to exercise jurisdiction over so much of the property as was within the same state, but in another district. In disposing of the question the court said "that courts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers," cited *Booth v. Clark* as authority, and held that the decision in *Muller v. Dows* did not justify the procedure of the circuit court for Missouri. *Atkins v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 162. The court in Missouri, in effect, rescinded so much of its order as applied to the property over which the court in Illinois took jurisdiction, and gave possession to the receiver appointed by the latter, but insisted that the decision in *Muller v. Dows* was conclusive of the propriety and legality of its former action. *Central Trust*

*Co. v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 618. In *Beers v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 161, substantially the same facts were involved, and the same result was reached. In the case of *Blackburn v. Selma, M. & M. R. Co.* 2 Filipp. 525, Fed. Cas. No. 1,467, it appears that the legislatures of Alabama, Mississippi, and Tennessee each incorporated railway companies bearing the same name, the act of incorporation in the states last named being identical; but it does not clearly appear from the opinion whether all the acts authorized consolidation of the three corporations. The railways were constructed, and the companies consolidated so far as they were authorized, after which bonds were issued, secured by mortgage on the railway. Suit was brought on some of the bonds, in which foreclosure was asked in the circuit court of the United States for the northern district of Tennessee, and that court appointed a receiver over the railway situated in the three states, but he failed to get possession of that part in the state of Alabama, which was placed in the hands of a receiver by a court of that state, and subsequently sold in foreclosure of mortgage. The court held that it had jurisdiction to appoint the receiver, to foreclose the mortgage on the railway in the three states, and to sell it. The case of *Muller v. Dows* was again relied on in support of the jurisdiction claimed, and the same course of reasoning followed in that case was adopted. If the court in Alabama, under whose decrees a receiver was appointed and the property sold, had jurisdiction of the proper persons to make a decree which would bind the property, what would be the relative rights of a purchaser under the decree made by that court, and a purchaser under decree rendered by the circuit court in Tennessee, if their rights were not affected by priority of mortgage? The Mercantile Trust Company filed a bill in the circuit court of the United States for the southern district of Ohio against the Kanawha & Ohio Railway Company, a corporation existing under the laws of Ohio and West Virginia, a part of whose road was in each state, for the purpose of foreclosing a mortgage, and a receiver was appointed. Subsequently, a bill was filed in the circuit court of the United States for West Virginia, which consisted of a copy of the bill filed in the court in Ohio, with prayer that the court take ancillary jurisdiction, and asking that the court confirm the order of the court in Ohio appointing a receiver of the entire property, and make such orders as might be necessary to give him possession and control of it. The purpose of the proceeding in West Virginia is thus stated by *Mr. Justice Harlan*: "The purpose of the parties by whom, or at whose instance, the suit here was instituted, was to have the entire mortgaged property administered under the orders of the court in Ohio in which the suit for foreclosure was brought, and that nothing was desired or expected from this court except an order approving or confirming the appointment of Kelley as receiver, and such other orders as may be necessary to vest in him the possession and control of such of the mort-

gaged property as was in this district." The case of *Muller v. Dows* was relied upon again as authority for the action of the court in Ohio, but it was held not to be applicable. The learned judge then declares, if the plaintiff "desires the active intervention of this court in respect to the mortgaged property in West Virginia, such intervention should only occur in a separate, independent suit, of which it may take cognizance, and in which, if proper or necessary to do so, this court may lay its hands upon the property within this district, and, if need be, administer it by a receiver directly amenable to its authority, for the benefit of all parties interested, of whatever state they may be citizens. The request that this court will simply confirm the appointment of a receiver made in another circuit, and by its order invest that receiver with the possession and control of the mortgaged premises within this district, no other relief being contemplated, is, in effect, a request that this court will compel all who have claims and rights in respect to the mortgaged property situated in West Virginia to seek relief in the original suit for foreclosure pending in another state; and this, notwithstanding such parties may have the right, under existing legislation, to invoke the jurisdiction of this court, or of some court of general jurisdiction established by this state. It might be well if congress would so enlarge or regulate the jurisdiction of the courts of the United States as to enable a circuit court, in which is brought an original suit for the foreclosure of a mortgage resting upon an interstate railroad, to take actual possession, by its officers, of the entire line, and of all the mortgaged property, wherever situated, and administer it for the benefit of all concerned, preserving in that mode the unity of the railroad, and the just rights of mortgagors, mortgagees, and creditors, as well as those of the general public interested in commerce among the states. But there has been no such legislation, and we do not see our way clear to effect any such result by judicial orders merely."

The case of *State v. Northern Cent. R. Co.*, 18 Md. 193, is frequently referred to as authority for the proposition that a court may exercise extraterritorial jurisdiction and appoint a receiver, and through him take possession of a continuous line of railway running into another state; but we do not understand the court to have made such a ruling. Counsel for both parties conceded the nonexistence of such jurisdiction, and the opinion of the court, in which it is said that "the consideration that the authority of this court cannot extend beyond the territorial limits of the state, in the exercise of its remedial power, does not deter it from acting, in a case within its acknowledged jurisdiction, to the verge of those limits," evidences the fact that the court was of the same opinion. The purpose of that suit was to compel the railway company to apply its receipts, not necessary for its operation, in accordance with contract, to payment of debt to the state, and by injunction to prevent the misapplication of funds thus arising. Ad-

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mission of necessity for resort to a jurisdiction, now frequently inaptly termed "ancillary," is simply a concession that the tribunal which is in such case termed that of primary jurisdiction is destitute of power over property situated in another state; for, if this be not true, neither excuse nor necessity can exist for action by another court having jurisdiction in the state where the property is. A court clothed with full power to administer property needs no aid from another; and if, in the exercise of a lawful power, it has taken possession of property through its receiver, interference with that by another court would be wrongful. One court cannot acquire power over property not within its territorial jurisdiction through the action of another court having jurisdiction where the property is, for the jurisdiction of every court must depend on the law, and cannot rest on the friendly action of another court, which is sometimes termed "comity." The statute now in force in this state declares: "If property sought to be placed in the hands of a receiver is situated within the limits of this state, no other court than one within the limits of this state shall have power to appoint any receiver of said property." Sayles' Civ. Stat. art. 1470b. This asserts a rule of comity which the courts of this state, since its passage, must observe; but it also asserts a jurisdictional rule which, from the nature of suits in which such appointments may be made, is applicable everywhere in the absence of such a statute. What power congress might confer on a circuit court for a district in one state over property situated in another state is not the question involved in this case. That question is, what jurisdiction has it conferred on such courts? The acts of congress, on which solely depend the jurisdiction of circuit courts, clearly manifesting intention, even in actions transitory in their nature, to have the rights of litigants determined, as far as may be practicable, in courts of the locality in which they live, and to confer jurisdiction over actions or suits local in nature only on courts having jurisdiction in the territory in which the thing in litigation is situated, we are forced to the conclusion that the circuit court in Louisiana had not jurisdiction over property in Texas, such as conferred upon it power to take possession of and administer it, through a receiver or otherwise.

The second question certified is: "If no such power existed, would the negligent act of a receiver thus appointed, resulting in death, while operating the road, in Parker county, Texas, make the company liable?" If the Texas & Pacific Railway Company permitted a person, appointed receiver by a court having no jurisdiction over its property in this state, to take possession of that property and to operate it, then such person must be deemed to have been simply its agent, and it is liable for injuries resulting, while the railway was managed by him, in all cases in which it would be liable had he been made its agent in the ordinary manner.

The third question is: "Would the company be liable for such negligent act if the receiver was appointed and discharged, and

the property restored to it, by consent and collusion, as alleged by appellees, whether the court making the appointment had or had not the requisite jurisdiction, and, if the court had jurisdiction, could that issue be made available in this suit?" Appellees alleged that the suit in the circuit court of the United States by which the receiver was appointed was collusively brought, and that the receiver was appointed by consent of all parties to it, and that, while ostensibly acting as receiver, the person so appointed was really but the agent of the railway company during the time he managed its property. They further alleged that, before the discharge of Brown as receiver, the railway company bound itself by writing to assume and pay all liabilities incurred by him during the time he managed the company's property as receiver; and they further alleged that during the time he operated the railway he made permanent improvements on the road to the value of \$2,000,000, which were paid for out of current earnings, and that, when restored to the company, the enhanced value of the road resulting from improvements so made was \$2,000,000. If a court appointing a receiver has jurisdiction over the property to which the receivership relates, its orders and decrees will be binding on parties to the suit, and must be given effect so far as they affect the property; but it does not follow from this that the true relation of the person appointed to the railway company, when property is placed in his possession, may not be inquired into whenever that becomes necessary in litigation between the company and persons not parties to the suit in which the appointment is made. If the court has jurisdiction, every reasonable presumption ought to be indulged that the relation of the receiver to the property and its owner is what that relation ordinarily is; for it ought not to be presumed, or even found to be true, in the absence of cogent evidence, that a court has made itself the mere tool of apparently adverse litigants, or that it entertained a collusive suit. A suit is said to be collusive when brought by seemingly adverse parties under secret agreement and co-operation, with a view to have some legal question decided which is not involved in a real controversy between them, or when so brought with intent to defraud other persons, there being no real controversy between the parties, on purpose to secure some relief which, as between themselves, would not be conceded without suit. The power of a court to appoint a receiver is based on the fact of real litigation between the parties, in which it becomes necessary, in the opinion of the court, to take possession of property to which the controversy in some manner relates, in order to preserve it, or, if necessary, to administer it for the benefit of all persons interested. He "is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the

parties in interest in litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interest of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is *in custodia legis*." *Davis v. Gray*, 83 U. S. 16 Wall. 217, 21 L. ed. 452. If parties having no real controversy, and desiring no lawful relief, which makes resort to a court necessary, institute a suit, and have a receiver appointed to take possession of property, for the purpose of defrauding other persons, or to embarrass them in assertion of right against one of the parties and its property, no principle of justice sanctions the interposition of a court or the appointment of a receiver; and it would be a perversion of justice to hold otherwise than that a receiver appointed under such circumstances is the agent of the person or corporation whose property may thus collusively be placed in his possession.

The theory on which a receiver is held to be an officer of the court appointing him, and not the agent of the owner whose property is placed in his possession, is that the property to be controlled is taken from the custody and management of its owner, and made subject to the control of the court, without his consent; but, when the defendant owner asks the court to do this, he, in effect, asks the court to make an appointment for him, and it is but just that a receiver so appointed should be held to be his agent. That a plaintiff collusively acts with a defendant for such a purpose only aggravates the case, for this enables the owner to impose upon the court, and such a plaintiff has no ground for complaint if the receiver be held the agent of the owner in reference to every act out of which, in the management of the property, obligation to other persons may arise. The statute of this state which declares that "no receiver shall ever be appointed of any joint-stock, incorporated company, or of any co-partnership or private person on the petition of such joint-stock, incorporated company, partnership or person," is but a legislative declaration of the rule recognized by courts of equity. *Robinson v. Hadley*, 11 Beav. 614; *Leddel v. Starr*, 19 N. J. Eq. 168; *Marr v. Littlewood*, 3 Myl. & C. 458. Corporations ought not to be heard to say that they are either indisposed or incompetent to manage their own affairs, and that therefore some court should take charge of them through a receiver. If the officers of a corporation misconduct its business, stockholders usually have power to remove them, and, in cases in which they have not the ability to protect themselves, courts of equity have power to control the acts of such officers, or even to remove them; but such misconduct does not authorize courts to appoint receivers, and through them to assume the management of a business or property. The opinion in *Metc v. Buffalo, C. & P. R. Co.*, 58 N. Y. 61, 17 Am. Rep. 201, states the only ground on which it can be held that receivers are not agents of the persons

or corporations whose property is placed in their possession by a court of competent jurisdiction, but it recognizes the fact that the rule applies only when the appointment is not made or brought about at the desire of the owner, and assumes that the rule applies only when the appointment is made against such person's will. We do not wish, however, to be understood to hold that there must be active opposition, or even open dissent, on the part of the owner to the appointment of a receiver, in order to make operative the general rule; for, if the application be justified by existing facts, good faith would not require opposition; but we do wish to be understood to hold, when a receiver is appointed by agreement between the parties to a suit in order to accomplish a purpose not lawful in itself, that the receiver must be considered the agent of the owner of the property.

In a case in which, by consent of parties, a receiver was appointed with power to receive and sue for all sums due the litigants, and the same to hold subject to the order of the court, it was held that the person so appointed could not be considered an officer of the court, and that he must be considered the agent of the parties, because the appointment was in effect the act of the parties. *Kellar v. Williams*, 8 Rob. (La.) 321. The Texas & Pacific Company, including its main and lateral roads, perhaps had more than 1,000 miles of railway in Texas, the main line extending from its eastern to its western boundary, and it may be that it had, as is not unusual, a floating indebtedness, and would, in current business, incur obligations along its entire line, whether operated by the company or a receiver, in payment of which current earnings ought to have been applied. Under such circumstances, if the real purposes of the receivership were not the lawful purposes shown by the pleadings in the circuit court, but were to place the property of the company in the hands of a receiver subject to the control of a court sitting in another state, in order that the railway company might not be subject to suits in the ordinary course of judicial proceedings, that its creditors here should be thus embarrassed in enforcement of their rights by having to resort to a court so far from the place where their causes of action arose, all for the purpose of enabling the parties to that suit, by agreement between them, to apply the earnings of the road to the betterment of the property belonging to the one, and to which the other looked as a security for debt,—then the receivership ought to be deemed to have been collusive, and the receiver be held to have been simply the agent of the railway company. Under such facts (which we do not assume to be true, but refer to for illustration) made known to the court the receiver would not have been appointed, and the railway company ought not to be permitted to escape liability on the ground that, through false and fraudulent pretenses made by another acting under a collusive agreement with it, the court had been induced to make an appointment that would not have been made had the real pur-

pose been disclosed. In *Sage v. Memphis & L. R. Co.*, 18 Fed. Rep. 571, a distinguished circuit judge of the United States, on discovering the existence of such a state of facts as referred to, at once took steps to close a receivership, and, in disposing of the questions presented, with such forceful language vindicated the abused jurisdiction of the court, and gave the rules applicable in such cases, as to challenge the admiration of every person having due regard for the pure administration of the law. If the appointment of the receiver was obtained through collusion of the parties to the suit in which the appointment was made, it is unimportant whether the court would have had jurisdiction, in a proper case, to make the appointment; for in such case the company would be as fully responsible for negligence in the operation of its road, through which injury resulted to a third person, as would it be if its road had been operated under the management of a superintendent appointed by its directory, and the facts which show such liability may be proved in this cause.

The fifth question certified is: "In what, if any, state of the case as above set forth, would appellees be precluded from disputing the validity of the appointment of the receiver, the deceased fireman having contracted with him in that capacity?" In view of the entire case stated it is not perceived that the fact that the person acting as receiver made the employment in that character could affect the right of appellees to show what his true relation to the company was. If, while he was in fact and in law the agent of the company, it permitted him to assume to act as receiver, and to control its property, and employ persons to operate it, this would present simply the ordinary case of an agent contracting in relation to the principal's business intrusted to him without disclosing who his principal is. It was held in *East Line & R. R. Co. v. Culbertson*, 72 Tex. 375, 3 L. R. A. 567, that one railway company operating the road of another under an unauthorized lease was the agent of the latter in so far as its duties to the public were concerned, but that as to the employes of the former no such agency and resulting liability existed. The decision in that case can have no application to the question certified.

The sixth question certified is: "In any state of case as above set forth, would the statute of limitations preclude a recovery?" It has been held by the Supreme Court of the United States, and by this court, that after the discharge of a receiver against whom suit has been brought, if there be facts to fix liability on a railway company's property for acts occurring during the receivership, it is proper to make the company a party, and continue the litigation. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829; *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717; *Brown v. Gay*, 76 Tex. 444; *Boysse v. Brown*, 82 Tex. 43; *Texas & P. R. Co. v. Comstock*, 88 Tex. 537. In *Texas & P. R. Co. v. Comstock* it was held that the action did not abate on discharge of the receiver, and that, the company having been made the defendant, the action should be treated as con-

tinuous from the time it was instituted against the receiver, from which it followed that limitation could not be invoked unless the action was barred when brought against the receiver. This action, however, could not have been maintained against the receiver, nor against the railway company after his discharge, if his relation to the company was really only that which a receiver ordinarily sustains to the person whose property is placed in his possession and management. *Turner v. Cross*, 83 Tex. 218, 15 L. R. A. 262. If the action had been brought against Brown as agent of the railway company, it could not have been sustained, for the action, so treating him, ought to have been brought against his principal. The case now stands as though no suit had been brought until the railway company was made the defendant, and from that standpoint the question of limitation must be considered. The question of limitation is presented under the facts assumed as the basis for the preceding questions certified, and, looking to them, it is evident that such facts operated to conceal the fact that cause of action existed against the company, and it could not well be held that such concealment was not fraudulent. The rule in this state is that the fraudulent concealment of a plaintiff's cause of action takes the case out of the bar of statutes of limitation. *Munson v. Hallowell*, 28 Tex. 475, 84 Am. Dec. 582; *Ripley v. Withee*, 27 Tex. 17; *Ransome v. Bearden*, 50 Tex. 127; *Calhoun v. Burton*, 64 Tex. 515; *Anding v. Perkins*, 29 Tex. 348; *Connolly v. Hammond*, 58 Tex. 17; *Brown v. Brown*, 61 Tex. 45. The limitation on this rule is that a plaintiff cannot excuse his delay in instituting suit on the ground of fraudulent concealment of his cause of action if his failure to discover is attributable to his own neglect, and whether such neglect existed in a given case must be determined from the facts of that case.

The fourth and seventh questions certified are: "If a collusive and fraudulent receiver-

ship was shown, or rather if that was the proper deduction from the undisputed evidence, was the court required to submit the issue to the jury before a judgment could be entered on a general verdict finding negligence?" "If appellant could be held liable for the death loss in question on the ground of a collusive and void receivership, as alleged, upon a verdict finding that issue in favor of appellees, should the judgment be reversed for fundamental error where the pleading and proof raised the issue, and no error is assigned for failure to submit it to the jury?" These may be considered together. It has been held in a long line of decisions that a charge, correct so far as it applies to the facts, but omitting to state the law applicable to an issue raised by them, furnishes no ground for reversal unless proper instruction relating to the matter omitted be asked and refused. *Robinson v. Varnell*, 16 Tex. 887; *O'Connell v. State*, 18 Tex. 363; *Peeler v. Guilkey*, 27 Tex. 858; *Ford v. McBryde*, 45 Tex. 501; *Davis v. Roosevelt*, 53 Tex. 316; *Beazley v. Denson*, 40 Tex. 434; *Cockrill v. Cox*, 65 Tex. 675; *Galveston, H. & S. A. R. Co. v. Arispe*, 81 Tex. 519. Whatever exceptions there may be to this rule, none of them embrace a case in which the undisputed evidence establishes the fact to which the omission relates.

The eighth question certified is: "As deceased was killed since the Act of Congress of March 8, 1887, relating to federal receiverships, what effect, if any, did it have on the issues involved?" As this is now an action against the railway company, that act has no bearing on any issues raised by the pleadings; but were it an action that could have been maintained against the receiver, or were it against him, all the issues made in the pleadings on which that act could have any bearing were settled by the Supreme Court of the United States in the case of *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 38 L. ed. 81, and in other cases.

## NEW YORK COURT OF APPEALS.

Edward M. STECK, *Resp't.*,

v.

COLORADO FUEL & IRON CO., *Appt.*

(148 N. Y. 236.)

**Long accounts in a counterclaim, in an action on contract where plaintiff's**

**claim is disputed, will not justify compulsory reference, under the provision of the New York constitution for "trial by jury in all cases in which it has heretofore been used in the colony of New York," since the practice in the colony permitted a set-off only with plea of payment, which admitted plaintiff's claim, and the provision in the Colonial Act of December 31,**

**NOTE.—Compulsory reference as a denial of the constitutional right to trial by jury.**

- I. *The United States Constitution.*
- II. *Where the right existed prior to the state constitution.*
- III. *State statute no infringement of constitutional right.*
- IV. *Equitable account.*
- V. *Constitution violated.*
- VI. *Action at law.*
- VII. *State constitution.*

The principles deducible from the decisions would seem to be,

25 L. R. A.

That article VII. of the Amendments to the United States Constitution does not affect the power of the states to legislate upon the question of compulsory arbitration in civil actions.

That where the power of compulsory reference existed prior to the date of a state constitution, it will not be taken to be abridged by such constitution.

That where the cause was one referable by the rules and principles of equity it will not be taken as within the constitution.

So certain state statutes have been held to be no infringement of the right.

1708, for reference of an action involving a "long account, either on one side or the other." was applicable to a counterclaim only when plaintiff's cause of action was not disputed.

(Andrews, Ch. J., and Finch and O'Brien, JJ., dissent.)

(April 24, 1894.)

**A** PPEAL by defendant from an order of the General Term of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County directing a reference of a case brought to recover salary alleged to be due and unpaid. *Reversed.*

The facts are stated in the opinions.

*Mr. James Stikeman*, for appellant:

Trial by referee is an exceptional mode of judicial procedure, and when it is sought to coerce a suitor into a submission to it the burden is upon the party applying for a reference to show that the case is within the excepted class.

*Cassidy v. McFarland*, 139 N. Y. 201.

It is not enough to justify a compulsory reference that the case may involve the examination of a long account. It must be shown that the trial will involve such examination.

*Thayer v. McNaughton*, 117 N. Y. 111; *Spence v. Simis*, 137 N. Y. 616; *Cassidy v. McFarland*, *supra*.

The referable quality of an action must be determined from the complaint and a counterclaim set up in the answer cannot change it.

*Mr. William C. Cammann*, with *Messrs. Holmes & Adams*, for respondent:

But where the action is one which is not referable by the rules of common law it is not the subject of a compulsory reference.

The right to a trial by jury in civil actions will be seen to be limited by the constitutions of some of the states.

#### I. The United States Constitution.

Article VII. of the Constitution of the United States provides: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

The above provision in the United States Constitution relates only to such courts as sit under the authority of the United States, and was not intended as a restriction upon the state courts. *Huston v. Wadsworth*, 5 Colo. 212.

So the reference of a case for trial without the consent of the parties was held not to be in violation of such seventh article, in *Huston v. Wadsworth*, *supra*.

The provisions of such constitution apply only to the United States courts, and do not prescribe a rule of practice for the courts of a state. *Hunt v. McMahan*, 5 Ohio, 124.

The provision is no objection to a cause being heard before a referee or a state court, and the state constitution is no objection either, references being well known and sanctioned prior to the adoption of the New York constitution. *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624.

The right of trial by jury so secured is simply the right to that kind of trial. *Mathews v. Tripp*, 12 R. I. 253.

The Supreme Court of the United States also holds that the above amendment relates only to 25 L. R. A.

The question whether the examination of a long account is necessarily involved in the action is not appealable to this court.

*Welsh v. Darragh*, 52 N. Y. 590; *Kain v. Delano*, 11 Abb. Fr. N. S. 29; *Martin v. Windsor Hotel Co.* 70 N. Y. 101; *Harrington v. Bruce*, 84 N. Y. 103.

The referable quality of the action depends upon the issues presented by the complaint and answer.

*Searle v. Davis*, 39 N. Y. S. R. 169; *Maryott v. Thayer*, 7 Jones & S. 417; *Backstone Nat. Bank of Boston v. Bogart*, 9 Jones & S. 292; *Kain v. Delano*, *supra*.

The referable quality no longer depends upon the complaint alone.

*Mitchell v. Oliver*, 56 Hun, 208; *Thayer v. McNaughton*, 117 N. Y. 111.

*Earl, J.*, delivered the opinion of the court:

The plaintiff's cause of action, as alleged in his complaint, is for his salary, as general manager of the defendant, at a stipulated price, for the quarter of the year ending December 31, 1892. The verified answer of the defendant gainsays and puts in issue all the material allegations of the complaint, and alleges counterclaims consisting of long accounts. It is conceded that if the plaintiff's cause of action had been merely put in issue by the answer, the action could not have been referred without the consent of both parties, and that either party demanding it would have been entitled to a jury trial. But the contention of the plaintiff is that because the

the United States courts and that the states must regulate the trials in their own courts. *Edwards v. Elliott*, 36 U. S. 21 Wall. 532, 22 L. ed. 437; *Walker v. Sauvinet*, 32 U. S. 90, 23 L. ed. 673; *Pearson v. Yewdall*, 35 U. S. 294, 24 L. ed. 436.

#### II. Where the right existed prior to the state constitution.

The right remains inviolate so long as the jury continues to be constituted substantially as the jury was constituted when the constitution was adopted, and so long as all such cases as were then triable by jury continue to be so triable without any restrictions or conditions which materially hamper or burden the right. *Mathews v. Tripp*, 12 R. I. 253.

Where the right existed prior to the constitution being adopted, it cannot be impaired by legislative act. *Flanders v. Warner*, 55 N. H. 179.

In such a case there cannot be a compulsory reference. *McCullough v. Brodie*, 13 How. Fr. 346; *Townsend v. Hendricks*, 40 How. Fr. 123; *Brink v. Republic F. Ins. Co.* 2 Thomp. & C. 550.

It has been held that the language of the constitution indicates that the right of trial by jury shall continue to all suitors in court, in all cases in which it was secured to them by the laws and practice of the courts at the time of the adoption of the constitution. *Tribou v. Strowbridge*, 7 Or. 155.

So the clause in the Wisconsin constitution has been interpreted as designed to secure only the right of trial by jury in all cases where it could by law have been claimed as a matter of right at the time the constitution was adopted. *Mead v. Walker*, 17 Wis. 189; *Gaston v. Babcock*, 6 Wis. 503; *Stilwell v. Kellogg*, 14 Wis. 422.

The law being in favor of such method of procedure before the constitution, the right of trial



counterclaims involve long accounts, therefore the action may be compulsorily referred, and all the issues therein tried before a referee. The question is thus presented again to this court whether, where the cause of action alleged in the complaint is not referable, the action can be made referable by anything which appears in the answer. We have several times answered this question in the negative, and we should do so again. As it is sought to distinguish this case from our prior decisions, to which I will hereafter refer, and as we differ among ourselves, it becomes important, more particularly than ever before, to examine the grounds of those decisions, and to give somewhat fully the reasons for our present conclusion.

It was provided in the State Constitution of 1777 that "trial by jury in all cases in which it has heretofore been used in the colony of New York shall be established and remain inviolate forever," and that provision is contained in all the revisions of our constitution since that time. We have therefore, to determine whether such an action as this could, prior to 1777, have been referred to a referee for trial without the consent of the parties. References of actions pending in the common-law courts for trial before referees were not known to the common law, and, so far as they are now authorized, they are particularly provided for by statutes. Under the Dutch rule in the colony of New York, actions involving long accounts could be referred to arbitrators or referees, and such a reference was a very common mode of trial

during that period. But it was not pleasing to the English colonists, who had received the trial by jury from their ancestors,—a priceless heritage secured by Magna Charta,—and hence, some years after the capitulation of the Dutch to the English in 1683, by the charter of liberties and privileges granted by the Duke of York to the inhabitants of New York, it was provided "that all trials shall be by the verdict of twelve men." See Charter, Append. No. 2, 2 Rev. Laws 1813. Thereafter, all actions in the common-law courts of the colony were triable before juries, except the action of account, and that was applicable only to a limited class of cases, involving the examination and taking of accounts. It was one of the most difficult, dilatory, and expensive actions known to the law, and was very rarely resorted to. *McMurray v. Rawson*, 3 Hill, 59; *Magown v. Sinclair*, 5 Daly, 68.

The difficulties attending the prosecution of such an action were such that the practice became general for merchants and others having long accounts to enforce their collection by actions of assumpsit, which were always then triable by jury. But the embarrassments attending the trial of such actions by jury were such that December 31, 1768, an Act (2 Van Schaick's Laws N. Y. 517) was passed, with a preamble as follows: "Whereas, instead of the ancient action of account, suits are of late, for the sake of holding to bail, and to avoid the wager of law, frequently brought in assumpsit, whereby the business of unraveling long and intricate accounts,

by jury as provided in the state constitution will not prohibit a compulsory reference where it existed before. *Mead v. Walker*, *supra*.

The same was the ruling of the court in *Dane County Supra v. Dunning*, 20 Wis. 210.

To the same effect, *Edwardson v. Garnhart*, 56 Mo. 81; *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624.

III. *State statute no infringement of constitutional right.*

In *Shepard v. Bank of State of Missouri*, 15 Mo. 143, the court held that the sections of the Missouri code relating to a reference were not contrary to the constitutional right to a trial by jury, nor an infringement thereof.

And in the later case of *Edwardson v. Garnhart*, 56 Mo. 81, the court upheld the right to submit to arbitration, even where both parties did not consent, stating that it never was the intention that the constitutional provision should so change a law which had existed for twenty years in that state, the object of the constitution being to preserve the constitutional right as it existed at the time, and was then practiced in the state.

The New Hampshire Act of 1874, chapter 97, referring certain cases, was upheld as not in conflict with article 20 of the Bill of Rights, or the constitution of that state, in *Flanders v. Warner*, 55 N. H. 77.

So the New Hampshire statute, relating to reference of matters to auditors to report upon, was held not unconstitutional, in *Perkins v. Scott*, 57 N. H. 65.

See also *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624.

The Ohio law does not conflict with the United States Constitution. *Hunt v. McMahan*, 5 Ohio, 124.

Section 1013 of the New York Code of Civil Procedure governs the right to compel a reference in that state where a long account is involved, and 25 L. R. A.

difficult legal questions do not arise. *Camp v. Ingersoll*, 86 N. Y. 433.

The statutory right of reference is merely permissive and not mandatory. *Goodyear v. Brooks*, 4 Robt. 632; *Martin v. Windsor Hotel Co.* 70 N. Y. 101; *Wheeler v. Falconer*, 7 Robt. 45.

The right is confined to cases of long account. *Barnes v. West*, 16 Hun. 68; *Kain v. Delano*, 11 Abb. Pr. N. S. 29; *Sharp v. New York*, 18 How. Pr. 213.

It has been held that section 222 of the Oregon Civil Code (Hill's Annotated ed. 1892, p. 810) relating to compulsory references, is not contrary to the provisions of the state constitution, art. 1, § 17, declaring that in civil cases the right of trial by jury should remain inviolate. *Tribou v. Strowbridge*, 7 Or. 155.

The Oregon act providing for the assessment of damages without a jury, in cases relating to the taking of material for road repairs, was not unconstitutional. *Kendall v. Post*, 8 Or. 141.

In *McDonald v. Schell*, 6 Serg. & R. 240, the court held that section 11 of the Pennsylvania Arbitration Act of 1810, requiring payment of costs before appeal, was not unconstitutional.

In the above case the court, in declaring the statute constitutional, refused to consume time in hearing the question argued. *McDonald v. Schell*, *supra*; *Emerick v. Harris*, 1 Binn. 416.

An intention to destroy the constitutional right will not be gratuitously imputed to the legislature. *Com. v. Bennett*, 16 Serg. & R. 243.

The above case was an action for a penalty for neglect to serve notice required under the Arbitration Act of 1810.

The Wisconsin act entitled "An act concerning proceedings in courts of record," giving the court power to compel the parties to refer questions involving a long account, was declared not unconstitutional, in *Norton v. Booker*, 1 Pinney, 196.

most proper for the deliberate examination of auditors, is now cast upon jurors, who at the bar are more disadvantageously circumstanced for such services; and this burden upon jurors is greatly increased since the laws made for permitting discounts in support of a plea of payment, so that by the change of the law and the practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions, and jurors perplexed and rendered more liable to attainments; and by the vast time necessarily consumed in such trials, other causes are delayed and the general course of justice greatly obstructed. Be it, therefore, enacted," etc., "that whenever it shall appear probable in any cause depending in the supreme court of judicature of this colony (other than such as shall be brought by or against executors or administrators) that the trial of the same will require the examination of a long account, either on one side or the other, the said court is hereby authorized, with or without the consent of parties, to refer such cause by rule, to be made at discretion, to referees. . . . and if the report or award of the referees, or of the major part of them, shall be confirmed by the said court, and any sum be thereby found for the plaintiff, judgment shall be entered for the same, with a *relucta verificatione*, as by confession with costs, if by law the plaintiff would have recovered costs, had a verdict passed in the same cause for the sum so reported to be due; but if, after payment pleaded, any sum shall be reported to be due to the defendant, and the award be confirmed, he shall have judgment and recover his costs. . . . And when such referees shall report that nothing is due from the defendant, and the report be confirmed, then judgment shall

be entered as by *non pros.* and the defendant shall recover his costs, to be taxed, and such judgment be a perpetual bar." That was the first act in the colony of New York authorizing a reference in any common-law action. It was undoubtedly a tentative act, and it expired, by its own limitation, on the 1st day of January, 1771. It was revived and re-enacted by the Act of February 16, 1771, and was to continue in force until February 1, 1780. It is evident that the people of this state parted with the trial by jury in any case with great hesitation and reluctance, as the temporary statute authorizing references was not re-enacted in 1780, and there was no such statute in this state from that date until 1788, when it was again substantially reinstated. It was in force prior to and at the time of, the adoption of the Constitution of 1777; and the question for our determination is whether, under it, such an action as this could have been referred. And I think it is very clear that it could not have been. The preamble to the act may be read for the purpose of ascertaining its meaning and scope, and from that it clearly appears that the lawmakers were then dealing with actions brought by merchants and others upon long accounts; that it was such actions, only, that were intended to be provided for; and that such actions, only, were intended to be sent to referees for trial. The provision is that an action could be referred when the trial would "require an examination of a long account, either upon the one side or the other," and therefore it may be conceded that when the trial would involve the examination of a long account, under the practice as it then existed, upon either side, a reference could be ordered. But when I have made this concession little

So in *Janvrin v. Janvrin*, 57 N. H. 146, a reference in divorce proceedings was upheld as not being a case in which the parties had a right at law to a trial by jury. *Moore v. Moore*, 56 N. H. 512, to the same effect.

#### IV. *Equitable account.*

The extent of the constitutional right is generally conceded to be that which was according to the common law, not including cases in the courts of chancery, admiralty, and probate. *Plimpton v. Somerset*, 33 Vt. 233.

In a suit in equity, the party has no absolute constitutional right to trial by jury. *Camp v. Ingersoll*, 86 N. Y. 433.

In *McMartin v. Bingham*, 27 Iowa, 234, 1 Am. Rep. 265, the question was raised as to the power of the court to direct a reference when the parties did not consent, and the court held that under section 3090, subsection 1, of the Revised Code of that state, where an action fell within the rules of equitable cognizance, there should be no hesitation in the exercise of the power of compulsory reference, and that therefore the district court had no power to order a reference without consent, except in such cases, and that such an action would be contrary to and in violation of the right to trial by jury, which remains unviolated by article 1, section 3, of the Constitution of that state.

That which is the matter of calculation as mere account, as within the jurisdiction of equity, is the subject of a compulsory reference, and the constitutional provision relating to trial by jury is not violated by such reference. *Blair Town Lot & Land Co. v. Walker*, 50 Iowa, 376.  
25 L. R. A.

In questions of long account a trial by jury would be a mockery. *Ibid.*

The power to make a compulsory reference under section 2316 of the Iowa Code, was held not to violate the provisions of the said article of the state constitution, the article not guaranteeing the right to trial by jury in cases within the province of equity jurisdiction. *Burt v. Harrah*, 65 Iowa, 643. The same conclusion was reached by the court in *Mills v. Miller*, 3 Neb. 94.

#### V. *Constitution violated.*

In *Com. v. Bennett*, 16 Serg. & R. 243, it was stated that the right of trial by jury was supposed to be guaranteed by the constitution, and that acts of assembly were required to be construed so as not to infringe it; and an intention to destroy the right would not be gratuitously imputed to the legislature.

The general rule of restriction in reference to the provision of the constitution is that any act which destroys or materially suppresses the right of trial by jury according to the course of the common law in cases proper for the cognizance of a jury is unconstitutional. *Plimpton v. Somerset*, 33 Vt. 233.

To justify the court in holding a legislative law unconstitutional, the case must be clear and manifest. *Norton v. Rooker*, 1 Pinney, 195.

A submission under a statute authorizing a justice of the peace to render judgment on a referee's report, when the subject-matter in controversy was under two hundred dollars, was held void in *Hayes v. Bennett*, 2 N. H. 423.

The Rhode Island statute, providing that when a cause is at issue in the supreme court, or court of

progress has been made. We must determine under what circumstances a long account could appear in the answer of the defendant, so as to make the action referable when a long account was not set forth in the complaint, and that makes it necessary for us to examine the ancient law of set-off.

Set-offs in common-law actions were unknown to the common law. If a defendant had accounts or claims against the plaintiff, he could enforce them only by an action commenced by him against the plaintiff. Even if the plaintiff's accounts or claims were undisputed, and the defendant had accounts or claims against the plaintiff far in excess of those made against him, he could not offset them, but was obliged to enforce them by an independent action. That practice was not changed in England until the Acts 2 & 8 Geo. II., whereby set-offs were first authorized there. 3 Bl. Com. 805; Barbour, Set-Off, 24. They were authorized several years earlier in the colony of New York by the Act, chapter 281 of the Laws of 1714, 1 N. Y. Colonial Laws [Livingston & S. ed.] 106. In that act it was provided "that if any two or more dealing together be indebted to each other upon bonds, bills, bargains, promises, accounts or the like, and one of them commence an action in any court of this colony, if the defendant cannot gainsay the deed, bargain, or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or any part of the debt or sum demanded, giving notice in writing with the said plea of what he will insist upon at the trial for his discharge, and give any bond, bill, receipt, account, or bargain so given notice of in evidence, and if it shall happen that the defendant hath fully paid or satisfied the debt or sum demanded, the jury

shall find for the defendant, and judgment shall be entered that the plaintiff shall take nothing by his writ and shall pay the costs; and if it shall appear that any part of the sum demanded is paid, then so much as is found to be paid shall be discounted and the plaintiff shall have judgment for the residue only, with costs of suit; but if it appear to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted, or in arrear to the defendant more than will answer the debt or sum demanded; and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a debt of record," etc. That was the only law upon the subject of set-off enacted in the colony previous to the Constitution of 1777. At that time, and, I believe, at all times prior to the code practice, notice of matter in defense could not be given except in connection with some plea. The lawyers of that period could not conceive of a defense except under some plea, and at no time in this state, prior to 1801, could there be more than one plea to a declaration. The pleadings on both sides were required to be such as to present for trial a single issue, and a pleading tendering several issues was bad for duplicity. 1 Chitty, Pl. 259 264, 592. Under the Act of 1714 the defendant could give notice of his set-off only with the plea of payment, and with no other plea, and under his plea of payment he could prove no payment except that accomplished by his set-off. There could not be two distinct issues,—one upon the payment, and the other upon the set-off; and under the plea of payment, with notice of set-off, the only matter that could be litigated was the set-off. A plea of pay-

common pleas, if the form of action be assumpsit, debt, covenant, or other form of action in any way involving accounts, the court may in its discretion appoint one or more auditors, and that their report shall be prima facie evidence of all matters embraced in the order, was held void as contrary to section 15 of article 1 of the State Constitution which reserves the right of trial by jury inviolate. *Francis v. Baker*, 11 R. L. 103, 23 Am. Rep. 424.

In Vermont the Act of 1856 (No. 6, page 10) relating to compulsory references and making the referee's report prima facie evidence of the facts reported, was held unconstitutional in so far as it related to trials in which the party was entitled to a jury trial by common law. *Plimpton v. Somerset*, *supra*.

#### VI. Action at law.

All rights, whether existing at the time of making the constitution, or afterwards arising, properly falling into classes of rights to which the common law secured the trial by jury, are within its provisions. *Plimpton v. Somerset*, 33 Vt. 283.

Where the action is clearly one maintainable at law, the court has no power to order such a reference, and such an order is an interference with the constitutional right. *Grant Dist. Twp. v. Bulles*, 9 Iowa, 535, following *McMartin v. Bingham*, 27 Iowa, 284, 1 Am. Rep. 265.

In *Mills v. Miller*, 3 Neb. 94, a purely legal action cannot be referred, except by consent of the parties, as neither can be deprived of the right to a trial by jury in such cases, and in actions involving an account it was only in case of a purely equita-

ble nature that a reference could be ordered without the consent of the parties.

The above decision was approved of and followed in *Lamaster v. Scofield*, 5 Neb. 143.

Where the act of the state legislature made a railroad company liable for the full value of livestock killed or maimed by passing trains, the value to be ascertained by appraisers chosen as therein provided, the court held the provision of the act unconstitutional, as such legislature had no power to deprive any person or corporation of the right of trial by jury in a common-law action, where the amount involved exceeded twenty dollars. *Dacres v. Oregon R. & Nav. Co.* 1 Wash. 525.

#### VII. State constitution.

Generally, it may be said that the state constitutions provide that the right to trial by jury in civil causes shall remain inviolate, but by section 27 of article 6 of the Constitution of Michigan, the right to trial by jury remains but is deemed waived in all civil cases, unless demanded by one party in the manner prescribed by law.

And it has been held that under the Mississippi constitution, the right to trial by jury exists in all cases where by common law it was requisite. *Isom v. Mississippi Cent. R. Co.* 36 Miss. 800.

By section 1 of article 5 of the Constitution of South Carolina of 1882 (Gen. Stat. 1882, p. 30) the general assembly has power to pass laws necessary and proper to discharge differences by arbitrators, to be appointed by parties choosing that summary mode of adjustment. H. W.

ment, as well as a plea or notice of set-off, always admitted the plaintiff's claim. They were pleas of confession and avoidance. *Jacobs, Law Dict.* and *Tomlins, Law Dict.* title *Set-Off*; 2 *Parsons, Cont.* 734; 2 *Bl. Com.* 305. A "set-off" is defined to be "a mode of defense whereby the defendant acknowledges the justice of the plaintiff's demand, on the one hand, but, on the other, sets upon a demand of his own to counterbalance it, either in whole or in part." *Blackstone*, at the page cited, says: "To this head may also be referred the practice of what is called a 'set-off,' whereby the defendant acknowledges the justice of the plaintiff's demand, on the one hand, but, on the other, sets up a demand of his own to counterbalance that of the plaintiff, either in the whole or in part, as if the plaintiff sues for ten pounds due on a note of hand, the defendant may set-off nine pounds due to himself for merchandise sold to the plaintiff, and, in case he pleads such set-off, must pay the remaining balance into court." In 2 *Parsons, Cont.* p. 734, it is said: "Set-off" has been well defined as a mode of defense by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a demand of his own against the plaintiff to counterbalance it, in whole or in part." And again, at page 741, it is said: "The essential difference between reconpment or reduction, on the one hand, and set-off, on the other, is that in set-off the ground taken by the defendant is that he may owe the plaintiff what he claims, but a part of the whole of the debt is paid, in reason and justice, by a distinct and unconnected debt which the plaintiff owes him." So, under the Act of 1714, it was not possible for the defendant to give notice of his set-off and at the same time dispute the plaintiff's claim. He could not have done so, even if the statute had not expressly provided that he could give notice of his set-off only in case he was not able to gainsay the plaintiff's claim. His plea of payment, with notice of set-off, necessarily confessed the claim. If the words "cannot gainsay," etc., did not condition the right of set-off, then they were absolutely without meaning, and no purpose for their use can be plausibly suggested, or even conceived. Besides this express limitation, the whole framework of the statute shows that the right of set-off was limited to cases where the plaintiff's claim was not in dispute, as the set-off was to be allowed—not against the claim or debt of the plaintiff found or established or actually existing—but against "the debt or sum demanded." These words quoted are not found in the English statutes of set-off, but are found in all the statutes upon the subject in this state until the Revised Statutes, when they, as well as the words "cannot gainsay," are for the first time omitted. The Statute of 1714 was re enacted, slightly changed, February 27, 1788, in the act "For the amendment of the law and the better advancement of justice;" and again the defendant, in case he could not gainsay the plaintiff's claim, was allowed, with the plea of payment, to give notice of set off. By the act, chapter 90 of the Laws of 1801,—a general practice act under the same title,—it was

provided that the defendant, in case he could not gainsay the plaintiff's claim, could plead the general issue, instead of payment, as before, and with that give notice of set-off. It was also provided in that act—for the first time, in this state—that "it shall be lawful for any defendant or tenant in any action in any court of record to plead the general issue and to give any special matter in evidence which, if pleaded, would be a bar to such action, giving notice with the said plea of the matter or several matters so intended to be given in evidence;" and also "that it shall be lawful for any defendant or tenant in any action, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters as he shall think necessary for his defense." All these provisions were carried into the Revised Laws of 1813, including the provision allowing the defendant, if he could not gainsay the plaintiff's claim with the plea of the general issue, to give notice of his set-off; and so the law remained until the Revised Statutes. Under these Acts of 1801 and 1813, it was held that the notice of set-off could only accompany the general issue, and no other plea, as before it could only accompany the plea of payment. *Alsop v. Caines*, 10 Johns. 896; *Caines v. Brisbane*, 13 Johns. 9; *Root v. Taylor*, 20 Johns. 137; *Wheeler v. Raymond*, 5 Cow. 231.

Under these acts, what was meant by the words "if the defendant cannot gainsay" the plaintiff's claim? They are not found in any statute of set-off in England, or elsewhere in this country. Did the lawmakers in 1801 and 1813 mean to change the prior practice, which had obtained when the notice of set-off was allowed with the plea of payment? Did they mean to deprive these words, which before had a meaning, of all meaning? Did they mean to permit the defendant to gainsay the plaintiff's claim when he was unable to do it? I believe they did not. They had not yet reached the stage of law reform which allows several actions to be tried in one. They were evidently not convinced of the wisdom and feasibility of allowing the defendant to litigate the plaintiff's claim and his own independent claims at the same time, and in the same action, and I do not believe that such a practice ever obtained in this state prior to the revised statutes. The lawmakers allowed the notice of set-off to go with the general issue because under that, as under the plea of payment, the defendant could show payment. The general issue was a mere formal plea to sustain or give place for the notice of set-off, and not to authorize the defendant to litigate or dispute the plaintiff's claim upon the trial. I have not overlooked the cases of *Gordon v. Bowne*, 2 Johns. 150; *Burgess v. Tucker*, 5 Johns. 105; *O'Callahan v. Sawyer*, Id. 118; *Tuttle v. Bebee*, 8 Johns. 152; *Root v. Taylor*, 20 Johns. 137; *Bridge v. Johnson*, 5 Wend. 342. In none of these cases was it held that the defendant could avail himself of his set-off upon the trial, and at the same time dispute and litigate the plaintiff's claim. The only case, which has come to my attention, which gives any countenance whatever to such a practice, is that of *Gordon*

v. *Bowen*, where the question upon the plaintiff's claim was one of law, upon undisputed facts, and the decision there proceeded upon the ground that the set-off was not proper; and it was never held, in any reported case, that the words "cannot gainsay," etc., did not have the meaning and force which I have attributed to them. But whether I am mistaken or not as to the meaning of these words when the notice of set-off accompanied the general issue is of no importance, as I cannot be mistaken as to their meaning when the notice of set-off was required to accompany the plea of payment only.

It was provided in 2 Geo. II., chapter 23, section 18, that "where there are mutual debts between the plaintiff and defendant, . . . one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the defendant is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon the general issue." This clause was made perpetual by the Act, 8 Geo. II., chapter 24, section 4, and it having been doubted whether mutual debts of a different nature could be set against each other, that doubt was removed by section 5, which authorized the set-off, notwithstanding the debts were deemed in law to be of a different nature; and it was provided that, when the debt due to the defendant was less than that due from him, he must, on pleading such set-off, pay the remaining balance into court. Under the English statutes, it was held that notice of set-off could be given only with the general issue. 1 Chitty, Pl. 606. As I have before stated, there was no provision in the English statutes allowing the defendant to give notice of his set-off only in case he was not able to gainsay the plaintiff's claim; and some years before the passage of these acts, by the Statutes of 4 & 5 Anne, it was provided, as afterwards, in this state, in the Acts of 1801 and 1813, that the defendant could, with the leave of the court, plead as many matters to the declaration of the plaintiff as he should think necessary for his defense. In drafting the Act of 1801, which was carried into the Act of 1813, the lawmakers here had before them the English statutes; and why did they continue the provision that the defendant could give notice of his set-off only in case he could not dispute the plaintiff's claim, if it was to have no meaning and effect, and if the statutes here were to have the same operation as the English statutes?

This review of the statutes shows clearly that prior to 1777, and for many years thereafter, a defendant was not permitted to set off his claims against the plaintiff's claims, except he admitted them. The provision for set-offs took this limited form to meet the obvious injustice of a case where the defendant was not able to gainsay the plaintiff's claims, but yet had set-offs sufficient, in whole or in part, to pay and discharge them;

and thus it is clear that prior to that period there was no possible way of depriving the plaintiff of a trial by jury in case his cause of action was gainsaid. There can, therefore, be absolutely no ground for saying that these accounts in this answer, which disputes and gainsays the plaintiff's claim, could prior to 1777, have been set up as a defense to the action, or that prior to that time there was any possible way for depriving the parties of a jury trial upon the issues formed upon the plaintiff's cause of action.

It would not be useful now to examine more particularly the statutes as to set-offs and references enacted since 1777, as there has been no power in the legislature since that time to curtail the right of trial by jury. It could not do so by changing the form of pleadings, or by allowing set-offs and counterclaims where they could not have been interposed prior to that time. In the Acts of 1788, 1801, and 1813, and in the revised statutes and the code, the power to refer actions is continued in substantially the same language as that used in the Act of 1768; and in the revised statutes, for the first time, as I believe, was the defendant enabled to plead or give notice of a set-off, and at the same time put in issue, and contest upon the trial, the cause of action alleged in the declaration. I can safely assert that prior to the revised statutes there is no record in any book of any cause compulsorily referred, where the complaint stated a disputed cause of action not involving the examination of a long account. I have examined all the old works on Practice, and all the earlier Reports, and have found no trace or hint of a practice that would authorize a reference in such a case as this; and since the adoption of the revised statutes, and the introduction of the code practice, I am confident there is no reported decision of any court of this state which sanctions the reference of an action merely because the answer involves a long account, when, upon the cause of action alleged in the complaint, standing by itself, either party could demand a jury trial, except the decision in the court below in this case, and in the cases where, upon appeals to this court, the decisions of the lower courts were reversed. If it should be asserted that the right of trial by jury had, by the practice and usage of the courts, become curtailed, prior to any of the modern revisions of the constitution, so as to give the meaning of the guaranty as to jury trial a more limited scope than it had in the Constitution of 1777, I answer that the assertion is unfounded.

I will now call attention to some decisions in this court. In *Townsend v. Hendricks*, 40 How. Pr. 148, the action was to recover back certain bonds and money obtained from the plaintiff by the fraudulent representations of the defendant; and to that action the defendant interposed a counterclaim requiring the examination of a long account. That case was literally within the law as to references, as it did involve the examination of a long account upon one side; and yet, after a careful consideration of the case, in the first opinion written by the late Judge Rapallo in this court, it was held that the action was not referable. In that opinion it

was said: "It is further contended that the defendants have, by interposing a counterclaim consisting of a long account, rendered the examination of such account necessary. It does not follow that the action can be referred for that reason. If the action is, from its nature, not referable, the answer cannot make it so. Should the counterclaim ever require examination, a reference can be ordered, as to it, after trial of the issues." There the cause of action alleged in the complaint was such that prior to 1777 a long account could not have appeared in the answer; and hence the action could not have been referred, and both parties would have had the right to a jury trial, and hence no subsequent legislation could take away that right. In *Welsh v. Darragh*, 53 N. Y. 590, the action was upon contract for the sale and delivery of various articles of merchandise, and the cause of action alleged in the complaint would require the examination of a long account. The answer set up fraud in the transaction, and claimed damages by way of recoupment or counterclaim; and there *Chief Judge Church*, writing the opinion, again announced the doctrine that the character of the action is determined by the complaint, and if that allege a cause of action upon contract, involving a long account, the action is referable, and that although the answer sets up fraud in the transaction, and claims damages by way of recoupment or counterclaim, that does not change the character of the action, or render it nonreferable; and there the order of reference was affirmed, as the complaint made the action referable under the Act of 1768. The question again came before this court in *Untermeyer v. Beinbauer*, 105 N. Y. 521. There the cause of action alleged in the complaint was for the recovery of unliquidated damages for breach of contract, and in no sense involved an account. The answer contained a counterclaim which required the examination of a long account; and the court again held (*Judge Rapallo* writing the opinion) that as the cause of action alleged in the complaint was not referable, it could not be made so by the counterclaim. In the opinion he referred to the language above quoted, which he used in the case of *Townsend v. Hendricks*. Why was not that action referable? It involved the examination of a long account, on one side, and thus the case was literally within the language of the Act of 1768. The answer is very plain. It was not an action upon a long account; the cause of action alleged in the complaint was not referable; it was put in issue; and therefore, although the defendant set up a counterclaim containing a long account, as he had the right to do, the action was not thereby made referable, and the defendant did not lose his right to demand a jury trial. When he put in issue the plaintiff's cause of action, if for no other reason, a case was made which could not have been referred under the Act of 1768. In *Casidy v. McFarland*, 189 N. Y. 201, 205, *Maynard, J.*, said: "It is sufficient if the fact clearly appears from the verified pleadings that the examination of a long account will be involved in the trial of the issues. The referable

quality of the action must alone be determined from the complaint." In *New Jersey* the law authorizes the reference of "all actions in which matters of account are in controversy;" and in *Gopell v. Hervey*, 34 N. J. L. 435, it is said "that it is the character of the plaintiff's claim which determines whether the case is referable." In *Hall v. United States Reflector Co.* 14 N. Y. Week. Dig. 48, 95 N. Y. 648, and 96 N. Y. 629, the plaintiff's cause of action was expressly admitted, and the litigation was over matters alleged in the defendant's answer, and which, in any view of the case, involved long accounts.

The construction I give to the Acts of 1714 and 1768 is neither narrow nor technical. It is dictated by the spirit of the times in which those acts were in force, when there was greater reverence for trial by jury than exists now; is required by their letter and spirit, leads to no absurd or inconvenient results, and is, as I believe, in harmony with the established practice of the courts for more than 125 years. I would speak with less confidence if one authority entitled to any weight in this court, holding otherwise, could be found. The meaning of the words, "require the examination of a long account, either on the one side or the other," and of their analogues in the more recent statutes, has been frequently under consideration in the courts, and the words have not always been literally construed. They have required construction, and their literal meaning has frequently been limited, as is shown by decisions of this court above cited, and by many other decisions. To say that a cause of action is referable in its nature when it has not, of itself, a single referable quality, and which cannot, on account of anything pertaining to it, be referred, is a most inaccurate use of language; and it is, to me, inconceivable that *Judges Rapallo, Church, and Maynard*, in the opinions above cited, used the expression as meaning a cause of action which could only be made referable by something appearing in the answer.

This discussion, therefore, comes to this: If the plaintiff brings his action upon a long account then it is such as was referable prior to 1777; and, as the examination of a long account is required on his side, the defendant cannot defeat a reference by anything he may set up in his answer, by virtue of the statutes allowing set-offs and counterclaims. If the plaintiff's cause of action be upon contract, for a definite sum of money, or for damages *ex contractu*, and this cause of action be not gainsaid by the defendant, and the defendant sets up a counterclaim which requires the examination of a long account, then the case is such as would have been referable under the Act of 1768. But if, in such actions, the plaintiff's cause of action be disputed, then a case is presented which, prior to 1777, gave the parties the absolute right to jury trial; and that right cannot be taken away or destroyed by anything which the defendant may set up in his answer. These views furnish a plain rule for the guidance of courts, resting upon a solid basis, and I think it would be most unwise to countenance any other

practice. According to the contention now made on behalf of the plaintiff, for the purpose of distinguishing this case from that of *Untermyer v. Beinhauer*, if the plaintiff brings an action to recover \$1,000, payable to him by virtue of a contract, the defendant may dispute his claim, and set up a counterclaim which requires the examination of a long account, and then the action becomes referable. But if he sues upon a contract,—possibly, the same contract,—seeking to recover \$1,000, unliquidated damages for a breach thereof, and his claim is disputed by the defendant, who also sets up a counterclaim requiring the examination of a long account, the action is not referable. Such a distinction is not founded in reason, and no rule of convenience or of public policy requires that it should be adopted. The following authorities may also be referred to as sustaining the conclusion I have reached: 2 *Am. & Eng. Encyclop. Law*, 670; *Williams v. Allen*, 2 Hun, 377; *Wood v. Hope*, 2 Abb. N. C. 186; *Verplanck v. Kendall*, 18 Jones & S. 525; *Gregory v. Seaman*, 19 Jones & S. 517. This conclusion preserves to the parties the constitutional right to trial by jury of the issues upon a nonreferable cause of action alleged in the complaint, and a right to the reference of the long accounts set up in the answer; and thus all the statutes have full force and effect, and the decisions of the courts are harmonized, and rendered consistent.

*The orders of the general and special terms should, therefore, be reversed, and motion for reference denied, with costs in all the courts.*

**Andrews, Ch. J., dissenting:**

This appeal involves the question of the power of the court, under the state constitution and laws, to order a compulsory reference of the action. The action is on contract, and is referable in its nature. But, having regard alone to the cause of action set forth in the complaint, it was not the subject of a compulsory reference, for the reason that no long account was involved. The action was to recover four months' salary alleged to be due and unpaid to the plaintiff under a contract of employment at an annual salary of \$8,000. The defendant answered, denying the complaint, and in, addition, pleaded several defenses, by way of counterclaim, arising on matters of account; and the answer concluded by prayer for judgment that the plaintiff account for the moneys mentioned in the second and third counterclaims, and that the defendant recover the sum which might be found due from the plaintiff to the defendant on such accounting. The plaintiff replied, denying the counterclaims, and then, upon the pleadings and proceedings, and upon affidavit, moved for an order of reference, on the ground, in substance, that upon the facts disclosed it appeared that the trial of the issue on the third counterclaim in the answer would involve the examination of a long account. The motion was opposed by the defendant, but was granted; and an order of reference was made, from which the defendant appealed to the general term of the

first department, which affirmed the order, and from the order of affirmance this appeal is taken. It was competent for the judge who granted the order to find, upon the facts presented, that the trial of the issue on the third counterclaim would involve the examination of a long account, and that on the trial none of the issues would require the decision of any difficult questions of law; and this finding, having been affirmed by the general term, is not reviewable here. The appeal, therefore, presents the question whether a compulsory reference may be directed, in an action on contract to recover stipulated payments, upon it being made to appear that, although no long account will be involved in maintaining the plaintiff's cause of action, nevertheless such account will be involved, and will be litigated, on the issue raised by the counterclaim in the answer. The question presented, in another form, is whether a cause of action referable in its nature, but which cannot be referred of itself, alone, because not involving the examination of a long account, may be referred, against the protest of either party, if a counterclaim, also arising upon contract, is interposed, which will involve the examination of a long account.

If the power to order a compulsory reference in this case depends alone on section 1018 of the Code of Civil Procedure, there can be no doubt that the court had jurisdiction to make the order. The language of the section is explicit and unambiguous. It authorizes a compulsory reference where the trial of an action will involve an examination of a long account "on either side" and there are no difficult questions of law. It needs no gloss or argument to show that the case in hand is within the express language of the section. There is a long account on the side of the defendant, arising on its counterclaim, and the legal questions involved are of the simplest character. The words "on either side," in section 1018, are not new, as applied to compulsory references. Compulsory references were first authorized by the Colonial Statute of 1768. 2 *Van Schalck's Laws*, p. 517. The act is entitled "An act for the better determination of personal actions depending on accounts." The first section authorizes a compulsory reference whenever it shall appear probable "in any case depending in the supreme court of judicature of this colony (other than such as shall be brought by or against executors or administrators) that the trial of the same will require the examination of a long account either on the one side or the other." The law authorizing compulsory references has been re-enacted in the successive revisions of the laws since the organization of the state government, and in all of them the language of the Colonial Statute of 1768, that a reference may be ordered when it shall appear that the trial of an action will involve the examination of a long account "either on the one side or the other," has been, in substance, retained and continued; so that at no time since 1768 have these words not been incorporated in the law relating to compulsory references. *Laws 1788, chap. 46; Laws 1801, chap. 90; Laws*

1808, chap. 1; 1 Rev. Laws 1818, chap. 56; 2 Rev. Stat. p. 884, § 89.

But the claim is made that, notwithstanding the broad and unqualified language of the statute, the constitutional right of trial by jury stands in the way of a compulsory reference of actions on contract, where the plaintiff's debt or demand is put in issue by the answer, and the necessity for the examination of a long account only arises upon a set-off or counterclaim interposed by the defendant. It is insisted that the words "on either side," in the statutes regulating compulsory reference, are, by the operation of the constitution, to be construed with this implied limitation. The Constitution of 1777 ordained that "trial by jury in all cases in which it hath heretofore been used in the colony of New York shall be established and remain inviolate forever;" and the same provision, in substance, is to be found in each of the subsequent state constitutions. Under the Dutch rule, all actions were triable by the court, and trial by jury was unknown. The question whether actions were referable never arose. There was no need of references, except for the information of the court. The argument is that the right of a defendant, during the colonial period, to interpose a set-off, depended upon, and was limited by, the statute of set-off enacted by the colony of New York in 1714 (Van Schaick's Laws, p. 95), and which continued in force until the Revolution, and that that statute confined the right of set-off to cases where the defendant admitted on the record the plaintiff's claim, and did not authorize a defendant to put the plaintiff's claim in issue, and at the same time to interpose a set-off. It is insisted, therefore, that the words, "either on the one side or on the other," in the Act of 1768, authorizing compulsory references, must be construed as referring only to cases where a long account was connected with the plaintiff's claim, or arose on the defendant's set-off interposed in connection with an admission of the demand of the plaintiff. The conclusion is therefore deduced that the power of compulsory reference, at the time of the adoption of the Constitution of 1777, not having been extended to cases of set-off connected with a denial of the plaintiff's claim, the right of trial by jury, in such a case, then existed, and was forever preserved by the constitution. This argument and conclusion, even if founded upon correct premises, is very technical, and unsatisfactory in its results; but it also proceeds, as I think, upon a misapprehension of the true meaning of the constitutional provision. But the argument puts upon the Statute of 1714 a construction contrary to the practical construction uniformly applied by the courts to statutes of like character. The clause in the Statute of 1714 (Van Schaick's Laws, p. 93) authorizing set-offs—that "if the defendant cannot gainsay the deed, bargain, or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or any part of the debt or sum demanded, giving notice in writing with the said plea upon what he will insist at the trial for his discharge, and give any bond, bill, receipt, account or

bargain so given notice of in evidence"—is claimed to limit the right of set-off under the statute to cases where the defendant admits, and does not put in issue, the plaintiff's demand. But the words "cannot gainsay the deed, bargain, or assumption upon which he is sued," and the subsequent words, were inserted simply to declare a rule of pleading, and to enable a defendant who had no defense to the plaintiff's claim to prove, under a plea of payment, a set-off, of which notice had been given; and these words were not intended to confine the right of set-off to cases where the defendant affirmatively admits the plaintiff's demand. There are no negative words. Proof of disconnected demands would not support the plea of payment, except by statute. If there might originally have been a question as to the construction of the statute in this respect, the construction put by the courts upon similar words has removed any doubt. The Statute of Set-off of 1714 and the Act of 1768, authorizing compulsory references, were, in substance, re-enacted and incorporated into the "Act for the amendment of the law and the better advancement of justice," of February 27, 1788, chap. 46 (3 Greenl. Laws, 102); also, in the act of the same title, chapter 90 of the Laws of 1801 (1 Webster, Laws, p. 347); also, in the Laws of 1818, 1 Rev. Laws, chap. 56, p. 515. In each of these statutes the section relating to set-offs contains the same words found in the Statute of 1714, "if the defendant or defendants cannot gainsay the deed, bargain, or assumption upon which he, she or they is or are sued, it shall be lawful," etc. Numerous cases are found in the Reports of this state, commencing from an early period after the formation of the state government, arising under these statutes, where, in connection with the general issue, the defendant gave notice of set-off. The set-off was in some cases allowed, and in some cases disallowed; but in none of them was it suggested by court or counsel that the defendant, in order to avail himself of the right of set-off, must admit the plaintiff's demand. On the contrary, not only was the plaintiff's claim put in issue in all these cases, but in some of them it was litigated on the trial. *Gordon v. Boune*, 2 Johns. 150; *Burgess v. Tucker*, 5 Johns. 105; *O'Callahan v. Sawyer*, Id. 118; *Tuttle v. Bebes*, 8 Johns. 152; *Root v. Taylor*, 20 Johns. 137; *Bridge v. Johnson*, 5 Wend. 342. These cases refute the claim that prior to the revised statutes a defendant could not contest by his pleading, and upon the trial, the plaintiff's claim, and at the same time insist upon a set-off in case he failed to establish his defense to the plaintiff's cause of action. It cannot be supposed that the judges and lawyers of that time were unacquainted with the practice of the colonial courts, or that they overlooked so easy an answer to the defense of set-off as that furnished by the words, "if the defendant cannot gainsay the deed, bargain, or assumption upon which he is sued," if they have the construction now claimed for them. It is noticeable that, in the case of *Root v. Taylor*, Spencer, Ch. J., quotes the Statute of 1818, and included in the quotation are the words, "if the defend-



ant cannot gainsay," etc.; and in that case, which was assumpsit for goods sold and delivered, the defendant had pleaded the general issue, with notice of set-off.

The rule that a defendant may at the same time deny the plaintiff's claim, and give notice of set-off, and thereby put the defendant to proof of his demand, prevailed in England under the English statutes of set-off, 2 Geo. II., chap. 22, § 18, and 8 Geo. II., chap. 24, § 4. *Harington v. Macmorris*, 5 Taunt. 228, was an action for money had and received, money lent, etc. The defendant pleaded the general issue, with notice of set-off, the particulars of which were furnished. The jury found against the set-off. The plaintiff relied for the proof of his claim on the admission of the notice of set-off, and had a verdict. The verdict was set aside on the ground that the admission in the notice of set-off was not available to the plaintiff to establish his demand. Lord Mansfield said: "It is every day's practice that the defendant's language in one plea cannot be used to disprove another plea, as in the familiar instance I have given of trespass, and justification pleaded, when the justification would certainly, if admissible, prove the act in case the reason of justification fails. Therefore, the particulars of the set-off must be incorporated with the notice of set-off, and cannot be given in evidence to prove the plaintiff's demand on the issue of nonassumpsit." The quotation from Blackstone (3 Com. p. 304) is quite consistent with the opinion of Lord Mansfield. The commentator is there speaking of the rule relating to tender, and the payment of money into court to mitigate damages and costs; and he says, in substance, that under a plea of set-off (which, standing alone, necessarily admits the plaintiff's claim) it is necessary, if the set-off does not equal the plaintiff's debt, that the defendant should pay the balance into court, to have the benefit of tender in mitigation of further costs, etc. The rule that the general issue, with notice of special matter, puts in issue the plaintiff's cause of action, is elementary. 1 Chitty, Pl. 478; *Vaughan v. Havens*, 8 Johns. 109. It has been frequently applied by other courts in this country in case of set-off. *Price v. Combs*, 12 N. J. L. 216; *Morgan v. Boone*, 1 J. J. Marsh. 585. There are no records showing the practical construction placed by the colonial courts upon the Statute of 1714 upon the point now in question; but the English statutes of set-off were enacted nearly fifty years before the organization of our state government, under which the practice prevailed of permitting a defendant to deny the plaintiff's claim in connection with notice or plea of set-off. It is presumable that the same practice was followed in the colony, and the practice of the state courts, following the English practice under statutes similar to that of 1714, makes this presumption almost a certainty. The English decisions, says Chief Justice Kent in *Gordon v. Bowne*, on the construction of the English statute of set-off, "are perfectly in point as to the construction of our act," and statutes of set-off from the time of their enactment, have been

"liberally expounded to advance justice, and prevent circuitry of action." Thompson, J., in *Tuttle v. Bebee*, 8 Johns. 152. The argument against the power to order a compulsory reference in this case, based upon the assumption that when the Constitution of 1777 was adopted no long account could be litigated, arising on a set-off, except where the defendant admitted the plaintiff's claim, and that the Act of 1768, authorizing compulsory references, did not apply in a case like the present one, where the plaintiff's claim is denied, proceeds upon false premises, and cannot be maintained.

But there is, I think, another conclusive answer to the objection based on the constitution. The words in the Constitution of 1777, "trial by jury in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolable forever," were intended to preserve the right of jury trial in the classes of cases where trial by jury before, as of right, existed. In expounding this provision, the principle which governed the colonial practice permitting compulsory references is to be applied. Cases of the same class, and governed by the same principle of public policy, as those within the Act of 1768, may be referred, consistently with the constitutional provision, although the exact case in hand was not within the terms of that statute. The policy upon which the Statute of 1768 was enacted is recited in the preamble, which, after referring to the disuse of the action of account, and to the Law of 1714 permitting discounts in support of the plea of payment, proceeds to declare: "So that by the change in the law and practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions and jurors perplexed and rendered more liable to attainments, and by the vast time necessarily consumed on such trials, other causes are delayed and the general course of justice greatly obstructed; it is enacted, therefore," etc. It cannot be supposed that the Constitution of 1777 intended to prevent a reference of cases of the same general class as those specified in the Act of 1768, and as to which the same considerations of public policy applied, even although, by reason of the rules of pleading and procedure prevailing in the colony, a set-off in a particular case involving the examination of a long account was not permitted. The principle established by the colonial legislation was that actions on contract involving litigations of long accounts "on either side" should be referred for trial to referees, to relieve jurors from perplexity, and to prevent the obstruction of justice. This legislative power was not abrogated by the constitution. It would be a narrow and injurious construction of the constitutional provision that, unless you are able to point out the precise case under colonial laws, a compulsory reference cannot be had. The Act of 1768 excepted from its operation suits "brought by or against executors or administrators." This exception was expressly abrogated in the Act of 1788 and the subsequent statutes of the state. But this abrogation of the exception was inoper-

ative, and in violation of the constitution, if you say that no compulsory reference can be authorized in any case not referable under the colonial laws, although the case is within the principle and policy upon which these laws were based. If the constitution restricts, as is claimed, the power of compulsory reference to the exact cases specified in the colonial Act of 1768, then I perceive no escape from the conclusion that whenever, now, an executor or administrator is a party to an action, it cannot be compulsorily referred, although the action may be on contract, and involves a long account on either or both sides. The present case is an action on contract, for debt. The set-off was also a matter of account. It was properly pleaded. The statute of set-off permits the defendant to contest the plaintiff's claim, and at the same time to insist upon a set-off. The trial of the set-off involves the examination of a long account. The statute permits a compulsory reference, in such case; and no constitutional right, I am persuaded, stands in the way of its enforcement.

But it is said that the question involved in this case has been decided adversely to the power exercised in three cases in this court, viz.: *Townsend v. Hendricks*, 40 How. Pr. 143; *Welsh v. Darragh*, 53 N. Y. 590; and *Untermeyer v. Beinhauer*, 105 N. Y. 521. This is a plain misapprehension. It is said in those cases that the referable character of an action is to be determined by the complaint. This was an accurate expression, having reference to the cases in which it was used, and the sense intended. Bearing in mind two well-settled principles established by the decisions—First, that actions *ex delicto* were not the subject of compulsory reference, either in the colony of New York or afterwards, *Johnson v. Parmely*, 17 Johns. 129; *Green v. Patchen*, 18 Wend. 293; *Dederick v. Richley*, 19 Wend. 108; second, that set-offs are not allowed in actions for unliquidated damages, although arising on contract, "as for not delivering goods according to contract," 1 Chitty, Pl. 572; *Duncan v. Lyon*, 8 Johns. Ch. 351, 1 L. ed. 644, 8 Am. Dec. 513; *Hepburn v. Hoag*, 6 Cow. 614,—the principle upon which the decisions in this court proceeded in the cases referred to is readily ascertained. *Townsend v. Hendricks* was an action for damages for false representations. The court, after referring to the pleadings, said: "The action must therefore be held to be one founded in tort, and not referable, against the will of either party." *Welsh v. Darragh* was an action on a contract for the sale and delivery of merchandise sold by the plaintiff to the defendant. The defendant, among other things, set up in his answer fraud and deceit in the sale of certain other merchandise, not included in the complaint. A reference having been ordered on the application of the plaintiff, the defendant appealed from the order. He resisted the reference on the ground that the issue of fraud raised by the answer was not referable, seeking to apply to the case the rule that actions of tort are not the subject of compulsory reference. This court affirmed the order of ref-

erence, and, in its opinion, first stated that, the action being on contract, the case was referable in its nature. The court then considered the claim of the defendant that the issue of fraud raised by the answer prevented the order of reference, and, deciding against this construction, said: "If the action is a referable one, the answer cannot make it non-referable." Having disposed of these questions, it proceeded to consider whether, upon the facts, a long account was involved in the plaintiff's cause of action, and, reaching a conclusion that there was, affirmed the order. There is no hint in the opinion of the doctrine now contended for,—that in an action upon contract a compulsory reference may not be ordered, where the examination of a long account will become necessary on the trial of a counterclaim arising on contract, unless the plaintiff's cause of action involves the examination of a long account, or the plaintiff's claim is admitted. *Untermeyer v. Beinhauer*, was an action to recover unliquidated damages for the breach by a builder of a building contract; and the court held that such an action was never referable, against the will of either party, saying: "It was simply an action for unliquidated damages for the breach of a contract, and in no sense involved any account." Neither of these cases sustain, or tend to sustain, the contention here. The case of *Kain v. Delano*, decided by this court, and reported in 11 Abb. Pr. N. S. 29, was an appeal from an order of reference made on the ground that the trial of an issue raised by a counterclaim would require the examination of a long account. The plaintiff's claim consisted of but a single item, and was denied by the answer, which also set up a counterclaim. This court reversed the order of reference on the ground that the fact upon which the order proceeded did not appear. It assumed that the order would have been justified if it had appeared that the issue on the counterclaim would require the examination of a long account. The rule here contended for is plain, simple, and practical. It is consistent with the constitution. It is in harmony with the public policy upon which statutes for compulsory references are based. The opposite rule violates the language of all statutes on the subject framed since colonial times. It is based on views so close and critical that they can be comprehended only with difficulty. It puts it in the power of a plaintiff, by exaggerating his own claim, to prevent its admission by the defendant, and thereby defeat a reference of a long account arising on a counterclaim. If the order in this case is reversed, the court will, I think, reverse the practice which has prevailed in the courts of this state without question for more than a hundred years. It is the strongest confirmation of the view that the words "on either side" mean what they plainly import, that no suggestion can be found in any of the Reports, so far as I can discover, of the limitation now contended for. If a practice prevailed in opposition to the natural import of the words, a trace of it would have been found. There would have been some judge or lawyer who would have queried how this

could be. The distinction is between actions of a referable quality, and such as are not referable by their very nature. In the one class the court may compel a reference, if on "either side" there is a long account; in the other, no reference can be compelled,

however many items of damage there may be. I think the order should be affirmed.

All concur with **Earl, J.**, for reversal, except **Andrews, Ch. J.**, and **Finch and O'Brien, JJ.**, dissenting.

## NEBRASKA SUPREME COURT.

George W. WOOLSEY, Admr., etc., of Harry Y. Woolsey, Deceased, *Plff. in Err.*,

v.

CHICAGO, BURLINGTON & QUINOY R. CO.

(.....Neb.....)

**\*1. A person riding on the locomotive engine** of a freight train, by agreement with the fireman of such engine to shovel coal for the privilege of riding (such person being on such train without the knowledge or consent of the conductor in charge thereof), is not a passenger of the carrier operating such train.

**2. To constitute one a passenger of the carrier on whose train such a person is**, it is essential that such person should be rightfully on such train, or should be thereon with the knowledge or consent of the carrier, or its agent in charge of such train.

**3. In a suit by an administrator against a common carrier for damages** for negligently causing the death of his intestate, it appeared that the deceased was a man eighteen years of age; that he rode on a locomotive engine by permission of the fireman thereof, agreeing with him to handle coal in consideration of being permitted to ride; that the conductor in charge of the train did not know of the deceased's presence on the engine; that the fireman told the deceased to get off the engine before the train reached McCook, for, should he be found on the engine at that place, he would be arrested; that no one attempted or threatened to put deceased off the engine; that the fireman did not tell the deceased to get off at the time and place he did; that there was no impending danger from a wreck, collision, or otherwise, which caused deceased to jump from the engine. The administrator pleaded: "When said engine was running at a rate of speed which made it dangerous to life to attempt to alight therefrom," the deceased jumped from the engine and was killed, and was induced to make such jump by the fear of arrest, should he be found thereon when the engine stopped. *Held*: (1) That the deceased was not a passenger of the carrier on whose engine he was riding; (2) that reasonable men can draw but one conclusion as to the character of the act of the deceased in leaping from the engine at the time and under the circumstances that he did, and that conclusion is that the act of the deceased was criminal negligence, and the proximate cause of his death; (3) that there was no evidence of negligence on the part of the carrier, or its servants, which the trial

court would have been justified in submitting to the consideration of the jury; (4) that the trial court did not err in instructing the jury to return a verdict in favor of the carrier.

(March 21, 1894.)

**ERROR** to the District Court for Nuckolls County to review a judgment in favor of defendant in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate. *Affirmed*.

The facts sufficiently appear in the opinion. **Mr. D. F. Osgood** for plaintiff in error.

**Messrs. T. M. Marquett and J. W. De-weese**, for defendant in error:

*Virginia Midland R. Co. v. Roach*, 83 Va. 875, holds that where the engineer of a train invited another to ride on the engine, and even though he was there by the invitation of the engineer, and both the engineer and conductor, he was still a trespasser upon the train, the rules of the company prohibiting any person from riding on the engine excepting the engineer and fireman, and that such a person had no claim against the company for personal injuries sustained by him through the negligence of the company's servants.

*Robertson v. New York & E. R. Co.* 22 Barb. 91, holds that where the engineer gave his consent to the plaintiff to ride on the engine without paying fare, it conferred no legal right upon the plaintiff, and that not being lawfully on the engine, he was a wrongdoer and could not recover damages of the company for an injury sustained while riding in that place.

*Chicago & A. R. Co. v. Michie*, 83 Ill. 428, holds that an engine driver has no authority or right to say who shall ride upon the train, or give permission to any one to ride upon his engine against the rules of the company.

See also *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 418; *Flower v. Pennsylvania R. Co.* 69 Pa. 218, 8 Am. Dec. 251. See *Illinois Cent. R. Co. v. Meacham*, 91 Tenn. 428.

Where a verdict in favor of the plaintiff would be set aside by the court for the reason that the plaintiff under the pleadings and evidence is not entitled to recover, it is the duty of the court to direct a verdict and avoid the trouble and expense of another trial.

*Osborne v. Kline*, 18 Neb. 351; *Reynolds v. Burlington & M. River R. Co.* 11 Neb. 192; *Atchison & N. R. Co. v. Loree*, 4 Neb. 450; *Burlington & M. River R. Co. v. Wendt*, 12 Neb. 81.

\*Headnotes by RAGAN, C.

**NOTE.**—For a collection of authorities as to who may be considered passengers on railroad trains, see notes to *Burbank v. Illinois Cent. R. Co.* (La.) 11 L. R. A. 720, and *Dewire v. Boston & M. Railroad* (Mass.) 2 L. R. A. 166.

26 L. R. A.

As to liability for injuries received in getting off from a moving train, see note to *Carr v. El River & E. R. Co.* (Cal.) 21 L. R. A. 354.

**Ragan, C.**, filed the following opinion:

George W. Woolsey, administrator, sued the Chicago, Burlington & Quincy Railroad Company (hereinafter called the railroad company), in the district court of Nuckolls county, for damages for negligently causing the death of his intestate, Harry Y. Woolsey. At the close of the evidence the jury, in obedience to an instruction of the court to that effect, returned a verdict for the railroad company. The court refused to set this aside, and overruled a motion for a new trial, and the administrator brings the case here for review.

The evidence in the record shows, or tends to show, that the deceased, at the time of his death, was eighteen years of age, and, on the day that he was killed, he and a man named Guidici, his companion, by an agreement with the fireman of an engine pulling a freight train of the railroad company that they (the deceased and Guidici) would break and shovel coal, got upon the engine of said freight train to ride; that such persons' presence on the train was without the knowledge or consent of the conductor in charge of the train; that they paid no fare, nor agreed to pay any, further than to assist the fireman in handling coal; that they were not in the employ of the railroad company, nor in any manner whatever connected with it, or the train on which they rode; that as the train was approaching the city of McCook, and running at a high rate of speed, the fireman told the deceased to get off the train before it stopped at McCook, as, if he should be found on the train there, he would be arrested; no employé of the company put, attempted, or threatened to put the deceased off the train; there was no impending or threatening danger from a wreck or collision, or otherwise, at any time; that the deceased, while the train was moving at a high and dangerous rate of speed, said to his companion that he was about to jump off; that Guidici put his hands on his shoulder, and advised him not to jump, but the deceased voluntarily jumped from the train, and was killed. It is now said by counsel for the administrator that the deceased was a passenger on this train. We do not think he was a passenger, within the meaning of any statute, rule of law, or decision, with which we are acquainted. The deceased was fraudulently on this train. He did not go upon this train having a ticket or free pass, nor with the intention of paying his fare. His agreement with the fireman to shovel coal in consideration of a ride was a fraud on the company. It was the duty of the fireman to handle the coal himself. He could not put the corporation which he served under obligations to the deceased, as a passenger, by allowing him to ride upon the engine in consideration of his shoveling coal, nor for any other consideration, certainly without the presence of the deceased on the engine being known to the conductor in charge of the train. One may become a passenger of a common carrier without ever being actually on the train of the common carrier. It is not easy to lay down a rule defining what, in all cases, constitutes one a passenger of the carrier on whose train such person is; but it is essential, to constitute one a passenger riding on a train of the carrier operating such train, that such person should be rightfully on

such train, or should be thereon with the knowledge or consent of the carrier, or his agent in charge of said train. *Union Pac. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245; *Chicago & A. R. Co. v. Michie*, 83 Ill. 427.

If we should hold, as a matter of law, that the deceased, at the time he met his death, was a passenger on the train of the railroad company, the judgment here sought to be reversed would still have to be affirmed. By section 8, art. 1, chap. 72, Comp. Stat. 1893, railroad companies are made insurers of the safety of a passenger, except in cases where the injury of such passenger arises from his criminal negligence. The administrator pleaded in his petition, and the evidence supports the plea, that the decedent jumped from the train "when said engine and cars were running at a rate of speed which [made it] dangerous to life to attempt to alight there [from]." All reasonable men can draw but one conclusion as to the character of the act of the deceased in leaping from this train at the time and under the circumstances that he did, and that conclusion is that in so doing the deceased was guilty of criminal negligence. It has been many times said in this court, and so often ruled as to be no longer an open question, that "when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. But, where the facts are such that all reasonable men must draw the same conclusion from them, the question is one of law, for the court." *Omaha Street R. Co. v. Craig*, 88 Neb. —, and the cases there cited.

The only act of negligence charged against the railroad company is that the fireman told the deceased to get off the train before it reached McCook, as, if he should be found upon the train there he would be arrested. But it is neither pleaded nor proved that the fireman told the deceased to jump off the train at the time he did jump. He told him to get off the train before it reached McCook. The deceased was not an infant of tender years, insane, or idiotic; and, as before stated he did not leap from this train in pursuance of any threat made to push him off if he did not jump, nor under the stress of a fear implanted in his mind by reason of an impending danger, wreck, or collision. There is no evidence in the record which shows that any employé of the train knew that the deceased was about to jump from the train at the time that he did. His companion, Guidici, who was a witness for the administrator, remained upon the train, and advised the deceased that it was dangerous for him to leap therefrom, and advised him not to do so. There is in all this record not one word of evidence of any negligent act or omission of duty on the part of this railroad company that conduced to the death of the deceased. We must not be understood as deciding that because the deceased was not a passenger upon the train of the railroad company,—because he was wrongfully and fraudulently on its train, and a trespasser thereon,—therefore the railroad company would not be liable for negligence in injuring or killing him. What we do decide is that the deceased, at the time he was killed,

was not a passenger upon the train of the railroad company, and that the district court properly held that the uncontradicted evidence shows that he met his death, not from any negligence of the railroad company, or any of its agents or servants, but from his own criminal negligence. The law does not require of district courts to do useless things, and in this case, had the jury returned a verdict in favor

of the administrator, it would have been the duty of the district court to have set such verdict aside; and in such a case the court was entirely right in directing the jury to find a verdict for the railroad company.

*The judgment of the District Court is affirmed.*

**Post, J.**, did not sit.

### SOUTH DAKOTA SUPREME COURT.

Anton MEUER, *Respt.*,

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO., *Appt.*

(.....S. Dak. ....)

- \*1. A special contract made in the state of Wisconsin, between a railroad company and a shipper, for transporting a car load of livestock and emigrant movables from a point in that state to a point in this state, is to be interpreted according to the law of the former state.
2. In an action tried in this state, where the interpretation of such contract is involved, the courts of this state will not take judicial notice of the law of Wisconsin, but such law must be alleged and proven like any other fact in the case.
3. In the absence of such proof, the law of that state will be presumed to be the same as the law of this state, and such contract will be interpreted in accordance with the law of this state.
4. By the law of this state, a common carrier of property or passengers may limit his liability by an express contract signed by the parties, except as to gross negligence, fraud, or willful wrong of such carrier or its servants.
5. A special contract for transporting a car load of livestock and emigrant movables, made between a railroad company and a shipper, in which it is stipulated that the shipper shall be entitled to pass upon the same train to care for, feed, and water his stock, and load and unload the same, at his "own risk of personal injury, from whatever cause," is a valid contract, and exonerates the railroad company from all liability for any injury to the shipper while a passenger upon such train, not caused by the gross negligence, fraud, or willful wrong of the company or its servants.
6. If when acting under such contract, the shipper is injured while unloading his stock at the place of destination, by reason of the negligence of the railroad company or of its servants, not amounting to gross negligence, such railroad company is exonerated from liability for such injury.
7. The shipper, while unloading his stock under such contract, is within the exemption clause of the contract,

\*Headnotes by CORSON, P. J.

NOTE.—Upon the question of presumption as to law of other states, see note to *Brown v. Wright* (Ark.) 21 L. R. A. 487.

As to rights of a person riding on a pass, see note to *Muldoon v. Seattle City R. Co.* (Wash.) 23 L. R. A. 74.

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though the car has arrived at its destination, and the shipper has left the car for a short time, prior to the injury, and proceeded to an hotel, to get lanterns and assistants to aid him in unloading the car.

(July 27, 1894.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Day County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

**Mr. H. H. Field**, with **Mr. John H. Perry**, for appellant:

Sections 3886, 3897, and 3898 provide, in substance, that the obligations of a common carrier may be limited by a special contract, except as against liability for the gross negligence, fraud, or willful wrong, of itself or its servants, by a special contract, signed by the passenger or consignor. These provisions taken together, constitute the law of this state and abrogate the rule of the common law forbidding a common carrier from limiting its liability for negligence.

*Hartwell v. Northern Pacific Exp. Co.* 8 L. R. A. 342, 5 Dak. 463.

The contract was made in Wisconsin. There was no evidence offered upon the trial as to the law of that state in regard to such contracts, and the presumption therefore is that the law of Wisconsin is the same as that in force in this state.

19 Am. & Eng. Encyclop. Law, p. 47; *Walsh v. Dart*, 12 Wis. 686; *Flato v. Mulhall*, 72 Mo. 522; *Neese v. Farmers Ins. Co.* 55 Iowa, 604; *Shumway v. Leakey*, 67 Cal. 458.

The general rule is that the validity of a contract for the carriage of persons or property from one state into another is to be determined by the law of the place where the contract is made.

*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 897, 32 L. ed. 788; *Hazel v. Chicago, M. & St. P. R. Co.* 82 Iowa, 477; *Hutchinson*, Carr. 2d ed. §§ 140-144; *Lawson*, Contracts of Carriers, § 211; *Wheeler*, Modern Law of Carriers, pp. 183 *et seq.*

There are many decisions, however, which hold that where a contract is made in one state for the carriage of persons or property into another, the law of the state where the contract is to be finally performed will govern.

*Pomeroy v. Ainsworth*, 22 Barb. 118; *Curtis v. Delaware, L. & W. R. Co.* 74 N. Y. 116, 80 Am. Rep. 271; *Gray v. Jackson*, 51 N. H. 9, 13 Am. Rep. 1; *Wheeler*, Modern Law of Carriers, pp. 192, 196, notes.

The sections of the code relied upon are similar to the provisions of section 7 of the English Railway and Canal Traffic Act of 1854, 17 & 18 Vict. chap. 81.

Macnamara, Carriers, pp. 145 *et seq.*; Hutchinson, Carr. §§ 283 *et seq.*

Under that section it has been held that the contract covers not only the risks of carriage and conveyance, but also those which attend the receiving and delivery.

*Hodgman v. West Midland R. Co.* 88 L. J. Q. B. 283.

The giving of a reduced rate, upon condition of which the owner relieves the carrier of all liability for loss or damage except from such as arise from willful misconduct on the part of the company's servants, is a just and reasonable condition within the meaning of the act.

*Lewis v. Great Western R. Co.* L. R. 8 Q. B. Div. 195, 47 L. J. Q. B. 181; *Robinson v. Great Western R. Co.* 85 L. J. C. P. 123; *Manchester, S. & L. Co. v. Brown*, 8 App. Cas. 708, 53 L. J. Q. B. 124.

The agreement that plaintiff should be carried at his own risk must be taken to exclude all liability on the part of the company.

*McCawley v. Furness R. Co.* L. R. 8 Q. B. 57, 42 L. J. Q. B. 4, 4 Moak, Eng. Rep. 218; *Gallin v. London & N. W. R. Co.* L. R. 10 Q. B. 212, 44 L. J. Q. B. 89, 12 Moak, Eng. Rep. 268; *Johnson v. Great Southern & W. R. Co.* 9 Ir. C. L. Rep. 708; *Duff v. Great Northern R. Co.* 4 Ir. C. L. Rep. 178; *Poucher v. v. New York Cent. R. Co.* 49 N. Y. 263, 10 Am. Rep. 864; *Bissell v. New York Cent. R. Co.* 25 N. Y. 442, 82 Am. Dec. 869; *Wells v. New York Cent. R. Co.* 24 N. Y. 181.

In the absence of a statute, that a railway company may, as to a gratuitous passenger, relieve itself from liability for the negligence of itself or its servants, a condition to that effect in a free pass is valid and will be enforced.

*Quimby v. Boston & M. R. Co.* 5 L. R. A. 846, 150 Mass. 385; *Griswold v. New York & N. E. R. Co.* 58 Conn. 371, 55 Am. Rep. 115; *Annas v. Milwaukee & N. W. R. Co.* 87 Wis. 46, 57 Am. Rep. 88, 58 Am. Rep. 848; *Kinney v. Central R. Co. of New Jersey*, 32 N. J. L. 407, 90 Am. Dec. 675, 84 N. J. L. 513, 8 Am. Rep. 265; *Illinois Cent. R. Co. v. Read*, 87 Ill. 484, 87 Am. Dec. 260.

*Messrs. Winsor & Kittredge* also for appellant.

*Messrs. Julian Bennett and W. S. Glass*, for respondent:

The contract under consideration in this action, in so far as it attempts to shield the appellant corporation from liability from negligence upon its part resulting in injury to a human being, is absolutely void.

The law with respect to the subject of a statute will not be limited by the express statutory language, but will only be determined after harmonizing, if possible, the language of the code with the law upon the same subject announced by the decisions of the courts, and in ways other than the express mandate of the statute.

*Re Apple's Estate*, 66 Cal. 432; *Ashton v. Nolan*, 68 Cal. 269.

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the carriers of persons have never made any distinction between the degrees of care and prudence exacted of the defendants. There has never been an attempt to relax the rule requiring the utmost vigilance by the carrier of passengers in operating its modes of conveyance. The later decisions merely reiterate the doctrines of the adjudications of not so recent origin.

*Dodge v. Boston & B. S. S. Co.* 2 L. R. A. 83, and note, 148 Mass. 207; *Moore v. Des Moines & Ft. D. R. Co.* 69 Iowa, 491.

The requirement in this case being the most exact that the law imposes, no matter what the relation may be, any failure or omission of the person upon whom this duty rests is negligence, and this negligence is not subject to division into degrees. Hence, the courts hold that any negligence of a carrier of passengers is gross negligence.

*Hutchinson, Carr.* § 508; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502; *The "New World" v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *Dodge v. Boston & B. S. S. Co.* *supra*.

Where the injured person secures transportation upon a drover's pass, being in one sense the exact position of the respondent in the case at bar, the courts hold that the whole contract relating to freight or stock and passenger will be construed as one obligation, and that although the contract contains a fiction to the effect that the passenger or person in charge of the stock shipped is a gratuitous traveler and rides free, still, the court will look further and find that inasmuch as a sum of money is paid for the transportation of the stock and the person in charge, it will be held that the person in charge of the stock is in fact a passenger for hire.

*Missouri Pac. R. Co. v. Ivey*, 1 L. R. A. 500, 71 Tex. 409; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 857, 21 L. ed. 627; Ray, Negligence of Imposed Duties, § 53.

To every contract between carrier and passenger the public is a party. The people have an interest in it which a private individual cannot waive.

*Mann v. Birchard*, 40 Vt. 326, 94 Am. Dec. 398; *Willis v. Grand Trunk R. Co.* 62 Me. 488; *Squire v. New York Cent. R. Co.* 98 Mass. 289, 98 Am. Dec. 162; *Stinson v. New York Cent. R. Co.* 32 N. Y. 333, 88 Am. Dec. 333.

No implication will be made in the construction of a contract limiting the liability of a carrier in order to sustain an agreement to this effect made by a carrier in the operation of its business.

*Cream City R. Co. v. Chicago, M. & St. P. R. Co.* 68 Wis. 98, 58 Am. Rep. 267.

The relation of passenger exists until the person carried has reached his destination and has left the depot of the carrier or has had a reasonable time so to do.

2 Am. & Eng. Encyclop. Law, p. 745; *Pittsburg, O. & St. L. R. Co. v. Krouse*, 30 Ohio St. 232; *Imhoff v. Chicago & M. R. Co.* 20 Wis. 344; *Stinson v. New York Cent. R. Co.* *supra*.

More general terms of exemption are not sufficient. Language practically the same if not in fact identical with that used in appellant's livestock contract has been repeatedly

held to be insufficient to release a carrier from liability for negligence.

*Magnin v. Dinsmore*, 56 N. Y. 168; *Mynard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180, 27 Am. Rep. 28; *Nicholas v. New York Cent. & H. R. R. Co.* 89 N. Y. 870; *Tanner v. New York Cent. & H. R. R. Co.* 108 N. Y. 623; *Westcott v. Fargo*, 61 N. Y. 543, 19 Am. Rep. 800; *Alexander v. Greene*, 7 HILL, 538; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 844, 12 L. ed. 465; *Black v. Goodrich Transp. Co.* 55 Wis. 819, 42 Am. Rep. 718; *Hutchinson, Carr.* § 261.

Before a carrier can successfully maintain an exemption under a special contract for damage caused by negligence, the agreement must expressly and distinctly indicate an intention to relieve the carrier for his own negligence, and this in cases both relating to freight and passengers.

Ray, *Negligence of Imposed Duties (Carriers of Passengers)* § 80; *Kennedy v. New York Cent. & H. R. R. Co.* 125 N. Y. 422.

There being nothing in the contract under consideration that indicates that the parties to it executed it with a view to the law of any other place except the law of the place where the same was made, the contract under which the exemption from liability is claimed must be interpreted and construed by the laws of the state of Wisconsin, the place where the contract was made.

*Michigan Cent. R. Co. v. Boyd*, 91 Ill. 271; *Pennsylvania Co. v. Fairchild*, 69 Ill. 263; *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 580, 39 Am. Dec. 398.

The law of Wisconsin provides that a common carrier may by express contract limit its liability, and if this be done, the company can only be held liable for damage or injury resulting from the negligence of its agents or employes.

*Cream City R. Co. v. Chicago, M. & St. P. R. Co.* 68 Wis. 98, 53 Am. Rep. 267.

In awarding damages for personal injury the best criterion is the average amount awarded for injuries of a like nature. As compared with the injuries received by the respondent, the amount of the verdict in this case is by no means exceptional.

*Morison v. Broadway & S. A. R. Co.* 8 N. Y. Supp. 436; *International & G. N. Railroad v. Smith (Tex.)* Oct. 19, 1886; *Jordan v. New York Cent. & H. R. Co.* 30 N. Y. S. R. 670; *Griffiths v. Giff*, 4 Utah, 462; *Fitch v. Broadway & S. A. R. Co.* 82 N. Y. S. R. 376; *Howard Oil Co. v. Davis*, 76 Tex. 680; *Nadav v. White River Lumber Co.* 76 Wis. 120; *Sellek v. Langdon*, 87 N. Y. S. R. 511; *Furston v. Chicago, R. I. & P. R. Co.* 61 Iowa, 452.

*Corson, P. J.*, delivered the opinion of the court:

In March, 1887, the plaintiff shipped from Avoca, Wis., a carload of livestock and emigrant movables over defendant's road, consigned to himself at Bristol, D. T. The car containing the freight arrived at Bristol, and the plaintiff, while removing the livestock from the car, was injured, to recover for which this action is brought. The livestock and movables were shipped under a special contract, by the terms of which the plaintiff was

permitted to pass on the train to care for and look after his stock. The material parts of the contract, so far as they affect this case, are as follows:

"(Exhibit A.) Chicago, Milwaukee & St. Paul Railway. Livestock Contract. . . . Persons in charge of livestock will be passed on the train with, and to care of it, as follows: One man with two or three cars, two men with four to seven cars, three men with eight cars, which is the maximum number that will be passed for one owner. Passes will be furnished in manner provided on back of this contract, to persons, who, as above, may have been in charge of two or more cars of stock. No return passes given on west-bound shipments. No person will be passed with one car of livestock, except that one car of horses or mules or emigrant movables containing livestock will entitle the owner or man in charge to pass one way on the same train, to take care of it. . . . Such entry of persons in charge and certificate of billing agent to that effect will be the authority of conductors to pass them with the stock. All persons are thus passed only at their own risk of personal injury from whatever cause. A. C. Bird, Gen'l Freight Agent."

" . . . Received of Anton Meuer, one car livestock and emg. mov. as per margin, to be delivered at Bristol, Dakota, station, at special rates, being \$45.00 per car; which stock is to be loaded and unloaded, watered and fed by said Anton Meuer, or his agents. . . . The Chicago, Milwaukee & St. Paul Railway Co., by D. Bohan, Agent. Anton Meuer, Shipper." Indorsement on back: "Parties actually in charge of and accompanying the within stock must write their own name in ink here. [Signed] Anton Meuer."

The contract was introduced in evidence by the plaintiff. At the close of the plaintiff's evidence, and again at the close of all the evidence in the case, the defendant moved the court to instruct the jury to return a verdict for the defendant on the ground that, by the terms of the contract, the plaintiff assumed all risk "of injury from whatever cause," and could not, therefore, recover in this action. These motions were denied, and exceptions duly taken.

The learned counsel for the appellant contend that, under the terms of the contract signed by the plaintiff, he agreed to assume all the risk of personal injury from whatever cause; that such a contract was authorized by the laws of this state, and was a legal, valid, and binding contract, exonerating the defendant from all liability for personal injuries to the plaintiff, from whatever cause received. They further contend that the contract, though made in Wisconsin, would nevertheless be interpreted by the laws of this state, in the absence of evidence as to the laws of Wisconsin in relation to the contracts of common carriers, and that the law of Wisconsin will be presumed to be the same as the law of this state relating to such contracts. The contract in this case, having been made in Wisconsin, may be regarded as a contract of that state, and to be interpreted in accordance with the laws of that state. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed.

788; *Hazel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 477. This court, however, will not take judicial notice of the laws of another state. Such laws must be alleged and proven on the trial, the same as any other facts in the case. No such evidence appears, from the record in the case, to have been given. In the absence of such evidence, this court will presume that the law of Wisconsin as to the right of a common carrier to limit the liability of himself or servants is the same as the law of this state upon that subject. *Sandmeyer v. Dakota Fire & Marine Ins. Co.* (S. Dak.) 50 N. W. Rep. 358. There is some conflict in the decisions of the different courts upon the question as to whether or not the court will presume that the law of another state is the same as the statute law of the state where the action is tried, but the weight of authority seems to support this view. In the case of *Palmer v. Atchison, T. & S. F. R. Co.*, decided by the supreme court of California in the present year, and reported in 85 Pac. Rep. 680, the court says: "The cause, so far as can be determined from the record, was tried upon the theory that the law of California is applicable. There is no suggestion that the law of Missouri, where the contract for transportation was made, was put in evidence. Under such circumstances, we are not at liberty to assume as a fact that the state of Missouri has a special statute on the subject, but must presume as a question of law that the law of that state is the same as our own. *Norris v. Harris*, 15 Cal. 226; *Hill v. Grigsby*, 32 Cal. 56; *Taylor v. Sheo*, 39 Cal. 540, 2 Am. Rep. 478; *Brown v. San Francisco Gaslight Co.* 65 Cal. 426; *Masters v. Lash*, 61 Cal. 622; *Shumway v. Leakey*, 67 Cal. 458. Judged by our own statute, and by the lawful limitation which defendant might and did embrace in its bill of lading, it was bound to transport to Albuquerque, and deliver to the Atlantic & Pacific, connecting road, within a reasonable time, plaintiff's goods." See also, 19 Am. & Eng. Encyclop. Law, 47; *Neese v. Farmer's Ins. Co.* 55 Iowa, 604; *Walsh v. Dart*, 12 Wis. 636; *Hadley v. Gregory*, 57 Iowa, 157.

The first question, then, to be determined is, What is the law of this state as to the right of a common carrier to limit his liability? for the contract in this case must be interpreted by our law upon this subject. There is a direct conflict in the decisions of the various courts upon the question of the right of common carriers to limit their common-law liability for the negligence of themselves and their servants by special contracts. In *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, the Supreme Court of the United States held that common carriers do not possess the power to limit their liability, even by express contract, for the negligence of themselves or their servants; and this view was affirmed in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788. On the other hand, the court of appeals of New York, in a number of cases, has held that common carriers possess such power. This doctrine is clearly laid down in *Bissell v. New York Cent. R. Co.* 25 N. Y. 442, 82 Am. Dec. 369, and affirmed by that court, after the decision in *New York Cent. R. Co. v. Lockwood*, *supra*, in *Mynard v. Syracuse, B. & N. Y. R. Co.* 71 N. 52 L. R. A.

Y. 180, 27 Am. Rep. 28. This court, however, is not called upon to decide between these conflicting opinions, as the Code of this state has settled the question within this jurisdiction. *Hartwell v. Northern Pacific Exp. Co.* 5 Dak. 463, 3 L. R. A. 342; *Hazel v. Chicago, M. & St. P. R. Co.* 82 Iowa, 477; *Kirby v. Western U. Teleg. Co.* (S. Dak.) 55 N. W. Rep. 759. The sections of the Code bearing upon this question constitute sections 3881-3888, Comp. Laws, and read as follows: "Every one who offers to the public to carry persons, property, or messages, is a common carrier of whatever he thus offers to carry." 3886: "The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract." 3887: "A common carrier cannot be exonerated by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants." 3888: "A passenger, consignor or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same." By section 3886 it will be noticed that common carriers may, in this state, limit their liability by special contract; and by section 3887 an exception is made in cases of "gross negligence, fraud, or willful wrong." It would seem, therefore, that, subject to the exceptions specified, a common carrier, by the laws of this state, may, by special contract, limit his common-law liability in all cases not included in the excepted cases. This case seems to have been tried, and the jury instructed, upon the theory that the defendant, notwithstanding the stipulations in the contract, was liable for the ordinary negligence of itself and servants, and the question of gross negligence is eliminated from the case. The record discloses the fact that the defendant's counsel requested the court to instruct the jury that there was no evidence of gross negligence, and it was refused, the court stating "that he did not submit the question of gross negligence to the jury, but simply the question of ordinary negligence." We shall assume, therefore, for the purposes of this decision, that there was no evidence of gross negligence, fraud, or willful wrong on the part of the defendant or its servants, and that the verdict of the jury was based entirely upon the theory that the injury to the plaintiff was caused by the ordinary negligence of the defendant or its servants. Taking this view of the case, was the defendant entitled to have his motion for an instruction to the jury to find for the defendant, granted at the close of the plaintiff's evidence? As before stated, the special contract was introduced in evidence by the plaintiff, and was therefore a part of the plaintiff's case. It appears from this contract between the parties that defendant, in consideration of the plaintiff's stipulations to load and unload the car, and feed and water the livestock on the trip, agreed to transport the car of stock and household movables at a reduced rate, and to pass the plaintiff on the same train, to care



for and look after the livestock, but at plaintiff's "own risk of personal injury from whatever cause."

Assuming that plaintiff's injuries occurred while such passenger upon the train, and that they occurred from the ordinary negligence of the defendant or its servants, the limitation in the contract would seem to be such a one as is permitted by the statute, and would exonerate the defendant from liability for the injuries plaintiff sustained, the contract being a special contract, and signed by the respective parties, as required by the statute. The terms of the contract are clearly stated. There is no ambiguity in its stipulations, and the intention of the parties is clearly ascertainable from the terms of the contract. The plaintiff was, by the terms of the contract, to be carried upon the same train with his livestock and movables, without extra charge, to care for and feed and water his stock; but at his own "risk of personal injury from whatever cause." This contract the law permitted the parties to make. Section 8881 defines who are common carriers, and section 8886, in the same chapter, provides "that the obligations of a common carrier . . . may be limited by special contract." And section 3887 uses the same general term, "a common carrier," etc. Interpreting the contract by the law, it is difficult to perceive any valid reason for holding the defendant liable for plaintiff's injury. The contract, as we have seen, is one which the law permits the common carrier to make, and by its terms it clearly exonerates the defendant from liability for injuries caused by the ordinary negligence of the defendant or its servants. The motion, therefore, should have been granted. The learned counsel for respondent contend that under the law of this state the contract is void. It is not claimed that the legislation of this state is not within the proper exercise of the legislative power, or is in violation of the organic act or the state constitution. But it is contended that under the common law a common carrier of passengers is required to exercise the utmost diligence and the highest degree of care and prudence in transferring passengers from one place to another by steam power, and that "there has never been any attempt to relax the rule requiring the utmost vigilance by the carriers of passengers in operating by this mode of conveyance." The requirement in this case being the most exact that the law imposes, no matter what the relation may be, any failure or omission of the person upon whom the duty rests is negligence, and this negligence is not subject to division into degrees; hence the courts hold that any negligence of a carrier of passengers is gross negligence. The counsel, after further argument, concludes as follows: "We therefore conclude, in view of the law as established by the judgments of the courts placing upon the carriers of persons the responsibility of exercising the greatest degree of care and vigilance in the conveyance of human beings, that section 3887 of the Compiled Laws does not relieve from responsibility the carriers of persons in cases where negligence is shown, even though the carrier has a pretended release from liability in the form of a special contract. That, while the section

apparently applies to common carriers in general, it must be limited in its operation to carriers other than those who engage in the transportation of persons. . . ." While it is true that the utmost care is required on the part of the carrier of passengers, and that such carrier is ordinarily liable for negligence, whether gross, ordinary, or slight, still there may be in fact degrees of negligence in the management of its business by itself or its servants; and it is upon this theory that the legislature has deemed it proper to permit such carriers to limit its liability for ordinary or slight negligence, when, under the law, it would ordinarily be held for injuries to persons caused thereby. The law-making power might properly permit special contracts exonerating such carriers from liability, when injury is caused to a person by ordinary or slight negligence, or even by gross negligence, if it deemed it proper. In New York, as we have seen, and other states, such contracts are permitted, and held valid, even without the aid of a statute. We are unable to discover any reason for holding that the law-making power may not make any provision governing the liability of common carriers, and authorizing them to limit their liability as it may deem proper.

It is further contended that the contract in this case is invalid, under the provisions of section 8578, Comp. Laws, which reads as follows: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." But the contract in this case is not a contract to violate any express law. It cannot be said that a contract permitted and sanctioned by express law is a contract to violate the law. If we are correct, the section of the statute relating to common carriers permits common carriers of passengers as well as common carriers of property to make the contract in question, subject, of course, to the exceptions contained in the law. The argument of counsel would have much more weight as applied to carriers of freight than as applied to the carriers of passengers, as carriers of freight at common law were absolute insurers of the safe delivery of the property intrusted to them, except where the loss occurred "by the act of God, or the public enemy, or by their own decay from inherent infirmity, or by the fault of the owner thereof." Further exceptions are made in the carrying of livestock, not material now to be stated. If, therefore, the contention of counsel is correct, the statute could have no effect, as there would be no class of carriers to which it would apply. We are of the opinion that the statute does apply to carriers of passengers as well as to carriers of freight, and we cannot assent to the contention of counsel for respondent that the contract in this case is void.

The counsel further contended that, as the stipulation in the contract is general, and does not specifically limit the liability of the defendant to the negligence of itself or servants, such negligence is not included; in other words, the language of the stipulation, "risk of personal injury from any cause," does not include in-

jury caused by the negligence of the defendant or its servants. There is force in the contention, and it has some support from the New York decisions. The doctrine is thus stated in *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28. "When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it." But this doctrine has generally been applied to contracts by carriers of freight. And even in this class of cases, when there is nothing in the contract upon which the general words can operate, unless the negligence of the defendant or his servants is included, such negligence is included in the general words, "for whatever cause." This doctrine is illustrated in *Cragin v. New York Cent. R. Co.* 51 N. Y. 61, 10 Am. Rep. 559, and *Holsapple v. Rome, W. & O. R. Co.* 86 N. Y. 275. In the former case the court says: "In this case the plaintiffs assumed and agreed to take the risk of injuries to the hogs in consequence of heat. Effect should be given to this stipulation. The parties must be held to have meant something by it. In consideration that the plaintiffs would assume and take certain risks, which would otherwise devolve upon the defendant, it agreed to carry at a reduced rate. If it be held that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault on his part, then it gets nothing; for in such case, without the stipulation it would not be responsible. Force and effect can be given to this stipulation only by holding that it was intended to exempt the defendant from negligence, in consequence of which the hogs died from heat. The judge, at the trial, however, entirely ignored this special contract, and put the case to the jury upon the defendant's common-law responsibility, charging that it was liable if they found it guilty of negligence in the transportation of the hogs; and he refused to the defendant any benefit whatever from the special contract. In this I cannot doubt the learned judge erred." In the latter case the court says: "The doctrine of *Mynard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180, 27 Am. Rep. 28, is decisive upon this question. It was there held that, where general words, limiting the liability of a carrier, may operate without including his negligence or that of his servants, such negligence will not be within the exemption of the agreement. To this extent, at least, we all concur. However broad or general may be the language of the contract which does not specifically and in express terms release the carrier from the consequences of his own negligence, it will not effect such release if the general words may operate without including such negligence. That is the case here. The precise injury might have occurred which actually happened without fault or negligence on the part of the carrier. . . . It is in this respect that the present case differs from that of *Cragin v. New York Cent. R. Co.* 51 N. Y. 61, 10 Am. Rep. 559. In that case the injury resulted from the vitality of the animals, and their inherent nature and characteristics. For such injury the carrier was not liable at common law, and the general words of release and exemption could not

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operate at all, unless upon the negligence of the defendant. The case was decided upon that precise ground." In *Kennay v. New York Cent. & H. R. Co.* 125 N. Y. 422, the rule was extended to a contract for the carriage of passengers, but under special circumstances. It was held in that case that the general clause in question was capable of another construction, as applied to the facts in that case, and the same rule was applied as in the case of contracts for the carrying of freight. In this case there are no special circumstances taking the case out of the general rule that in a case of a passenger the only basis of the carrier's liability is negligence, and such a stipulation in the contract would be deprived of all operation unless it would cover negligence. A carrier of passengers is not an insurer of the safety of the passengers as is a carrier of goods, for the safe delivery of the goods. A carrier of passengers is only liable for negligence, and hence the stipulation in the contract has nothing to operate upon unless negligence is included.

In the discussion thus far we have assumed that the plaintiff was injured while a passenger upon defendant's road. It is contended, however, by respondent, that he had ceased to be a passenger when the injury to him occurred, he having arrived at Bristol, the place of his destination, and left the car. It appears from the evidence that after plaintiff's car was sidetracked at the station, the plaintiff went to an hotel in Bristol to get lanterns and assistants to aid him in unloading his car; that he was absent a short time,—how long does not appear, but evidently only for a short period,—when he returned, and proceeded to unload his stock. While it may be true, as contended by respondent, that when an ordinary passenger arrives at his destination, and leaves the train and the depot, his relation to the carrier as passenger ceases, but, when one sustains to the carrier the relation sustained by the plaintiff in this case, we think a different rule applies. Being required by his contract to load and unload his stock, we are of the opinion that by the terms of the contract it must be held to extend to the final unloading of the stock. The stipulation is not limited, but provides that "all persons are thus passed only at their own risk of personal injury, from whatever cause." This would seem to include loading and unloading as well as transportation in the train. The plaintiff was unloading the car under the terms of the contract, when the injury occurred. To hold that he was acting under the contract in loading the stock, but still absolved from the stipulations of the contract as to defendant's liability for injuries to him, would be giving to the contract a construction not warranted by its terms. The plaintiff was permitted to go on the train with, and to take care of, his stock; and he was in and about the car for that purpose when injured. In *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364, the plaintiff was injured before the train started from the depot, by a stick of wood thrown from the tender, and the court held that defendant was exempt from liability under its contract. In that case the court said: "The injury complained of was sustained by plaintiff while he was on the defendant's premises, moving about the train on which his

animals were laden, for the purpose of taking care of them, and engaged in the performance of that duty. His only business there was to take charge of the stock in pursuance of the terms of the contract. The train was about starting, and he was to go in it according to the terms of the contract, being provided with a free pass for that purpose. The contract provided that he should go or send some person on the same train with the stock, to take charge of it, who should be carried free of charge; and that such person so riding free should take all the risk of personal injury from whatever cause, whether of negligence of the defendant or its agent or otherwise. We do not think it necessary, to bring the plaintiff within the operation of this stipulation, that he should have been actually riding at the time of his injury. The train had been formed, and was about to start. The plaintiff was there, under the contract, as a passenger furnished with a pass, entitling him to ride free, and coming from the performance of the duties contemplated by his contract." We think that by a fair and reasonable construction of the contract the plaintiff, while unloading his stock, was within the terms of his contract, whether he was called a passenger or not. He was doing what the contract stipulated he should do,—unloading his stock under the contract; and defendant's exemption from liability continued so long as the plaintiff continued to act under the contract, or the contract was in force. It was evidently the intention of the parties in

entering into the contract that the plaintiff was to assume all risk for personal injury from whatever cause until the car was unloaded as provided in the contract.

There were a number of other questions discussed in the briefs of counsel and in the oral arguments, but, as these questions may not arise on another trial, we do not deem it necessary to discuss them. Our conclusion is that, under the contract, construed by the law of this state and the record on this appeal, the motion of defendant that the court direct a verdict in its favor should have been granted.

*The judgment of the court below is therefore reversed, and a new trial is ordered.*

**Kellam, J.:**

I express no opinion upon the independent proposition, that the statutes of a foreign state will be presumed to be the same as those of the forum. I concur, however, in the decision of the case. It is the duty of the courts to sustain as valid and binding the deliberate agreement of parties, until some reason is shown against it. Assuming that, in the absence of evidence, the courts of this state may not know what the statute law of Wisconsin is, or indulge any presumptions in regard to it, it still remains a fact that the laws of Wisconsin may be such as to allow or authorize a contract like this, and the court ought to treat the contract as valid, until it is affirmatively shown that the laws of that state do not allow it.

### MONTANA SUPREME COURT.

John A. QUIRK, *Respt.*,

v.

Anna MULLER, *Appt.*

(.....Mont.....)

**A contract to procure for a consideration testimony that will win a lawsuit is void as against public policy and as tending to impede the administration of justice.**

(June 11, 1894.)

**APPEAL** by defendant from a judgment of the District Court for Lewis and Clark County in favor of plaintiff in an action brought to recover compensation for services rendered in procuring evidence to be used in the prosecution of a law-suit. *Reversed.*

**Statement by De Witt, J.:**

This is an appeal from the judgment, upon which the only contention made is that the complaint does not support the judgment. *Gillette v. Hibbard*, 8 Mont. 412.

The action was for compensation for certain personal services rendered by plaintiff to defendant, under an alleged contract. The complaint is somewhat voluminous, but the portions material to this inquiry may be stated

therefrom as follows: One Buyck was in possession of certain property of defendant herein, Anna Muller, under a deed from said Muller to Buyck, which she claimed was fraudulent. She desired to recover possession of this property. It may be stated in passing that the action which she brought for this purpose was finally decided in this court, under the title of *Muller v. Buyck*, and reported in 12 Mont. 854. The complaint in this case then alleges that she, Anna Muller, "made and entered into an agreement with this plaintiff, whereby she employed this plaintiff to make search and inquiry, and ascertain the names of persons who were familiar with the said property, and acquainted with the defendant and the said Sully Buyck, and with the facts and circumstances connected with the execution of the instrument aforesaid, and of the financial circumstances of the said Sully Buyck, and to procure such other testimony which, when introduced in court in an action duly and regularly brought, would entitle the said defendant to the possession of the said property, and the cancellation of the said instruments, and restore her to all her rights in and to said property; and the said defendant then and there promised and agreed that if this plaintiff would ascertain and procure the names of such witnesses, whose testimony would enable her to recover her rights in and to said property, and the possession thereof, that she, the said defendant, would pay to this plaintiff, for such

**NOTE.**—As to validity of contracts to procure testimony, see *note* to *Goodrich v. Tenney* (Ill.) 19 L. R. A. 371.

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services, an amount equal to 10 per cent of the value of the property so recovered, to be paid when the said property would be recovered; and plaintiff agreed and entered upon said employment, and procured the names of witnesses to establish said facts, if such witnesses could be procured. That thereupon this plaintiff, relying upon said agreement, commenced an investigation of the facts and circumstances connected with the execution of the instruments aforesaid, and to obtain all information he could with reference to the said Sully Buyck, and to procure the names of persons who were familiar with the facts and circumstances relating to the ownership of the said property, and with the execution of the said instruments, and the financial condition of the said Sully Buyck, and the consideration that was paid for said property, and the source from which such consideration was derived, and all other facts necessary to establish the right and title of the said Anna Muller in and to the property aforesaid; and plaintiff avers that he did procure the names of witnesses who were familiar with the facts aforesaid, and did secure sufficient testimony to establish defendant's right, title, and interest and claim in and to said property, and each and every part thereof." The complaint then goes on to set up the commencement of the action of *Muller v. Buyck*, and the trial thereof, and the judgment in favor of Muller. Speaking of the trial of that case, the complaint alleges: "And the said testimony procured by this plaintiff in his said employment was introduced, and the witnesses whose testimony he procured were produced and testified in said action in behalf of said Anna Muller; and, upon due consideration of said testimony, the court adjudged and decreed," etc. The judgment being for the plaintiff in this action, the defendant appeals.

**Mr. J. M. Clements** for appellant.

**Messrs. Walsh & Newman**, for respondent:

To make a contract champertous under the ancient law, there should be a bargain to receive part of the property in litigation. But such contracts are not now held void. They have been upheld in California and many other states.

*Howard v. Throckmorton*, 48 Cal. 482; *Bal-lard v. Carr*, 48 Cal. 74; *Hoffman v. Vallejo*, 45 Cal. 564; *Mathewson v. Fitch*, 23 Cal. 86; *Ramsey v. Trent*, 10 B. Mon. 841.

Where the contract specifies that the party shall receive as compensation an amount equal to a certain percentage of the value of the property recovered, as in this case, the contract will be upheld.

*McPherson v. Coz*, 96 U. S. 404, 24 L. ed. 746; *Stanton v. Embry*, 98 U. S. 548, 23 L. ed. 983; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 820; *Taylor v. Bemis*, 110 U. S. 42, 28 L. ed. 64; *Jeffries v. Mutual L. Ins. Co. of New York*, 110 U. S. 805, 28 L. ed. 156; 3 Am. & Eng. Encyclop. Law, p. 78.

**De Witt, J.**, delivered the opinion of the court:

We are of opinion that the complaint is not sufficient to sustain the judgment. The learned district judge would have doubtless

so held if the point had been made before him. We believe that the contract set out in the complaint is void as against public policy, and as tending to impede the administration of justice. The plaintiff was employed, not only to make search and inquiry for witnesses, and to ascertain the names of persons acquainted with the facts and circumstances, but also, in addition to this, to procure such other testimony which, when introduced in evidence, would entitle the said Anna Muller to recover possession of the property. The searching for witnesses who had disappeared or documents which had been lost, or the performance of legitimate detective work, is not subject to objection. But the plaintiff was, according to his contract, to do more than this. These things he was to do, but they were not considered sufficient. He added to them, and contracted in connection with them, that he would, in effect, procure testimony that would win a lawsuit. It is alleged, further, in effect, that the testimony which he thus procured did win the lawsuit. Indeed, the contract, brought down to a simple statement, is that plaintiff agreed, for a consideration, to procure testimony that would win the lawsuit. He procured the testimony, and it won the suit. We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury; but the contract had the tendency and opened the very strong temptation to the procurement of perjury. Mr. Bishop says: "The mere tendency of a contract to promote unlawful acts renders it illegal, as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts." Bishop, Cont. § 476. In the case of *Wellington v. Kelly*, 84 N. Y. 543, the court found that the particular contract there under review was a legitimate and proper one, but, upon the general principle of contracts to furnish evidence for a lawsuit, Judge Andrews, in the opinion, says: "In *Stanley v. Jones*, 7 Bing. 369, it was held that an agreement made by a third person to communicate to a person claiming to have been defrauded such information as would enable him to recover damages for the fraud, and to exert his influence to procure evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, was illegal. In that case the person making the agreement to communicate the information was an entire stranger in interest to the proposed litigation, and professed to have knowledge of facts of importance to the party, but which he did not disclose. Lord Denman said that such an agreement was illegal, from its manifest tendency to pervert justice, and we fully assent to the decision in that case. An agreement by a stranger to furnish evidence to substantiate a claim or defense, for a compensation depending upon the success of his efforts, is dangerous in its tendency, as furnishing an inducement for perjury and the subornation of witnesses." In the English case cited in the New York Report, the person contracting to furnish the evidence agreed that "he should and would use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the said defend-

ant." *Stanley v. Jones*, 7 Bing. 879. There is a very considerable similarity between the contract which was condemned by the English court and that which is now before us.

The supreme court of Illinois took occasion, in the case of *Gillett v. Logan County Supra.*, 67 Ill. 256, to treat this subject in very vigorous and pertinent language. A case was about to be tried involving the legality of an election to determine whether the county should subscribe for certain railroad bonds. The legality of the election which had been held being questioned, and the county supervisors, apparently desiring to overthrow the result of the election, made certain contracts as to the procuring of testimony to attack the result of that election. In the contract which the supervisors made with one McNeal, they provided as follows: "That if he [McNeal] will hunt up testimony and prepare the same, and present it to the proper authorities who may be authorized to receive it, and after said testimony or evidence is fully received and shall be acknowledged as legal, then, for said services, said McNeal is to receive from Logan county the following amounts: For ten illegal votes, so proved, \$100; for ten other illegal votes, so proved, \$200; for ten other illegal votes, so proved, \$300; for ten other illegal votes, so proved, \$400; for ten other illegal votes, so proved, \$400; for ten other illegal votes, so proved, \$400; for ten other illegal votes, so proved, \$400. The above-mentioned illegal votes must be in place of, answer to, or represent certain unknown names on the East and West Lincoln poll books of the election above mentioned. The condition of this obligation is such that the said McNeal is to pay all his own individual expenses and the expenses of any parties whom he may employ in preparing such testimony, and finding such witnesses; and that above amount, or any part of the same, shall not be due or payable until the illegality of such votes is legally proven. It is further agreed that, in case the county of Logan is finally released from any liability to pay said bonds now in dispute between said county and the P., L., and D. R. R. Company, by means of proving the majority in said election to be illegal, the county of Logan further agrees to pay the said M. B. McNeal the sum of twelve hundred dollars, which said amount is to be in addition to the scale of prices above mentioned, and payable only after the courts have decided the case in favor of the said county." The supreme court of Illinois, in passing upon this contract, said: "The evidence disproved the actual use by the committee of any corrupt means or any corrupt design, on their part, in the use of the money. But the contracts themselves are pernicious in their nature. They created a powerful pecuniary inducement on the part of the agents so employed that the testimony should be given of certain facts, and that a particular result of the suit should be had. A strong temptation was held out to them to make use of improper means to procure the needful testimony, and to secure the desired result of the suit. The nature of the agreement was such as to encourage attempts to suborn witnesses, to tamper with jurors and to make use of other 'base appliances' in order

to secure the necessary results which were to bring to these agents their stipulated compensation. The tendency of such arrangement must be to taint with corruption the atmosphere of courts, and pervert the course of justice. A pure administration of justice is of vital public concern. It tends to evil consequences that any such venal agency as is constituted by these contracts should have a part in the conduct of judicial proceedings where the attainment of right and justice is the end. Should such contracts of this character receive countenance, we might, among the multiplying forms of agency of the time, have to witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony for litigants in court, for pay, contingent upon success of their suits. In *Marshall v. Baltimore & O. R. Co.*, 57 U. S. 16 How. 314, 14 L. ed. 953, it was held that a contract or a contingent compensation for obtaining legislation was void by the policy of the law. With much greater reason, we think, should the contracts under consideration be held vicious. We cannot sanction them. On account of their corrupting tendency we must hold them to be void, as inconsistent with public policy." *Gillett v. Logan County Supra.* 67 Ill. 256. See also *Patterson v. Donner*, 48 Cal. 369.

We fully concur in the views expressed in these cases, and we are of opinion that the contract under consideration falls within the objectionable class. To be sure, under the contract the plaintiff, Quirk, may have performed only innocent acts and there is nothing to indicate that both his intentions in making the contract and his acts in carrying it out were other than wholly innocent and lawful. But the contract was just such a one as to encourage an unlawful act. It invited subornation of perjury. It held out a large reward for success. The amount claimed by plaintiff was some \$1,800. The obtaining of this large sum depended upon plaintiff procuring testimony which would win the lawsuit. The law does not tolerate the offering to any one, no matter how virtuous, of such temptations to crime. The evils and vices of such a contract are strongly stated in the language of the Illinois court, quoted above. It would, indeed, be a sad spectacle to see springing up in this state the business of procuring testimony sufficient to win lawsuits. We regretfully express the fear that perhaps such a business might find a patronage. But from such a result we will secure ourselves by declaring void a contract the manifest tendency of which is to present the direct temptation and the great inducement to one to procure subornation of perjury. There is here too close an approach of the evil maxim, sometimes quoted: "Get money; honestly, if you can; but get money." The contractor in plaintiff's position could only too easily be led to say to his conscience: "I will procure the necessary testimony, honestly if I can; but I will procure the testimony." The evils of such contracts are illustrated in the very case for which this plaintiff contracted to procure the testimony which would succeed in winning a judgment for plaintiff therein. That case was before us on appeal, and was reported in 12 Mont. 85. In our investiga-

tion, it appeared that practically the only witness for the plaintiff was herself. It seems that the case rested solely upon the testimony of plaintiff, Muller, and the defendant, Buyck. So, if it be true that plaintiff herein, Quirk, procured the testimony which won the judgment in *Muller v. Buyck*, he procured the plaintiff herself to testify, and the only construction of the situation by which it could be claimed that he procured any testimony, would be that he procured or instructed her to testify as she did, because it was her testimony that won the case. It does not appear, on an inspection of the decision in that case, that plaintiff herein did or could have rendered service of such nature, or any other. We speak of this as an illustration of the evil tendency

of such a contract as is pleaded in the complaint in this case. We think that nothing here said can be interpreted as forbidding the offering of rewards for the detection of crime, or the employing of persons to search for material witnesses or important papers or documents or exhibits which have been lost. We think that no difficulty will arise in sustaining contracts for the performance of legitimate services, while the stamp of disapproval is put upon contracts clearly *contra bonos mores*.

*The judgment is reversed*, and the case is remanded with directions to dismiss the complaint.

**Pemberton, Ch. J., and Harwood, J.,** concur.

### CONNECTICUT SUPREME COURT OF ERRORS.

**YALE GAS STOVE CO. et al.**

v.

**Jedediah WILCOX and Wife.**

**Jedediah WILCOX**

v.

**John B. FOLEY.**

(.....Conn.....)

#### 1. One who organizes a corporation to purchase letters-patent at a certain

price, while he already has a secret agreement with the owner whereby he is to obtain from the latter a part of the avails of the sale, but who induces subscriptions to the stock by stating that he is putting his money into the enterprise upon precisely the same basis as the other stockholders may be compelled to account to the corporation for the profits retained by him under his secret agreement.

#### 2. The illegality of an agreement by a corporation for the purchase of property by which to avoid the statutes and to de-

**NOTE.**—*The duties and liabilities of promoters to the corporation and its members.*

Until recently very little attention has been paid in this country to the doings of the promoters of corporations, or to their relation to the perfected concern which their exertions produce or its members. In England, however, the matter has been the subject of much attention on the part of both the courts and parliament and a very complete scheme for the government of the relation has been evolved.

#### *The duty of the promoter.*

The general rule is that the relation of the promoter to the corporation and its members is one of trust, and, while all dealings by him with the corporation are not prohibited, yet he must act in all things fairly and openly and place the corporation in possession of all his information which would be likely to affect its action.

As stated in one case it is the duty of a promoter toward those who are invited to co-operate in the enterprise not only to abstain from stating as a fact that which is not so, but not to omit to state any fact within his knowledge, the existence of which might in any form affect the extent or the quality of the advantages held out as an inducement. *Cortes Co. v. Thannhauser*, 45 Fed. Rep. 730.

#### *Sales by promoter to corporation.*

A property owner may organize a corporation to purchase the property and sell to it at any price he can get, provided he is guilty of no fraud or misrepresentation. He is not compelled to reveal his entire relation to the property and the profit he is making if he makes no pretensions of doing so and does not lead the corporation to think that he has done so.

The mere fact that the owner of land makes a profit in selling it to a corporation which he promotes will not make him liable to account for such

profits in the absence of fraud. *Burbank v. Dennis* (Cal.) Jan. 11, 1894.

The owners of property may form an association and sell the property to it at any price which may be agreed upon, no matter what it may have originally cost, provided there was no fraudulent misrepresentation. There is no duty to disclose the profits made out of the transaction. *Densmore Oil Co. v. Densmore*, 64 Pa. 48; *Langren v. Pennell*, 10 W. N. C. 297.

To make one liable for the profit made in selling property to a corporation, he must be shown to have occupied a fiduciary relation to the corporation. *McElhenny's App.* 61 Pa. 183.

If the promoters represent that they have been acting for the benefit of the corporation in purchasing the land, they will not be permitted to make a profit out of it. *Simons v. Vulcan Oil & Min. Co.* 61 Pa. 303, 100 Am. Dec. 623.

A promoter cannot make a profit by advancing the price of land which he had offered to sell to the corporation after the enterprise is so far under way as to seem probable of success. *Rice's App.* 79 Pa. 163.

Where a person projecting the formation of a corporation invites the public to join him in the project on a representation that he has acquired property which was intended to be applied for the purpose of the company, this is an invitation to participate in the benefit of the property purchased on the terms on which the purchaser acquired it, and the fiduciary character of the purchaser will, in such cases, commence from the time when he first begins to deal with the public, and will, in equity, be controlled by the representations he then makes to the public. But if, intending to form a corporation, he should purchase land with a view to the formation of it, and should state at once that he is the owner of it and proposes to sell it for a fixed price for the purposes of the corporation about to be formed, the transaction, so far as

fraud the public a secret contract was made for the purchase of patents, will not defeat the right of a corporation to recover from the promoter the avails of a secret agreement between him and the seller of the property.

3. No offer of rescission is necessary to obtain an accounting by a corporation from a promoter who has secretly received profits on property sold to the corporation by his frauds.
4. A corporation 'instead' of its stockholders should sue for the avails of a secret agreement between a promoter and one from whom the corporation purchases property.
5. Neither party can have the aid of a court to enforce rights under a contract which is opposed to public policy.

(February 19, 1894.)

**P**RESERVATION by the Superior Court for New Haven County for the opinion of the Supreme Court of Errors of actions by the Yale Gas Stove Company against Jedediah Wilcox and Wife for damages and equitable relief because of the conduct and representations of Wilcox as a promoter of the plaintiff corporation, and also of an action by Wilcox against John B. Foley for damages for breach of contract to divide with the plaintiff the proceeds realized by defendant from the corporation for defendant's interest in certain patents which the corporation was organized to obtain and operate. *Judgment for plaintiff in the first action and for defendant in the second.*

The facts found by the trial court were as follows:

"In December, 1889, John B. Foley, being the owner of certain valuable patents for inventions in gas stoves, which he was desirous of disposing of, offered, in a conversation with Jedediah Wilcox, to sell letters-patent for the sum of \$2,500. The said Wilcox, believing said letters-patent to be valuable, and having had experience in the organization of joint-stock companies for similar purposes, proposed to said Foley the organization by said Wilcox of a joint stock company for manufacturing gas stoves under said patents, the sale to such company of said letters-patent, and a division between said Foley and Wilcox of the avails of such sale. Said Wilcox, after interviews with various persons, believing that he could organize such a joint-stock company for the purpose of carrying out said plan of organizing such company to manufacture said stoves under said patents, and of selling such letters-patent to such company, and dividing between himself and Foley the avails of such sale, on the 14th day of January, 1890, entered into the following agreement with said Foley: 'This agreement, entered into this 14th day of January, 1890, by and between John B. Foley, of the town and county of New Haven and state of Connecticut, of the first part, and Jedediah Wilcox of said town and county, of the second part, witnesseth as follows: Whereas, said John B. Foley is the

the public are concerned, commences with that statement, and he will not be necessarily charged with the profit he makes out of the land. *Foss v. Harbottle*, 2 Hare, 489.

The property may be bought and sold at an advance to the corporation, if it is done fairly; but a full disclosure must be made to the corporation and an independent board of directors must act on the question of purchase; if the property is bought for the company by the promoter as agent, or if he acts as a director in completing the purchase, he will not be permitted to retain any profit that he may have made. *Plaquemines Tropical Fruit Co. v. Buck* (N. J.) Nov. 29, 1893.

To make an alleged promoter liable for the amount of paid-up shares allotted to him in consideration of the transfer by him to the company of property standing in his name, it must be shown that at the time of its acquisition he stood in such relation to the intended corporation that he could not claim to have bought the property for himself. *Re Hess Mfg. Co.* 21 Ont. App. 66.

If the owner agrees with the subscribers that all the property he sells shall be put in at cost price, he will be liable to refund all the profit which he realizes out of the transaction. *Burbank v. Dennis* (Cal.) Jan. 11, 1894.

That the promoter acting in good faith fell into an error of judgment as to the value of the property cannot be regarded as a fraud which will render him liable for its consequences. *Young v. Erie Iron Co.* 65 Mich. 111.

There seems to be a tendency among the lower English courts to be more lenient towards promoters than the higher courts were willing to sanction. Several transactions which have been countenanced by vice-chancellors have been condemned on appeal. In fact some of the language found in opinions of the latter courts might lead to the conclusion that they would not sanction transactions which would be good in this country.

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Thus in a late case it was said that persons who purchase property and then create a corporation to purchase from them stand in a fiduciary position towards the company and must faithfully state to it the facts which apply to the property and which would influence the company in deciding on the reasonableness of acquiring it. *Erlanger v. New Sombrero Phosphate Co.* 3 App. Cas. 1218, 48 L. J. Ch. 73, 39 L. T. N. S. 809, 27 Week. Rep. 65, affirming L. R. 5 Ch. Div. 73, 46 L. J. Ch. 425, 36 L. T. N. S. 523, 25 Week. Rep. 436, where it appeared that a syndicate purchased the lease of an island containing phosphate and then organized a corporation to purchase the lease, obtaining from it twice the amount paid for it, and the chancery division, reversing the vice-chancellor, held that the syndicate, being the promoters of the corporation, stood in a fiduciary relation to it and were bound to make a full and fair disclosure of their interest in the property; and that, as they had suppressed the fact that they were the real vendors and that they gave for the property only one half what the company gave for it, and had in addition control of the board of directors, which ratified the contract, there was no contract binding on the corporation, and the sale was set aside and judgment given against the members of the syndicate for repayment of the purchase money.

It will be observed that the facts brought out in the report in L. R. 5 Ch. Div. 73, make a plain case for relief and do not require such sweeping language as was used in the appellate court.

The New York court of appeals has taken quite an advanced position upon the subject.

In *Getty v. Devlin*, 54 N. Y. 403, where persons owning oil land were compelled to account for profits they made by selling it to a corporation which they organized for that purpose, one of the grounds of the decision is that after the subscriptions were made one subscriber will not be permitted to make a profit by buying land to be sold

owner of letters-patent of the United States of America, dated the 30th day of August, 1897, and numbered 368,938, for improvements in gas stoves, and he is also the inventor of a certain other improvement in gas stoves, for which he has applied for letters-patent of the United States, by application filed the 14th day of November, 1899, and serial number 330,244; and whereas, said Jedediah Wilcox is desirous of owning one-half part of the letters-patent, and of the invention and improvements above described: Now, therefore, in consideration of the covenants hereinafter contained, and of one dollar, and other valuable considerations, the said Jedediah Wilcox hereby covenants and agrees with said John B. Foley, and with his heirs and assigns, that he, together with his associates, will forthwith, and within a reasonable time, organize a joint-stock company, under the statute laws of the state of Connecticut, for the manufacture and sale of gas stoves containing the improvement described, and secured by said letters-patent of the United States, and to be secured; and said Wilcox also agrees to cause to be paid to said Foley the sum of three thousand dollars, in cash, upon the organization of said company, and also five thousand dollars of the capital stock of the company above described. Said John B. Foley, his heirs and assigns, hereby covenants and agrees with said Jedediah Wilcox, and with his heirs and assigns, that, upon the execution of his covenants herein

above described, he will assign and transfer, by written conveyance, one half of the letters-patent above described; also one half of the invention and improvements in gas stoves for which application for letters-patent has been made, and of any letters-patent which may be issued for said improvements; and also that he will assign to said Wilcox one half of any future improvements which he may hereafter invent in gas stoves while he is associated with him in the gas-stove business; and also one half of any letters-patent which may be issued to him for any of the improvements above mentioned, invested while so associated with him in said gas-stove business, or any reissue thereof. Said Foley also covenants and agrees to give said Wilcox one half of the three thousand dollars cash, as soon as received, and one half of the five thousand dollars of the capital stock of said company, as he shall receive it. Said Jedediah Wilcox also hereby agrees to subscribe for one thousand dollars, par value, of the capital stock of said proposed company, and to pay for the same as called for by the directors thereof. And said John B. Foley hereby agrees to take one half of said one thousand dollars worth of stock, when issued, and to pay to said Wilcox therefor one half of what said one thousand dollars worth of stock shall have cost him. And said John B. Foley hereby also agrees to unite with said Wilcox in the execution of all necessary papers giving to the proposed

to the corporation, and the court says: "If this be so as to a purchase of land made after the subscriptions are written, why should not the same rule be applied to a purchase made before; the wrong and breach of faith is just as great, and every reason advanced to show that the rule should be applied in the one case would show that it should be applied in the other." And that rule was recognized in *Getty v. Devlin*, 70 N. Y. 504.

In *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 680, one who signed the charter of a railroad company on January 20, purchased a roadbed on February 17, and filed the charter with the secretary of state on February 23, by which act the company for the first time had a legal existence. The court in discussing his liability to the company for profits on the roadbed says to make him responsible there must be an affirmative showing that at the time that he made the purchase he was either acting for or on behalf of the corporation, or that he so assumed to act, or that he occupied such a relation of trust and confidence with respect to the corporation that his purchase resulted to its benefit and not to his own profit. And then the court decides that he was not acting on behalf of the corporation and that at the time of the purchase he did not occupy such a position of trust to the corporation as to make him liable to it for the profits, on the ground that he was not a promoter of the road.

*Commissions, profits on options, and profits on property bought for the corporation.*

Concealed profits of this character are universally condemned.

If the promoters agree with the owners of the patents which the company is organized to operate, to receive a certain number of shares of stock without making payment for it, and this agreement is not disclosed to those who subsequently

subscribe for stock, the corporation has the right to elect: (1) to have the shares transferred back to it; (2) if the shares have been sold, to take the entire profits from the sale; (3) to require payment of profits which the corporation itself would have made by disposing of the stock at the market price. *Chandler v. Bacon*, 30 Fed. Rep. 538.

In *Lydney & W. Iron Ore Co. v. Bird*, L. R. 31 Ch. Div. 323, 55 L. J. Ch. 383, 54 L. T. N. S. 242, 34 Week. Rep. 437, the owners of a mine employed agents to form and launch a corporation for the purchase of the mine. This was done, the mine sold, and the agents were allowed a commission for their services, and the court held that the agents were acting solely for the vendors, and as it appeared that the purchase money was not increased because of the commission, and that it was in fact paid by the vendors, the agents could not be regarded as promoters of the company within the rule as to liability of such persons.

But that case was reversed in *L. R. 33 Ch. Div. 35, 55 L. T. N. S. 533, 55 L. J. Ch. 375, 34 Week. Rep. 749*, and it was held that if defendant was really a promoter of the company, the fact that he had acted as agent for the vendors did not exonerate him from accounting to the corporation for secret profits so made.

Where the owner of the property offered a commission to defendant in case he brought out a corporation which purchased the property, and he procured a third person who contracted with the owner of the property and then found directors and launched the corporation, he was held liable for his secret profit. *Emma Silver Min. Co. v. Grant*, L. R. 11 Ch. Div. 613, 40 L. T. N. S. 804.

In *Barnall v. Carlton*, L. R. 6 Ch. Div. 371, 47 L. J. Ch. 30, 26 Week. Rep. 243, 37 L. T. N. S. 451, persons were compelled to refund a commission allowed them by the vendors of property for getting up a corporation to purchase it, but were allowed their commissions and a fair compensation for their ser-



company, and to all other companies organized for similar purposes, the full right to manufacture and sell gas stoves containing the improvements secured by all the letters-patent above described, whenever so requested by said Wilcox. In witness whereof, we have hereunto set our hands, the day and year above written. [Signed] John B. Foley. Jedediah Wilcox. Signed and delivered in the presence of Julius Twiss.'

"The said Wilcox performed the work of procuring subscribers for the stock of the contemplated company, and of organizing said company, and carrying out said plan for the sale to said company of said letters-patent. It was agreed between said Wilcox and Foley that said agreement and arrangement between themselves that said Wilcox should receive a share of the avails of the sale of said patents to said company should be kept secret. The plan for the organization of such company, and which was stated by said Wilcox to those whom he solicited to subscribe for the stock of said company, and who became the stockholders of said company, and upon which said company was organized, was as follows: The capital stock of the company was to be \$30,000, divided into 600 shares, of \$50 each. There were to be ten subscribers of said stock, of whom said Wilcox was to be one, each of whom was to subscribe for twenty shares, and to pay in \$600 in cash. After the organization of the company the company was to purchase of

Foley the said letters-patent, paying him therefor \$3,000 in cash, and issuing to him 400 shares of paid-up stock, of the par value of \$20,000 for which said Foley was to subscribe. After having received said stock, said Foley was to transfer twenty shares to each of said ten subscribers to the stock of said company, and one hundred shares to the treasurer of said company, retaining the remaining one hundred of said four hundred shares, which, with said \$3,000, was to constitute the purchase price of said letters-patent. Thereby, each subscriber, by payment of \$600, was to receive stock of the par value of \$2,000; said Foley was to receive for his patents \$3,000, \$3,000 being in cash, and the remainder in paid-up stock; and there was to remain in the treasury of the company, as its working capital, \$5,000 in stock and \$3,000 in cash. Said Wilcox, in soliciting subscriptions for said stock, did not inform any person of said agreement between himself and Foley, or that he was to receive any of the avails of the sale of said patents, but, for the purpose of inducing persons to subscribe for said stock, stated to nearly all of the persons who subscribed for said stock, and who now constitute the stockholders of said company, that he (Wilcox) was putting his money into said enterprise upon precisely the same basis as the others of said subscribers; and it was with that understanding that nearly all said persons subscribed for said stock. Said Wilcox, with nine others,

vioces in accordance with an offer of plaintiff made at the trial.

Under the English Companies Act of 1862 if a promoter takes a bonus of shares from the owner of the property for his services in effecting the sale to the corporation, he is liable to account to the corporation for their value. *McKay's Case*, L. R. 2 Ch. Div. 1, 45 L. J. Ch. 148, 33 L. T. N. S. 517, 24 Week. Rep. 490.

In *Albion Steel & Wire Co. v. Martin*, L. R. 1 Ch. Div. 580, 45 L. J. Ch. 173, 33 L. T. N. S. 680, 24 Week. Rep. 184, where one who was in the habit of selling goods to a partnership, to purchase the business of which a corporation was formed of which he became a promoter and director, continued to supply goods to the firm and to the concern after it was incorporated, it was held that he must account for profits made after the incorporation, but not those made prior thereto.

Where five persons undertook to form a corporation to purchase and operate a mine, and one made a bargain with the owner for a bonus of £20,000 in case of the sale, and deceived his co-workers as to the amount for which it could be purchased, and they issued a prospectus in which they stated that the property could be obtained at a certain price, including all expenses and a premium to the persons who incurred the risk, it was held that although the mine proved cheap at the price paid, the company upon discovering the concealment could recover the £20,000. *Beck v. Kantorowicz*, 8 Kay & J. 230.

That one of the promoters obtains from the owner of the property a certain commission for effecting the sale of the property is sufficient to compel him to share the advantage with his associates in the corporation. *Emery v. Parrott*, 107 Mass. 95.

To obviate the apparent hardship of a rule which forbids a promoter from taking from the owner of the property compensation for services which 35 L. R. A.

he may have rendered he is allowed in England to take it if the fact is stated in the prospectus of the company which is sent out to secure subscriptions.

But the promoters will not be allowed the amount stated in the prospectus, if there is a concealment as to further compensation to be made them. *Ex parte Williams*, L. R. 2 Eq. 216, 35 L. J. Ch. 474, 14 Week. Rep. 703, 14 L. T. N. S. 456.

If the promoter receives shares of stock from the owner of the property which is sold to the company, he may be compelled to pay to the company their highest value after he received them. *Re Fitzroy Bessemer Steel Co.* 50 L. T. N. S. 144, 23 Week. Rep. 475.

If the owner of property agrees to pay the promoter of the corporation a commission for effecting the sale, the corporation may enforce payment of the unpaid portion of the amount by the owner to itself, upon discovering the existence of the agreement. *Whaley Bridge Calico Printing Co. v. Green*, L. R. 5 Q. B. Div. 109, 23 Week. Rep. 351, 40 L. J. Q. B. 326, 41 L. T. N. S. 674.

In *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. Div. 336, 43 L. J. C. P. 237, 40 L. T. N. S. 163, 27 Week. Rep. 836, metal brokers, who had been handling the metal from a certain mine and who assisted a promoter in disposing of the mine to a corporation which was formed to purchase it, were held to be themselves promoters and compelled to refund the amount which they had received for their services in the transaction.

From the time that the formation of the company is initiated the promoters stand in confidential relations to each other, and it is not then competent for any of them to purchase property for the purpose of the corporation and sell it at an advance, without a full disclosure of the facts. *South Joplin Land Co. v. Case*, 104 Mo. 572; *Paducah Land, Coal & Iron Co. v. Mulholland*, 15 Ky. L. Rep. 22.

Where promoters represented that certain silver

subscribed for said one hundred shares of said stock; each receiving ten shares, and each paying the sum of \$600. Said Wilcox was present at the first meeting of the stockholders, and was elected temporary clerk and a director, and voted in favor of the following resolution, which was adopted: 'Whereas, John B. Foley is the owner of certain letters-patent of the United States for improvements in gas stoves, issued to said John B. Foley (the one, No. 368,938, granted August 30, 1887; the other, No. 421,258, granted February 11, 1890); and whereas, said letters-patent are necessary and convenient for the purpose of this company, and are valued at the sum of twenty-three thousand dollars; and whereas, the said John B. Foley is a subscriber for the capital stock of this corporation to the amount of twenty thousand five hundred dollars: Therefore, voted, that the directors be, and hereby are, authorized and instructed to purchase said letters-patent Nos. 368,938 and 421,258 from said John B. Foley for the sum of twenty-three thousand dollars, and to pay him for the same by crediting his stock account the amount of his subscription, to wit, twenty thousand dollars, and issuing to him full-paid certificates for same, and to pay him the balance of said purchase price, to wit, three thousand dollars, in cash.' On the same day, at the first meeting of the directors of such corporation, said Wilcox was present, and voted in favor of the following resolution, which was

passed: 'Voted, to purchase of John B. Foley, as authorized and instructed by vote of the stockholders passed this day, letters-patent of the United States Nos. 368,938 and 421,258, and that in payment therefor the president and secretary be instructed to issue to him stock certificates, full paid, to the amount of twenty thousand dollars, and that the treasurer be instructed to pay him the sum of three thousand dollars in cash, upon receipt of proper deeds of said letters-patent.' At a meeting of the directors of the plaintiff corporation, held February 24, 1890,—three days after the organization of the corporation,—it was agreed between Foley and the Yale Gas Stove Company that three notes for one thousand dollars each, payable two, four, and six months from that date, should be given by the company, and accepted by Foley, in place of the \$3,000 in cash which it had been arranged should be paid Foley as a part of the purchase price of said letters-patent. Said Foley was also a director of said corporation. Said three notes were duly received by said Foley, and 400 shares of paid-up stock of said company, of the par value of \$20,000, were issued to said Foley, in payment of his subscription for said amount of stock. As soon as could be conveniently arranged thereafter, he transferred to each of his ten associate subscribers, including said Wilcox, twenty shares of the stock so issued to him, and also transferred to the treasurer of the corporation one hundred shares of said stock;

mines were of great value and could be obtained for \$30,000, and the corporation after purchasing them discovered that they were worthless and that the amount paid was only \$10,000, the promoters having divided the \$20,000 between them, the corporation was held entitled to recover the purchase price, all sums expended on the mines prior to the discovery of the fraud, and interest thereon. *St. Louis & U. S. Min. Co. v. Jackson*, 5 Cent. L. J. 317.

Where certain persons bid in land at auction at \$5.06 per acre, and organized a corporation to take it at \$25 per acre, taking back notes and mortgage to themselves for the purchase price, which was subsequently foreclosed, the court compelled them to surrender the notes and mortgage and cancelled the foreclosure decree on such mortgage, by which means the promoters were compelled to restore to the corporation an amount about equal to the secret profit which they made out of the transaction. *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610.

Where persons who had an option to purchase property for \$20,000 represented to the subscribers that the option would cost \$30,000, and, after securing the subscriptions and the money thereon, paid the \$20,000 and converted \$70,000 to their own use, it was held that an action on behalf of the corporation to recover the \$70,000 was maintainable. *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307.

#### *Liability to corporation.*

The cases above cited have been mostly suits by or on behalf of the corporation and the doctrine to be deduced from them is that the promoter may be compelled to turn over to the corporation his secret profits, and that is distinctly held in *Hobens v. Congreve*, 1 Russ. & M. 150.

There may also be a liability to the corporation on the ground of misrepresentations.

Thus in a case where the corporation was unregistered and was therefore nothing but a partner—*25 L. R. A.*

ship, it appeared that the promoters had advertised that all except a certain amount had been paid in and they were held liable to make up all that had not been paid, to the amount stated by them. *Re Royal Victoria Palace Theatre Syndicate*, L. R. 18 Q. B. 661, 43 L. J. Ch. 751, 22 Week. Rep. 573, 20 L. T. N. S. 663.

If the promoter was also the owner of the property which was sold to the corporation, his fraud may entitle the corporation to a rescission of the contract.

Upon discovering that the promoter had an undisclosed interest in the sale, the whole contract may be rescinded and the consideration must be refunded. *Lindsay Petroleum Co. v. Hurd*, L. R. 6 Q. B. 221, 23 Week. Rep. 492.

And if the owner of the property assists the promoter in making a secret profit out of the transaction, the contract may be rescinded against him. *Atwool v. Merryweather*, L. R. 5 Q. B. 464, note, 37 L. J. Ch. 26.

Where the owners of property, the title of which was defective, organized a corporation to purchase it and concealed the defect in title from the company, they were held liable to return the whole of the purchase money. *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. Div. 394, 45 L. J. Ch. 661, 37 L. T. N. S. 9.

But in such cases the promoter is held entitled to have the property returned in case he is required to account for profits.

The mere fact that the promoter did not disclose the fact that he was the seller to the corporation and that he was making a profit, will not render him liable to return to the corporation the profit made after the property has been sold by the corporation, so that rescission of the contract has become impossible. *Re Cape Breton Co.* L. R. 26 Ch. Div. 221, affirmed in L. R. 20 Ch. Div. 705.

If at the time of the purchase of the property subsequently sold to the corporation, the pur-

and, between Wilcox and Foley, transfers were made, as provided in said agreement, between them; Foley receiving ten of the twenty shares subscribed for by Wilcox, and Wilcox receiving on or before December 1, 1890, from Foley, fifty of the one hundred shares issued to Foley as a part of the purchase price of said patents. The first note for \$1,000 was paid to said Foley, and out of the proceeds thereof, on April 30, 1890, he paid to said Wilcox \$800, which was expressed to have been received by Wilcox on 'account of contract.' When the second note matured, though the corporation had the funds in the bank to pay the same, and though said Foley could have had the payment of the same at once, and was requested by said company, to receive payment, yet Foley declined to receive payment. His reason for so doing was his unwillingness to pay any further sum to Wilcox. Foley did not draw the payment of the second note until a few days before the 9th of October, 1890; and on the 9th of October, 1890, he paid Wilcox \$500, and took from him a receipt for such sum 'on account.' Foley did not draw the payment of the third note when due, although he could then have done so, and was requested so to do by the company. Said note has never been paid, and said company, having learned of said agreement between Foley and Wilcox respecting the division of the proceeds of the sale of said patents to the company, now decline to pay the same. Payment of said note

has never been demanded by said Foley. His reason for not having demanded the same was his unwillingness to make any further payment to Wilcox.

"On the \_\_\_\_\_ day of \_\_\_\_\_, 1891, Wilcox brought suit against Foley upon the said written agreement between them, the same being one of the suits in which this finding is made. If said agreement between Foley and Wilcox is valid, there is due thereon from Foley to Wilcox the sum of \$1,000. After said suit was brought the terms of the written agreement between Wilcox and Foley first became known to the directors of the Yale Gas Stove Company, whereupon said company, having been advised that said agreement between Wilcox and Foley was illegal and void, instituted their action against said Wilcox, which is one of the cases in which this finding is made. Of the eighty shares of stock so received by said Wilcox, five shares had been transferred by him to one Starr before the commencement of said suits, fifty-five of said shares stand in the name of Henrietta B. Wilcox, and twenty are owned by said Wilcox. Of the fifty-five shares owned by Henrietta B. Wilcox, twenty shares were the shares originally subscribed for by Wilcox in his own name. He in fact acted at the request of his wife, and as her agent, in making such subscription, and the \$600 paid for said stock was the money of said Henrietta B. Wilcox. Said twenty shares were issued to said Wilcox as trustee.

classes are not in the relation of promoters to the corporation, the mere fact that they subsequently become so will not render them liable for secret profits made on the sale, if no rescission of the contract can be had. *Ladywell Min. Co. v. Brookes*, L. R. 24 Ch. Div. 308, affirmed L. R. 35 Ch. Div. 400, 46 L. J. Ch. 684, 56 L. T. N. S. 677, 36 Week. Rep. 785.

The general rule also is as shown above that the promoter will not be permitted to receive shares as full paid when they are not so.

Hence if the promoter takes from the vendor of the property part of the shares given for the property under a secret agreement between them, he may be compelled to pay to the liquidator of the company their full value. *Re Morvah Consols* [Tin Min. Co. 24 Week. Rep. 49].

So where four persons organized a corporation and took all the shares themselves, paying therefor only three fifths of their value, but entering on the books of the company the fact that the shares were fully paid, after which the stock was sold to other persons, the company upon discovering the fraud were held entitled to compel them to pay in the balance of the amount. *Society for Illustration of Practical Knowledge v. Abbott*, 2 Beav. 569.

But circumstances may arise under which it would not be equitable to compel the payment of the money and it will not then be done.

Thus, where all the shares of a corporation are allotted to the owners of the property in payment for it, the corporation cannot compel certain of the owners, who take a prominent part in the affairs of the company, to pay the difference between the nominal value of their shares and their interest in the property. *Ex parte Taylor*, L. R. 14 Ch. Div. 320.

So where a number of persons associated together to work a patent, and issued shares to themselves without paying for them, the mere fact that subsequently other persons were taken into the  
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concern who paid for their shares does not render the original members liable to pay up their shares to the liquidator upon the winding up of the corporation. *Re British Seamless Paper-Box Co. L. R. 17 Ch. Div. 457*, 50 L. J. Ch. 497, 44 L. T. N. S. 498, 20 Week. Rep. 600.

In *Patty v. Hillsboro Roller Mill Co.*, 4 Tex. Civ. App. 224, a subscriber, whom the court calls a promoter, was held entitled to withdraw his subscription before the organization of the corporation, if the one who was to furnish the consideration for which the capital of the corporation was to be paid, consisting of a plant to be operated by the corporation, consented to the withdrawal.

#### *Liability to subscribers.*

In addition to the liability to the corporation as such a separate liability is recognized under certain circumstances to individual subscribers.

In England the charter is not granted until the stock is subscribed for and everything in readiness to proceed with the business of the concern. Hence some provision must be made for the custody of the money paid in, and for the necessary work preparatory to obtaining the charter. This was formerly done by the promoters, but is now generally done by a provisional committee of directors. These persons are, however, generally found by the promoters or are the promoters themselves, so that many of the decisions applying the law to a given state of facts have dealt with members of a provisional committee. These decisions are collected here because of the light which they throw upon the general question.

If the scheme proves a failure the money paid in must be returned.

If the ones originating the scheme, after procuring the money to be paid in, abandon it, the subscribers may recover back the money paid without any deduction for expenses incurred. *Nockels v. Crosby*, 3 Barn. & C. 814, 5 Dowl. & B. 751.

Twenty shares were afterwards, at the request of Wilcox, transferred to her by said Foley as bonus upon said subscription. The remaining fifteen of said fifty-five shares were transferred to said Henrietta B. Wilcox by her husband in consideration of an indebtedness of said Wilcox to his wife in about the sum of \$800. Said Wilcox at no time informed his wife of said agreement between himself and Foley. Since its formation said corporation has continued to manufacture and sell gas stoves under said patents, the business of said company has been prosperous, and said company has paid in each and every year upon its capital stock dividends ranging from 10 to 16 per cent. I find the value of said stock to be \$50 a share. Said corporation has never offered to return or transfer to either said Foley or said Wilcox said patents, or any part or interest therein, and has not done any act in rescission of its purchase of said inventions.

"At the request of all the parties to said causes, the questions of law arising upon the same, and upon said facts, are reserved for the advice and consideration of the supreme court of errors, next to be holden at New Haven, within and for the third judicial district, on the third Tuesday of January, 1894, except that judgment is rendered, in favor of Henrietta B. Wilcox in the first-entitled case."

The authority of that case was recognized in *Hutton v. Thompson*, 3 H. L. Cas. 161, 6 Railw. Cas. 708.

Upon abandonment of the project, the deposits may be recovered back. *Chaplin v. Clarke*, 4 Exch. 402; *Moore v. Garwood*, 4 Exch. 681, 19 L. J. Exch. 15.

If sufficient deposits are not paid to make it possible to undertake any of the business of the concern, all must be returned to the depositors. *Walstab v. Spottiswoode*, 15 Mees. & W. 501.

So the projectors may be compelled to return the money subscribed and paid in for the construction of a railroad, if they have aided in the formation of another rival line, which has made the projected line impossible, and have been speculating with the money so paid in. *Wilson v. Stanhope*, 2 Colly. Ch. Cas. 629, 10 Jur. 421.

The finance committee may be compelled to account. *Clements v. Bowes*, 1 Drew. 684, 1 Week. Rep. 442, 1 Eq. Rep. 553, 22 L. J. Ch. 1022.

In *Manistee Lumber Co. v. Union Nat. Bank of Chicago*, 143 Ill. 490, a contract by the promoters with the holder of claims against an insolvent corporation whose property was to be purchased, which claims were to be taken at a certain price and paid for in cash and stock of the new company, to turn over the dividends received on such stock in case the new company was not formed, was enforced.

A liability to subscribers may also arise in case the promoters are guilty of fraud or misrepresentation.

If the entire scheme is fraudulent, all the projectors may be held liable for the money paid in. *Colt v. Woollaston*, 2 P. Wms. 154.

If the project is a bubble, the subscribers may maintain an action to recover back their deposits. *Green v. Barrett*, 1 Sim. 45.

If the scheme is known by the promoters at the time of the subscription to be impracticable, the subscribers may recover their deposits. *Harvey v. Collett*, 15 Sim. 822, 4 Railw. Cas. 387, 15 L. J. Ch. N. S. 378, 10 Jur. 603.

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*Messrs. Alling, Webb & Morehouse*, for the Gas Stove Company and Foley:

A director is under the obligations of a trustee and the corporation is his *cestui que trust*. *Mallory v. Mallory Wheeler Co.* 61 Conn. 181.

A director is liable to be sued by the corporation for all profits which he may have secretly made, directly or indirectly, from dealings with the corporation.

*Cook, Stock & Stockholders*, § 649; *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426.

A director commits a breach of trust in accepting a gift or secret pay from a person who is contracting or who has contracted with the corporation, and the corporation may compel the director to turn over to it all money or property so received by him.

*Cook, Stock & Stockholders*, § 650; *Wardell v. Union Pac. R. Co.* 103 U. S. 651, 26 L. ed. 509; *Courrier v. New York, W. S. & B. R. Co.* 35 Hun, 355; *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. Div. 396; *Bank of London v. Tyrrell*, 5 Jur. N. S. 924; *McGourkey v. Toledo & O. Cent. R. Co.* 146 U. S. 536, 36 L. ed. 1079.

A contract by which a director of a railroad company uses his official position to secure personal advantage to himself, is either wholly void, or inures to the benefit of the company.

*Sargent v. Kansas Midland R. Co.* 48 Kan. 672.

The case would be clear against Wilcox

One induced to purchase shares by false representations in the prospectus has a right of action to recover his damages. *Gerhard v. Bates*, 2 El. & Bl. 476, 20 Eng. L. & Eq. 186.

A stockholder who was induced to take his stock by the fraudulent representations of a promoter may maintain an action against him for the damages. *Miller v. Barber*, 66 N. Y. 558.

Promoters are liable in damages to a subscriber whose subscription is procured by fraud. *Paddock v. Fletcher*, 42 Vt. 389; *Cridland v. DeMauley*, 1 DeG. & S. 469, 12 Jur. 1015; *Vollans v. Fletcher*, 1 Exch. 20.

Judgment was entered for plaintiff in *Owen v. Challis*, 6 C. B. 115, 5 Railw. Cas. 537, 1 Dowl. & L. 802, 17 L. J. C. P. 266, 12 Jur. 701, and *Coupland v. Challis*, 2 Exch. 682, because of the entry of a bad plea.

A promoter may be held liable for false information furnished to be used in a prospectus, although he does not in fact himself see or approve the prospectus after it is ready for circulation. *Glasier v. Rolls*, 60 L. T. N. S. 591.

In *Kempson v. Saunders*, 4 Bing. 5, 13 Moore, 44, 2 Car. & P. 366, an action to recover money paid for stock to one who was not an original projector was sustained, the court remarking that the seller may sue the one from whom he bought until at last they come to the original projectors, and in getting at them a great service will be done.

If one procures subscriptions by representing that the property belongs to a third person and can be bought for a certain price, when it in fact belongs to him and the price stated is a large advance on what he paid for it, one induced to subscribe by such representations may recover back his subscription. *Short v. Stevenson*, 63 Pa. 25.

Where the promoters only allotted a few of the shares, determining to take the rest themselves if they could make a profit on them and if they could not to reject them, a suit was sustained for a return of the deposits. *Blain v. Agar*, 1 Sim. 37, 5 L. J. Ch. 1.

A statement that the consideration for the prop-

even if he was not a director, because he was the promoter of this corporation.

A promoter is not allowed to receive or retain a secret profit given to him by the parties with whom the corporation contracts.

Cook, Stock & Stockholders, § 651; Morawetz, Priv. Corp. § 546; *Bagnall v. Carlton*, L. R. 8 Ch. Div. 371; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 78; *Simons v. Vulcan Oil & Min. Co.* 61 Pa. 202, 100 Am. Dec. 628; *South Joplin Land Co. v. Case*, 104 Mo. 572.

The promoters of a corporation stand in a confidential relation, not only to each other, but to all who may subsequently become members of the corporation, from the time they begin to promote the association, and will be required to account for the profits made by the purchase of the property for the company, and its sale to it at an advance.

*Paducah Land Coal & Iron Co. v. Mulhol-land*, 15 Ky. L. Rep. 22.

That no fiduciary relations existed between the corporation and its promoters, at the time the latter obtained a contract for the purchase of land, will not prevent the retention on their part of the secret profits in the sale of the land to the corporation, from being fraudulent.

*Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610.

Wilcox should not be heard to say that the plaintiff is not the proper party to bring suit.

*Gray v. Lewis*, L. R. 8 Ch. App. 1085; *Harvey v. Veazie*, 24 Me. 9, 41 Am. Dec. 384.

*Messrs. Doolittle & Bennett*, for Wilcox: The objections, that a resale to some new corporation was contemplated, that the purchase price was to be stock of such corporation, that but little time elapsed between the two contracts are not fatal.

*Ladywell Min. Co. v. Brookes*, L. R. 34 Ch. Div. 398, L. R. 35 Ch. Div. 400; *Gover's Case*, L. R. 20 Eq. Cas. 114; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 78; *Erlanger v. New Sombrero Phosphate Co.* 8 App. Cas. 1218.

If it be assumed that Mr. Wilcox, as director or while holding a fiduciary relation to the corporation, sold the patents to it without disclosing his interest therein, such sale is yet not void but is voidable only. Until rescinded by the company it is good.

*Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 268.

Inasmuch as Mr. Wilcox was acting for himself alone and was not a fiduciary of the company at the time when he acquired his interest in the patents, there were but two courses open to the company, to wit: they could affirm the sale, or rescind it, return the patents and sue for their price. They cannot, as they are here attempting, keep the patents, and recover the consideration received by Wilcox from Foley.

erty is \$221,000 when that amount included \$2,000 for promotion money is so far untrue that all who issued the prospectus containing the statement will be held liable for a return of the deposits—*Capel v. Sim's Ships Composition Co.* 58 L. T. N. S. 37, 38 Week. Rep. 680, 57 L. J. Ch. 712.

If the payment of the deposit and the signing of the contract are induced by a fraudulent misrepresentation that all the shares have been allotted, the shareholder will not be bound by the agreement so as to preclude recovery back of the deposit. *Wontner v. Shairp*, 4 C. B. 404.

One who is induced by the fraud of the promoter to put money into a corporation for the purpose of purchasing property, the value of which is largely overstated by the promoter, who is its owner, may recover the amount of the overpayment, and it is not necessary that the action be brought in the name of the corporation. *Teachout v. Van Hoesen*, 1 L. R. A. 664, 76 Iowa, 113.

Promoters who acquire the property to be used by the corporation wholly at the cost of those who pay for their shares and retain for themselves a majority of the stock, which cost them nothing, will be required to pay to the defrauded subscribers the damages caused by such action. *Brewster v. Hatch*, 122 N. Y. 349, affirming 10 Abb. N. C. 400.

The promoters cannot be held liable on the ground of fraud, if they proceed to form a corporation different from that stated in the prospectus. *Stewart v. Austin*, L. R. 3 Eq. 299.

It seems that in such case the remedy is at law against the company into which his money was put. *Ship v. Crosskill*, L. R. 10 Eq. 73, 30 L. J. Ch. 60, 22 L. T. N. S. 365, 18 Week. Rep. 618.

But the fact that the prospectus contains a guarantee that a certain percentage shall be paid each year does not give one who purchases shares a right of action against the promoters for the dividends, if they are not paid. *Gerhard v. Bates*, 2 E. & Bl. 470, 20 Eng. L. & Eq. 126.

Under the English statute the promoters are liable to subscribers if in the prospectus they do 25 L. R. A.

not insert contracts made by themselves for property to be subsequently sold to the corporation and for a commission for awarding construction contracts to third persons. *Twycross v. Grant*, L. R. 2 C. P. Div. 469, 46 L. J. C. P. 683, 35 L. T. N. S. 812, 25 Week. Rep. 701.

If contracts required by statute to be set out in the prospectus are not so set out, the promoters and directors may be held personally liable for the injuries thereby caused to subscribers. *Charlton v. Hay*, 31 L. T. N. S. 437.

Where there was an understanding but no agreement that the promoters should receive from the owners a compensation for their services which was not settled upon at the time of the issuance of the prospectus, the mere fact that the existence of such understanding was not inserted in the prospectus was not such fraud as to render the promoters liable to subscribers in an action for deceit. *Arkwright v. Newbold*, L. R. 17 Ch. Div. 301, 50 L. J. Ch. 372, 44 L. T. N. S. 393, 26 Week. Rep. 455.

In *Craig v. Phillips*, L. R. 3 Ch. Div. 722, 46 L. J. Ch. 49, 35 L. T. N. S. 198, the vice-chancellor held that there was no deceit which would entitle a subscriber to recover on the following facts: On March 26 defendant wrote a letter which was sent to plaintiff among others recommending a certain colliery as a first-class investment; on May 10 he bought it with £16,124; on May 29 he agreed with trustees for a corporation to be formed to sell it for £23,725; on June 21 a prospectus was issued in which only the last-named contract was mentioned, and in which defendant's name appeared as director, on the faith of which plaintiff subscribed for shares in the company.

To render one of the promoters liable to refund deposits, it must be shown that he was one of the persons to whom the deposits were paid. *Burnside v. Dayrell*, 3 Exch. 224, 19 L. J. Exch. 46, 6 Railw. Cas. 67.

So the provisional committee is not liable unless the money came to their hands. *Watson v. Charlemont*, L. R. 18 Q. B. 65, 12 Q. B. 856, 18 Jur. 117.

*Re Cape Breton Co.* L. R. 29 Ch. Div. 795; *Erlanger v. New Sombrero Phosphate Co.* 8 App. Cas. 1234; *Ladywell Min. Co. v. Brookes*, L. R. 84 Ch. Div. 398, L. R. 85 Ch. Div. 400; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263; *Baird v. New York*, 96 N. Y. 567; *Grymes v. Sanders*, 98 U. S. 68, 24 L. ed. 802; *Tryon v. White & Corbin Co.* 20 L. R. A. 291, 62 Conn. 171.

Fenn, J., delivered the opinion of the court:

Upon the facts appearing upon the record, it is claimed in behalf of Jedediah Wilcox, the defendant in the principal case, that the agreement between Foley and himself was a valid and proper contract, which could be carried out without fraud, and contemplated none; that, therefore, when he began to solicit subscriptions to the stock of the new corporation, he had an interest in the patents; that he was in fact a partner with Foley; that, in making this contract with Foley he acted wholly for himself, and stood in no fiduciary relation to the Yale Gas Stove Company, or any of its stockholders. "There was," says his counsel, "no man, and no body of men, who had any hold upon him, at the time he made this contract, nor any to whom he owed a duty, nor any selected, and in contemplation, to whom he might owe a duty." The objections "that a resale to some new corporation was contemplated, that the purchase price was to be new stock of such

corporation, that but little time elapsed between the two contracts," are said to be "all met and answered" by the cases of *Ladywell Min. Co. v. Brookes*, L. R. 84 Ch. Div. 398, and, on appeal, L. R. 85 Ch. Div. 400; *Gover's Case*, L. R. 20 Eq. Cas. 114; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73; and *Erlanger v. New Sombrero Phosphate Co.* 8 App. Cas. 1218. It is further said that these cases, and also the case of *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263, 277, and *Re Cape Breton Co.* L. R. 29 Ch. Div. 795, are authorities for the defendant's further claim, that "if it be assumed that Mr. Wilcox, as director, or while holding a fiduciary relation to the corporation, sold the patents to it without disclosing his interest therein, such sale is yet not void, but is voidable only," and that "but two courses are open to the company, to wit, they could affirm the sale, or rescind it, return the patents, and sue for the price. They cannot, as they are here attempting, keep the patents, and recover the consideration received by Wilcox from Foley."

In the light of the above claims, we will first examine the cases cited in their support, and see precisely what they hold. The principal and most recent of these English cases is that of *Ladywell Min. Co. v. Brookes*, *supra*, in which the facts were that on February 1, 1878, one Palin and three associates purchased a leasehold mine for £5,000, with a view of reselling it at a profit to a company

If one making advances to others to aid in the promotion of a corporation to purchase property which he states can be bought for a certain price, which is to go to the owners, they are entitled to rescind their contract to purchase upon learning that there is a considerable profit which he is to make by effecting the sale. *Cortes Co. v. Thannhauser*, 45 Fed. Rep. 780.

A contract releasing the provisional directors from liability made in ignorance of their fraud may be avoided when the fraud is discovered. *Grand Trunk & S. & P. U. R. Co. v. Brode*, 9 Hare, 823.

Intimately connected with the question of the recovery back of deposits is the further question of the payment of the expenses of the undertaking.

The English parliamentary subscription contract provides that the expenses of the undertaking shall be paid out of deposits. *Aldham v. Brown*, 7 El. & Bl. 164, 8 Jur. N. S. 158.

And the letter allotting the shares may reserve to the promoters the right to apply deposits to the payment of expenses in such a way as to prevent a recovery back of deposits in case the scheme proves a failure. *Jones v. Harrison*, 2 Exch. 52, 5 Railw. Cas. 138, 17 L. J. Exch. 132, 12 Jur. 122.

Where the letter calling for deposits expressly states that the money is for necessary expenses, it cannot be recovered back upon failure of the scheme, if it has been so expended. *Willey v. Parratt*, 3 Exch. 211, 6 Railw. Cas. 32, 18 L. J. Exch. 82.

But after an application for shares the provisional committee cannot require the applicant to execute an agreement which is broader than that which is provided for by the Act of 7 & 8 Vict., chap. 110, § 23. *Ashpitel v. Seroombe*, 5 Exch. 147, 6 Railw. Cas. 224, 19 L. J. Exch. 82.

Signing the agreement to permit deposits to be used to pay expenses will preclude a recovery of any part of them, if they are necessary to pay such 25 L. R. A.

expenses. *Garwood v. Ede*, 1 Exch. 264, 5 Railw. Cas. 13, 17 L. J. Exch. 23.

And such result will not be prevented by the mere fact that the parliamentary contract is not signed, if the scrip certificate received by the subscriber states that it has been. *Clements v. Todd*, 1 Exch. 268, 5 Railw. Cas. 132, 17 L. J. Exch. 31.

And if the contract has been signed a nonsuit should be granted. *Atkinson v. Pocock*, 1 Exch. 76.

In the absence of fraud, the promoters will not be prohibited from applying deposits to the payment of current expenses by the fact that the scheme fails because of failure to raise the amount required by statute, if the subscription papers contained an agreement to raise a sum not exceeding a certain amount, with no minimum limit, and provides that deposits may be applied to expenses. *Watts v. Salter*, 10 C. B. 477, 20 L. J. C. P. 43.

On the other hand if the prospectus contains a provision that in case the projected corporation is not put through all the deposits will be returned, the promoters are alone liable for the expenses, including those of winding up the concern. *Re Dover & D. R. C. P. T. & C. J. Co.* 4 DeG. M. & G. 411.

An undertaking to return the whole of the deposits without deductions is binding on the promoters. *Ward v. Londeborough*, 12 C. B. 252.

And the enforcement of the promise of the prospectus that all deposits will be returned will not be superseded by a clause in the subscription contract that deposits may be applied in satisfaction of expenses incurred in the interest of the concern. *Mowatt v. Londeborough*, 3 El. & Bl. 307.

But a promise in the prospectus to return the deposits will not save them from being attached at the suit of creditors. *Moseley v. Cressey's Co.* L. R. 1 Eq. 406, 12 Jur. N. S. 46, 35 L. J. Ch. 360, 14 L. T. N. S. 99.

In England it would seem that the allowance for expenses would include some compensation for the promoter.

to be formed. They afterwards made a provisional contract with a trustee for an intended company for £18,000 in cash. The company was formed, having for its principal object the purchase of the mine; and Palin and his associates received their purchase money, of £18,000, April 4, 1878. The contract of February 1, 1878, was not disclosed to the company, nor did it become known to it until about June, 1883, after it had gone into voluntary liquidation. In June, 1883, the company allowed judgment by default to go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions—one against the executors of two deceased vendors, and the other against the two surviving vendors—to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary capacity to the company at the time they bought the mine. It was held that the evidence failed to show this to be the fact, and that they were not liable to refund the profit they made on the transaction. The judgment of *Justice Stirling*, L. R. 34 Ch. Div. 398, was appealed from; and this appeal constitutes the case in L. R. 35 Ch. Div. 400, in which the former judgment was sustained. There are several opinions. In that by Cotton, L. J., it is said that the plaintiff claims that the defendants stood in such a position at the time of their purchase that they could not have claimed to have bought the mine for

themselves, and could not, therefore, sell it at an advanced price to the company. This is said to be mainly a question of fact, and on that question the contract of February 1, 1878, was, in its terms, perfectly absolute, and not dependent on any company being formed; that though, doubtless, it was contemplated a company should be formed, no part of the purchase money was to be provided for out of the funds of the company, or to consist of shares of the company. And it is added: "One thing which is very strong in favor of the defendants is that the whole of the price, £5,000, was in fact completely paid when the lease was granted, out of their own money, and not in any way out of money provided by means of this company." And, finally, it is said that the facts found did not make the defendants, at the time when they entered into the contract to purchase, persons so acting as to entitle the company afterwards to say: "When you bought this mine, you were acting for us. This purchase, although made by you, is one which must be considered as having been made by you for the company which was afterwards formed at your invitation." Lindley, L. J., concurring, said there might be a case for rescission, if rescission were possible, but that rescission was not possible, because the property assigned by the company did not belong to it any longer. He added: "Then we are driven to consider the point which was really raised and decided in *Re Cape Breton Co.*—whether, rescission

In *Garden v. General Cemetery Co.* 5 Bing. N. C. 253, 7 Scott. 97, 7 Dowl. P. C. 275, it was held that debt would lie to recover for services rendered and expenses incurred in obtaining the charter, which expressly provided for the payment of such expenses, and the reporter's note states that it is immaterial that the plaintiff was a member of the corporation, although the effect of such fact is not brought out in the opinion.

But where the promoters concealed from the corporation the fact that they received certain remuneration from the owners of property for procuring its purchase by the corporation, it was held that their action operated as a fraud on the company and precluded them from recovering from the company any compensation for their services to it. *Re Hereford & S. W. Wagon & Engineering Co.* L. R. 2 Ch. Div. 621, 45 L. J. Ch. 461, 35 L. T. N. S. 40, 24 Week. Rep. 953.

A statement in a prospectus that subscribers shall incur no liability in case the project does not go through, will not prevent the promoter from proceeding under the statute, in case of the winding up of the concern, for the value of his services, since the promise is to the subscribers and is not available in favor of the corporation. *Re Brampton & Longtown R. Co.* L. R. 10 Ch. App. 177, 44 L. J. Ch. 670, 33 L. T. N. S. 5, 23 Week. Rep. 818.

In Connecticut it has been held that no compensation can be collected for procuring subscriptions to stock. *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 171.

In *Hall v. Vermont & M. R. Co.*, 28 Vt. 401, charges for procuring the charter were disallowed, but those for securing stock subscriptions were allowed on the ground that the services were necessary and that a promise to pay for them would be implied.

A lump sum cannot be allowed a promoter for the expenses of organization, regardless of the actual cost of such proceedings; but, if such a sum is put into their hands, they may be compelled to  
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render an account. *Mann v. Edinburgh Northern Tramways Co.* [1892] A. C. 69, 68 L. T. N. S. 93.

#### *Duty to bondholders.*

The trust relation of promoters does not appear to have been extended so as to operate in favor of bondholders. In England it has been said that non-disclosure of contracts is not made by the statute a fraud as against bondholders. *Cornell v. Hay*, L. R. 8 C. P. 323, 43 L. J. C. P. 136, 33 L. T. N. S. 475, 21 Week. Rep. 530.

And in *Banque Franco-Egyptienne v. Brown*, 34 Fed. Rep. 162, a case in which plaintiffs sought to hold persons who had been made trustees to receive and disburse money raised by mortgage bonds on a railroad liable as trustees *ex maleficio* for a return of the subscription money because of their connection with the formation of the company and the publication of a false prospectus, the court apparently makes a distinction between the rights of shareholders and bondholders in favor of the former, by stating that misrepresentations by prospectus, except as between promoter and shareholder, is to be tried by the ordinary criterion of misrepresentation. But that case is not a valuable authority on the subject of liability of promoters, because defendant had assumed so many other relations and the discussion is based more upon such other relations than upon their standing as promoters pure and simple.

#### *Character of promoter's liability.*

Promoters are jointly liable for false representations, if they are all acting together for a common object. *Hornblower v. Crandall*, 7 Mo. App. 220, affirmed 73 Mo. 581.

The promoters are liable as partners. *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73, 45 L. J. Ch. 425, 36 L. T. N. S. 222, 26 Week. Rep. 436.

Persons who promote a corporation are liable as partners to the corporation for any illegal profits

being impossible, the company can obtain from Palin an account of the profit which he made by the transactions which have been alluded to,—and that depends really upon the evidence. But the evidence is not sufficient to enable them to succeed. It is not proved that when Palin bought—that is, on the 1st of February, 1878—he bought for the company which was ultimately formed, nor that when he bought the company was so far formed as to entitle it, or its members, to claim the benefit of the purchase, on any theory of trusteeship. Nor is it proved that persons were induced to take shares on the faith that the new company was buying from the old company. It is plain that the new company did not in fact find the money which the vendors were paid. Under those circumstances, can we say that there was any such relation between Palin and the company as to entitle the company to say, 'You bought for us?' It appears to me that the evidence is not sufficient for that purpose. If it were, we could see our way to give relief." Loopea, *L. J.*, also concurring, said: "The question is, Did Palin and his associates, on the 1st of February, stand in a fiduciary position towards this company that was thereafter to be formed? Or, in other words, were they then acting for the company about to be formed? If they were, the plaintiffs are entitled to succeed." This, he said, was entirely a question of evidence, and that in his view the evidence did not establish this conclusion.

"They bought the mine themselves, and paid for it out of their own pockets. No person is called to say they were asked to take shares by any of these vendors because they were forming a company." He concludes: "No doubt, having regard to the secret profit that was made by these vendors, the company might have claimed rescission of the contract: but, in the circumstances, rescission had become impossible." The other cases may be more briefly stated. In *Gover's Case*, *supra*, one Mappin agreed to buy a patent from Skoines for £65,000, payable partly in cash, and partly in shares of a company to be formed to use the invention. Mappin also engaged to use his best efforts to organize the company. Three months later, Mappin agreed with one Wright, who acted as trustee for the proposed company, to sell the patent to it for £125,000, payable in cash and shares, and it was also agreed that Mappin should be appointed managing director. The company was formed, and Mappin became a director. The suit was an application by Miss Gover, a subscriber pressed to pay "calls," to have her name removed from the company's register of members because of the failure to disclose the Mappin-Skoines contract in the prospectus. It was decided that the statute did not give a remedy against the company, but only against a delinquent promoter, and it held that Mappin was not a promoter when he made the contract. In *Erlanger v. New Sombrero Phosphate Co.* *supra*, a leasehold in-

which they have made, or for the damages which are adjudged to the corporation for failure to return the stock which they received without payment therefor, in case the corporation elects to take the stock. *Chandler v. Bacon*, 30 Fed. Rep. 538.

Promoters occupy towards each other the relation of partners, as to subscribers suing for a return of subscriptions. *Getty v. Devlin*, 54 N. Y. 403.

If the members of a partnership undertake to organize a corporation, each partner is liable for the misrepresentations of his copartners in the prosecution of the enterprise. *Walker v. Anglo-American Mortg. & Trust Co.* 72 Hun, 334.

The provisional committeemen are liable to contribute their respective shares to one of their number who is compelled to pay a debt contracted by them in furtherance of the scheme. *Batard v. Hawes*, 2 El. & Bl. 237, 22 L. J. Q. B. 443, 17 Jur. 1154.

In *Boulter v. Peplow*, 9 C. B. 433, 19 L. J. C. P. 191, 14 Jur. 248, where three of the provisional committee had hired offices for the use of the corporation, which was not yet organized, and one was compelled to pay the rent, he was held entitled to contribution from the other two for their shares of the amount paid.

If a person procures others to associate themselves with him for the purpose of forming a corporation, and then acts as their secretary, he cannot maintain an action against them for his services expended on behalf of the project. *Parkin v. Fry*, 2 Car. & P. 311.

In *Holmes v. Higgins*, 1 Barn. & C. 74, 2 Dowl. & R. 196, in which it appeared that certain persons had associated for the purpose of procuring a charter for a railroad, it was held that they were partners in the enterprise, so that one could not maintain an action against others for services rendered by him as a surveyor, although there is no discussion of the relative rights of the parties in the character of promoters of a corporation. 35 L. R. A.

No promoter can recover his expenditure from the others without consenting to an account of all expenses entered on all the promoters. *Denton v. Macnell*, L. R. 2 Eq. 353, 14 Week. Rep. 812, 14 L. T. N. S. 721, 35 Beav. 652.

A finance committee, acting under authority of the managing board, will not be held alone liable for a misapplication of funds subscribed. *Carpen-ter's and Weiss's Cases*, 5 De G. & S. 432, 16 Jur. 900, 21 L. J. Ch. 335.

The general subject of partnership liability of stockholders in case of defective or illegal incorporation is treated in a note to *Rutherford v. Hill*, (Or.) 17 L. R. A. 549.

#### *Effect of promoters' fraud upon corporations' right against subscriber.*

If a subscription is procured by fraud, it cannot be enforced. *Centre & K. Turnp. Road Co. v. McCosaby*, 16 Serg. & R. 140; *Venezuela Cent. R. Co. v. Kisch*, L. R. 2 Eng. & Ir. App. 90.

The fraud of the promoters in statements made in the prospectus may entitle a subscriber to have his name removed from the list. *Kent v. Freehold Land & Brick-Making Co.* L. R. 4 Eq. 533, 17 L. T. N. S. 77.

That the promoters made a large profit out of property which they undertook to purchase for the corporation will not relieve a subscriber from paying his subscription to a receiver of the company. *Dorris v. French*, 4 Hun, 202.

The mere fact that the subscriber is not informed that only a portion of the subscriptions have been paid in is not such fraud as will avoid a subscription agreement. *Vane v. Cobbold*, 1 Exch. 793.

In *Gover's Case*, L. R. 1 Ch. Div. 123, 45 L. J. Ch. 83, 33 L. T. N. S. 619, 24 Week. Rep. 123, affirming L. R. 20 Eq. Cas. 114, which was an application to have the name of a subscriber removed from the list, after the affairs of the corporation had begun to be wound up, it appeared that a certain person had



terest in the island of Sombbrero was purchased by a syndicate acting for themselves alone, and not as the representatives of any corporation existing or proposed. Soon afterwards, they formed a joint-stock company, and sold the lease to it for double the price paid by them. The contract of purchase by the corporation, at its instance, was set aside. In *Re Cape Breton Co.*, *supra*, the facts, briefly, were: One Fenn was the agent of a company to purchase a specific property, in which, before the commencement of his agency, he had acquired an interest. He did purchase it for the company, without disclosing to the company his interest in the property. After his purchase the facts were fully disclosed, and, with the knowledge so acquired, the company elected to retain the property. It was held the company could not recover, but the court said: "This case is not the case of an agent who, after he has accepted the agency, has acquired property, the purchase of which was within the scope of his agency, and then has resold that property to his principal at a larger sum, in which case it is obvious that the principal may say that the original purchase by the agent at a small price was a purchase in behalf of the principal." In *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 277, it is sufficient to say that the principle is laid down that a voidable contract remains good until rescinded, and that, to rescind, the property obtained under the contract must be returned.

Who and what are "promoters," so called, of corporations, and what their relations to the corporations which they help to form, has been more frequently judicially considered and determined by the English courts than by those of this country. Some English cases appear to be more in point, as applicable to the questions arising upon the record, than those cited by the defendant, to which we have just referred. A "promoter" has been defined to be a person who organizes a corporation. It is said to be, not a legal, but a business, term, "usefully summing up, in a single word, a number of business operations familiar to the commercial world, by which a company is generally brought into existence." *Brown, J.*, in *Whaley Brads Calico Printing Co. v. Green*, 38 Week. Rep. 851, 852, L. R. 5 Q. B. Div. 109. That such persons occupy a fiduciary relation towards the company or corporation whose organization they seek to promote is well settled by the decisions of both countries. *Lord Cotton* prefers to call them "trustees." *Bagnall v. Carlton*, L. R. 6 Ch. Div. 885. *Sir George Jessel, M. R.*, in *New Sombbrero Phosphate Co. v. Erlanger*, *supra*, said, "Promoters stand in a fiduciary relation to that company which is their creature." In *Erlanger v. New Sombbrero Phosphate Co.*, *supra*, the lord chancellor said of promoters: "They stand, in my opinion, undoubtedly, in a fiduciary position. They have in their hands the creation and molding of the company. They have the power of

agreed with the owner of a patent to purchase it for a certain price, and three months afterwards he made an agreement with a trustee for a corporation to sell it to the corporation for a price nearly double that paid for it, and two of the judges held that at the time he made his purchase he was not a promoter of the corporation, and that his failure to specify that agreement in the prospectus was not fraudulent, either under general law or under the statutes. One judge held that since, after the agreement, he became a promoter he should have made a disclosure, and one held that the failure to make the disclosure was fraudulent under the statute, and three judges to one held that the plaintiff was not entitled to have her name removed from the list.

But the company is not bound by promises made by a promoter in securing subscriptions. *Joy v. Manion*, 28 Mo. App. 55.

So violation of the promoters' guarantee that the railroad would pass near a certain tract of land will not release a subscriber. *Braddock v. Philadelphia, M. & M. R. Co.* 45 N. J. L. 363.

#### *Feigned subscriptions.*

In many cases the promoter has made an agreement with some one whose influence was needed in the enterprise that if he would subscribe for shares he would not be called upon to pay them, or fictitiously paid-up shares have been furnished him by the promoter. In such cases the corporation is generally held to be entitled to enforce the liability apparently assumed by the subscriber.

A promoter's promise that a subscriber will not be required to pay for his shares is without avail. *Litchfield Bank v. Church*, 29 Conn. 137.

So an agreement by the promoters that the stock issued to one of the subscribers is given him for the influence of his name and that he will not be required to pay for it is not binding on the corporation. *55 L. R. A.*

*tion. York Park Bldg. Assn. v. Barnes (Neb.) March 21, 1894.*

So a secret agreement that a subscriber may, at his option, be relieved from a portion of his subscription is not valid as against other subscribers. *White Mountain R. Co. v. Eastman*, 34 N. H. 124.

Nor is it binding on a corporation. *Miller v. Hanover Junction & S. R. Co.* 87 Pa. 97, 30 Am. Rep. 349.

A subscriber will not be permitted to defend against a subscription on the ground that it was feigned. *Graff v. Pittsburgh & S. R. Co.* 31 Pa. 490.

Persons to whom promoters give shares to qualify them as directors are liable upon the winding up of the concern to pay the value of them. *Re Pearson's Case*, L. R. 4 Ch. Div. 222, affirmed in L. R. 5 C. H. Div. 336, 45 L. J. C. H. 339, 25 Week. Rep. 618.

A director accepting shares from a promoter to qualify him to act, which the promoter obtained without paying for them as part of his profit in getting up the concern, is liable to pay for them at their highest market value at any time after he received them. *Nant-y-glo & B. Ironworks Co. v. Grave*, L. R. 12 Ch. Div. 738, 38 L. T. N. S. 345, 26 Week. Rep. 504.

Each of several directors who accepts from the promoter certain unpaid promotion shares is liable to the company for the whole amount due on all, and he cannot set off amounts which he has advanced to the corporation for expenses. *Re Carriage Co-op. Supply Assn.* 51 L. T. N. S. 236, L. K. 27 Ch. Div. 323, 53 L. J. Ch. 1154, 33 Week. Rep. 411.

Directors must account for shares given them by promoters. *Re Drum Slate Quarry Co.* 53 L. T. N. S. 250, 55 L. J. Ch. 36.

In *Re Postage Stamp Automatic Delivery Co.* [1892] 3 Ch. 563, 67 L. T. N. S. 88, directors who had been rendered eligible by stock given them by the owner of the property and promoter of the company under an agreement which was afterward ratified by the company, were held not bound to

defining how, and when, and in what shape, and under what supervision, it shall start into existence, and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchasers of the property of themselves (the promoters), it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive; that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it; but I do say that if he does he is bound to take care that he sell it to the company through the medium

of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person." *Lord O'Hagan*, referring to the same subject, expressed a similar opinion in even more emphatic language; declaring that while an original purchase might be legitimate, and not less so because the object of the purchaser was to sell it again, and to sell it by forming a company which might afford them a profit on the transaction, yet "the privilege given them for promoting such a company for such an object involved obligations of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future stockholders." The test, therefore, of the validity of such transactions, is that it must, in all its parts, be open and

pay up the amount of them, but were required to pay up the amount of other shares received by them under an agreement which was concealed from the company.

And equal strictness is observed in all cases of feigned subscriptions or transactions amounting thereto.

An agreement, by which persons organizing a corporation are to have bonds of the corporation to an amount equal to the stock subscribed for, secured by mortgage on the company's property, is illegal and void and cannot be enforced against the company. *Morrow v. Nashville Iron & Steel Co.* (Tenn.) 8 L. R. A. 37.

A promoter cannot make an agreement with a director to take from him his qualification shares at any time he may wish to resign, at the price he paid for them. *Re North Australian Territory Co.* (Archer's Case) [1892] 1 Ch. 322.

Directors who accept shares from the promoters to qualify themselves may be rendered personally liable for the return of deposits which have been induced by false misrepresentations in the prospectus. *Henderson v. Lacon*, L. R. 5 Eq. 249, 18 L. T. N. S. 27, 16 Week. Rep. 323.

Where the provisional directors professed to the shareholders that they had taken enough additional stock to float the concern, they were not allowed to pay back to themselves the whole amount so advanced, upon the failure of the scheme. *Williams v. Page*, 24 Beav. 664, 4 Jur. N. S. 102, 27 L. J. Ch. 426.

#### *Waiver of fraud.*

A fraud practiced on stockholders cannot be ratified or even waived by the directors. *Burbank v. Dennis* (Cal.) Jan. 11, 1894.

#### *How suit should be brought.*

The result of the promoter's owing a duty to both corporation and subscriber is that breach of duty may render him liable to different kinds of action. Of course in many cases the remedy is plain and the proper plaintiff a matter of no doubt. But cases have arisen in which relief has been in a form which has been adjudged to be improper.

A distinction was made between an action by the company for rescission and by subscribers for deceit, in *Arkwright v. Newbold*, L. R. 17 Ch. Div. 301, 50 L. J. Ch. 372, 44 L. T. N. S. 303, 29 Week. Rep. 455.

If the agreement of the individual subscribers is merely to take stock in the corporation and the corporation agrees to purchase the property, it is the proper party to bring suit for a rescission of 25 L. R. A.

the contract to purchase. *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610.

And if the promoters have received money on subscriptions and used it in purchasing property, from which a profit has been realized, it may be secured for the benefit of the subscribers at the suit of some on behalf of all, although the corporation has never been formed and the subscribers are not limited to the remedy of suing for a return of their deposits. *Butt v. Monteaux*, 1 Kay & J. 98, 24 L. J. Ch. 99.

If the promoters are charged with having sold land to the corporation at a profit and with having squandered the funds of the corporation, individual members of the corporation cannot maintain a bill on behalf of themselves and others without showing that the company was prevented from maintaining the suit in its corporate capacity. *Foss v. Harbottle*, 2 Hare, 489.

But in case the corporation will not bring an action to recover the secret profits, it may be maintained by a stockholder. *Burbank v. Dennis* (Cal.) Jan. 11, 1894.

One shareholder may maintain a bill on behalf of himself and all others for an account of the receipts and expenses of the promoters and a return of the unexpended balance. *Cooper v. Webb*, 15 Sim. 464, 4 Railw. Cas. 582, 11 Jur. 443.

If a majority of the stock is owned by the promoter, so that the corporation cannot be prevailed upon to bring the action, it may be brought by one subscriber on behalf of himself and others. *Atwood v. Merryweather*, 37 L. J. Ch. 35.

In *Apperley v. Page*, 16 L. J. Ch. N. S. 100, some of the subscribers were held entitled to maintain a bill on behalf of all, where it sought an account, alleged that the promoters had been expending money for unauthorized purposes, and asked that only legitimate expenses should be paid out of the deposits and the remainder returned to subscribers.

The plaintiff need not proceed under the winding-up acts, and neither the directors nor the other shareholders need be parties to the record. *Clements v. Bowes*, 17 Sim. 167, 16 Jur. 96, 21 L. J. Ch. 306.

If the promoters have paid back a portion of the deposits, individual subscribers cannot maintain an action on behalf of themselves and all others for an account, since if there has been an overpayment the promoters are entitled to have a pro rata return of it, and are therefore entitled to have all the subscribers before the court. *Williams v. Salmond*, 2 Kay & J. 463, 2 Jur. N. S. 251.

H. P. F.

fair, so that the promoters shall not, in fact substantially "act both as vendors and vendees, and in the latter capacity approve a transaction suggested by them in the former." *Foss v. Harbottle*, 2 Hare, 461, 488; *McElhenny's App.* 61 Pa. 188; *Simons v. Vulcan Oil & Min. Co.* Id. 202; *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307; *South Joplin Land Co. v. Case*, 104 Mo. 572; *Re British Seamless Paper-Baz Co.* L. R. 17 Ch. Div. 467; *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. Div. 394. In the last case the distinctive feature was that the vendors paid the commission to the trustees who received the property on behalf of the company. They were compelled to pay it to the company. In *Hichens v. Congreue*, 1 Russ. & M. 160 (on appeal, 4 Russ. 563), three promoters induced their company to buy a mine for £25,000, of which they received from the vendor, and divided among themselves, £15,000. This they were compelled to account for to the company. Similar cases are *Beck v. Kantorowicz*, 3 Kay & J. 230; *Whaley Bridge Calico Printing Co. v. Green*, *supra*; *Rimma Silver Min. Co. v. Grant*, L. R. 11 Ch. Div. 918; *Bagnall v. Carlton*, *supra*; *Kent v. Freehold Land & Brick-making Co.* 17 L. T. N. S. 77; *Re Mission Land & Water Co. v. Flash*, 97 Cal. 610.

It is an undoubted rule of law that where two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid by his associates, when in fact he receives a difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it. *Emery v. Parrott*, 107 Mass. 95. The same principle is applied against promoters of corporations, in case of any secret contract more favorable than that disclosed. *Pittsburg Min. Co. v. Spooner*, *supra*, and the very numerous cases therein cited, and an exhaustive note, by Mr. Freeman, to said case, 17 Am. St. Rep. 149, 167. See also, as applied to directors, *Cook, Stock & Stockholders & Corporation Law*, §§ 649, 650; *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426; *Wardell v. Union Pac. R. Co.* 108 U. S. 651, 26 L. ed. 509; *McGourkey v. Toledo & O. Cent. R. Co.* 146 U. S. 536, 36 L. ed. 1079.

A careful examination of the cases will, we think, disclose two grounds of the liability of defendants to corporations for undisclosed profits resulting from transactions with such corporations: First, where the defendants are corporate fiduciaries. The characteristic of this relation is trust. Such a relation undoubtedly exists between companies and their officers, such as directors. *Mallory v. Mallory-Wheeler Co.* 61 Conn. 185. With reference to promoters, since a man cannot receive an appointment from a non-existent company, the proof may be less obvious; but it may nevertheless be shown conclusively, by a variety of representations, admissions, and acts. The second ground of liability is fraud. The law does not pro-

hibit a promoter from dealing with his company, but he must make full disclosure to the company of his relations to the property that is the subject of his deal. Suppression, concealment, or misrepresentation of material facts is fraud, upon proof of which rescission of contract, or repayment of the secret profits, will be compelled. A very recent English case, in which a secret arrangement between a promoter and a director of a company was considered, is that of *Re North Australian Territory Co.—Archer's Case*—[1892] 1 Ch. 822. The facts in the case were these: Archer, being requested by the promoter of a projected company to become a director, agreed to do so upon the terms that if he should, at any time, desire to part with the shares he was to take in order to qualify him as director, the promoter should purchase them of him at the price he should pay for them. The company was subsequently formed, and Archer became a director, took the qualification shares, and paid for them at par, out of his own money, and from time to time acted as director; but he never disclosed to his codirectors, or to the company, his agreement with the promoter. He afterwards resigned his office of director, and, subsequently to his resignation, the promoter, at his request, paid to him the sum which he had paid for the shares, and accepted a transfer of them. At that time the shares were valueless in the market. In the winding up of the company, the liquidators asked that Archer be ordered to pay to them the sum received by him from the promoter, with interest; and it was held (reversing the lower court) that having regard to his position as director of, and therefore agent for, the company, whatever benefit or profit accrued to him under the indemnity constituted by his secret agreements with the promoter belonged to the company, and that the retention by him of the proceeds of the indemnity occasioned a loss to the company, for which he was accountable, with interest, upon what was declared to be the principle of *Hay's Case*, L. R. 10 Ch. App. 598, and *Re Pearson's Case*, L. R. 5 Ch. Div. 386. During the argument the counsel for the liquidators, in support of the appeal, were stopped by the court; and counsel for Archer, then proceeding, were submitted to some peculiar interruptions by the judges. Fry, L. J., asked: "Why should not Archer be accountable for the £500, as property of the company retained by him?" Counsel replied: "The real question is, Did the company suffer loss by what was done? They never had the £500, and therefore cannot be said to have lost it. In the majority of cases in which a director has been held accountable to the company, he has, in effect, received money which originally came from the coffers of the company, as in *Hay's Case*, and the cases already mentioned." Bowen, L. J.: "Smith, being in a fiduciary relation to the company, had no right to give a director a benefit without the company knowing it. An indemnity against loss is a valuable consideration." Counsel said: "At the time the letter was written, Archer had not taken the shares, and had not then agreed to become a director. Again,

there is no evidence that the contract was not disclosed to the company." Fry, *L. J.*, asked: "Would an honorable man assent, as Archer did, to accepting this indemnity, on the terms that he was to keep it secret? If it was not actually dishonest, it seems to me to be a very improper course of proceeding." Bowen, *L. J.*: "Is it right that the wolf should give a sop to the watchdog without his master's leave?" This question appears to have practically "closed the debate." The opinions of the judges, separately declared, appear at considerable length in the report, and are so able and apposite that we regret that we cannot feel warranted in quoting from them.

Applying the principles recognized in the decisions to which we have referred to the case before us, it seems clear that the plaintiff in the principal case is entitled to recover. The finding is explicit that the original arrangement between Wilcox and Foley contemplated no acquisition of any interest in the patents by Wilcox, but the organization by Wilcox of a corporation, and the sale to it of such patents; then a division between Foley and Wilcox of the avails of such sales. The written contract between Wilcox and Foley was entered into for the purpose of carrying out said plan of organizing the company, selling the patent, and dividing the avails. In the agreement itself, while it is stated, under a "whereas," that Wilcox is desirous of owing one half of said patents, yet the very writing discloses that the proper construction of this language is that the patents, as belonging to Foley, should be sold to a joint-stock corporation, to be organized by Wilcox, for twice the sum that Foley was willing to dispose of them for, namely, for the sum of \$3,000 in cash to be received from the company, and \$5,000 of the capital stock of the company, and that then Foley should give to "said Wilcox one half of the three thousand dollars cash, as soon as received, and one half of the five thousand dollars of the capital stock of the company, as he shall receive it." Such being the arrangement, it was, very appropriately, agreed that it should be kept secret. Wilcox, in soliciting subscriptions for stock, most scrupulously observed such obligation of secrecy, and also went further, and, "for the purpose of inducing persons to subscribe for said stock, stated to nearly all of the persons who subscribed for said stock, and who now constitute the stockholders of said company, that he (Wilcox) was putting his money into said enterprise upon precisely the same basis as the others of said subscribers, and it was with that understanding that nearly all of said persons subscribed for said stock." The corporation was organized, and Wilcox, at its first meeting, was present, and was elected temporary clerk and a director, and voted in favor of a resolution (which was adopted) which recited that Foley was the owner of certain letters-patent, necessary and convenient for the purposes of the company, and which directed their purchase for certain stock and the sum of \$3,000 in cash. It will thus be seen that the transaction between Wilcox and Foley contemplated, and 25 L. R. A.

Wilcox, in its execution, both as promoter and director, used, every possible species of bad faith, breach of trust, and infidelity, while occupying such a fiduciary relation. Placing the actual conduct of Wilcox side by side with the standard of conduct required of those in such positions, as declared by the judges in the *New Sombrero Phosphate Co. Case*, *supra*, so much relied upon as authority by the defendant, the contrast is overpowering. Although many of the very numerous cases which we have cited, and almost numberless others to which reference might also be made, are direct authorities for the doctrine that, in such cases as that before us, a defendant may be compelled to account, though no offer of rescission is made, and the property may be worth as much or more than was paid for it, and although the subject has already been incidentally referred to and considered, in certain aspects of it, in this opinion, yet, in view of certain language in some of the cases upon which the defendant relies, including *Mallory v. Mallory-Wheeler Co.*, *supra*, and *Tryon v. White & Corbin Co.* 62 Conn. 171, 20 L. R. A. 291, it may be useful, further, to say that, properly understood, there is nothing in any of such cases cited by the defendant in conflict with the doctrine stated. Thus, in *Mallory v. Mallory-Wheeler Co.*, *supra*, the plaintiff sought to recover a sum as balance of salary claimed to be due him for services rendered as chief manager and director of the defendant's business. It was claimed that the contract under which such service was performed was void, or, if not void, that it was voidable at the option of the corporation. This court, treating it as a case in which a director had made use of a fiduciary relation to secure for himself an advantageous contract for a salary, held that, independent of the question of public policy, such transaction was voidable at the election of the corporation. The court then added: "It may fairly be gathered from the authorities cited that the rule we are now considering does not operate, *ipso viro*, to avoid every transaction of a trustee, made with his beneficiary, in which he is interested. It is generally limited in its operation to rendering it voidable at the election of the party whose interests are concerned in the question of its affirmance or disaffirmance. If, therefore, nothing was done in avoidance, the transaction remains. 2 Pom. Eq. Jur. § 1077; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190, 193. Much more if the transaction has been ratified by that party. *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 255. This court, in that case, was considering a transaction in which there was no concealment or secret profit, and nothing proved to have been done in actual, as distinguished from constructive, bad faith or fraud; and the plain distinction between such a case and the one under consideration, in reference to equitable relief, is clearly shown in the section referred to in *Pomeroy* (1077), and the very numerous authorities cited in the exhaustive note to that section, in the second edition. The same thing may be said in reference to other cases relied upon by the defendant; and we think

the contention that a person who, first as a promoter, then as a director, induces a corporation to embark its capital in a business, in such a way that the rescission of its purchase of property essential to the continued life of the company can only be made by the sacrifice of such existence, can retain his secret profits in the transaction, unless the contract shall be rescinded and the enterprise abandoned, is contrary to the doctrine of numerous cases, and without the intended sanction of any. Such a rule would permit retention of secret profits, and its enforcement would turn the courts into promoters, not of corporations, but of frauds upon them, numerous enough as they are, and needing no such promotion. "It is a general rule that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract, and demand back what has been received under it, or he may affirm the bargain, and sue and recover damages for the fraud." Cooley, Torts, 589, 591, and cases cited in note 2. Thus, if, after discovering a shortage in goods, the price is paid, an action lies for the fraud, although the contract may not be disaffirmed. *Nauman v. Oberle*, 90 Mo. 666. So, also, in case of wrong dealing by a trustee, the rule is, when the facts come to the knowledge of the *cestui que trust*, he may either affirm or repudiate the transaction, and if he does the former he may yet recover secret profits. Thus, where a partner sold his own goods to a partnership without the knowledge of his associates, he was held liable to account to them for the profits. *Bentley v. Craven*, 18 Beav. 75. See also, *Kimber v. Barber*, L. R. 8 Ch. App. 56; *Gelty v. Devlin*, 54 N. Y. 412. The same rule applies in the law of principal and agent, and of attorney and client; indeed, in every case where one improperly conducts himself to his own advantage while acting in any fiduciary capacity. The language, therefore, cited from *Mallory v. Mallory-Wheeler Co.* and the statement in *Tryon v. White & Corbin Co.* 62 Conn. 178, 20 L. R. A. 291, that "an acceptance of the benefits of the transaction imposes an obligation to assume its burdens," and the principles stated in other decisions relied upon by the defendant, have no legitimate application to cases where a corporation seeks to recover from a promoter or director money had and received, which, in equity and good conscience, belonged to the corporation. Instead of rescinding the transaction of purchase, the corporation, by its suit, affirms it, and enforces the real contract, as made for its benefit, and not the pretended contract, as simulated, in order to defraud it. In such a case the corporation recognizes the obligation to assume the burdens, and only demands that it shall receive "the benefits, of the transaction." Indeed, the principle of *Murray v. Jennings*, 42 Conn. 9, 19 Am. Rep. 527, is decisive of this whole matter.

The defendant in the principal case further contends that the Yale Gas Stove Company does not appear in court with clean hands.

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It is said the finding shows that "the real bargain between Foley and the Yale Gas Stove Company fixed the price to be paid for his patents at \$3,000 in cash and \$5,000 in stock," but that, to avoid the joint-stock law, and to defraud the public, a sham contract was made; that thereafter a court of equity should leave them where they have placed themselves. "With what propriety," it is asked, "can the court decree that one party shall give up to the other an illegal profit, while permitting that other to keep an equally illegal profit obtained in the same transaction?" The maxim that "he who comes into equity must come with clean hands" has no such application as the defendant seeks to give it. It refers solely to willful misconduct in regard to the matter in litigation. Snell, Eq. 35. Though an obligation be indirectly connected with an illegal transaction, it will not thereby be barred from enforcement, if the plaintiff does not require the aid of the illegal transaction to make out his case. *Armstrong v. American Ech. Nat. Bank*, 188 U. S. 483, 83 L. ed. 747; *Lewis's App.* 67 Pa. 158, 166; *Woodward v. Woodward*, 41 N. J. Eq. 224; *Pittsburg Min. Co. v. Spooner*, *supra*.

Finally, the suit was properly brought by the corporation, instead of by its stockholders. The question arose in *New Sombraero Phosphate Co. v. Erlanger*, *supra*, and James, L. J., said (L. R. 5 Ch. Div. 122): "The company represent the contracts of yesterday as of to-day, as they will the contracts of tomorrow or the next day or next year. They represent the contracts which were made by the company. They are liable upon the contracts, and they have every right, in respect of those contracts, which an individual being would have if he had the like case, or was under the like liability. Therefore, I am of the opinion that the company not only can sue, but that the company was the only proper plaintiff that could sue, upon the case made by this bill." See also, 1 Morawetz, Priv. Corp. § 546; 3 Pom. Eq. Jur. §§ 1094, 1096, and the numerous cases therein cited. Indeed, no contention upon this point was made.

In reference to the suit of *Wilcox v. Foley*, the contract between them was manifestly opposed to public policy, to good morals. It is illegal, and cannot be enforced. If any one has a cause of action against Foley, not upon the contract, but by reason of the transaction to which it led, it is the corporation, and not Wilcox.

The superior court is advised that judgment be rendered for the plaintiff in *Yale Gas Stove Co. v. Wilcox*, to recover \$3,000, with interest on \$500 of said sum from October 9, 1890, to the date of said judgment, and interest on the balance, of \$2,500, from December 1, 1890, with costs, and, in the case of *Wilcox v. Foley*, that judgment be rendered for the defendant.

The other Judges concurred.

C. W. BLAKESLEE *et al.*  
v.  
Anthony CARROLL, *Appt.*

(.....Conn.....)

1. Testimony under oath before a committee of aldermen investigating charges against the city board of public works is not absolutely privileged.
2. The report of a committee of aldermen is admissible to show that the committee did investigate matters not specifically committed to it in order to show that a witness, who is charged with slander in statements made to the committee, was making relevant statements.
3. Pertinent and relevant testimony of a witness before a committee of aldermen having power to compel testimony is within the conditional privilege of the witness, although the committee appointed to investigate certain charges against the board of public works had extended the scope of its investigation to other charges against the board, and in respect to these the evidence was given.
4. The mere fact that words uttered by a witness were not in response to questions does not avoid the privilege, if they were spoken in respect to pertinent and relevant matters, although statements officiously volunteered might be evidence of express malice.
5. A citizen is privileged in going before a committee of aldermen investigating charges against city officials and in good faith giving such information as he may have touching the matter under investigation.

(March 6, 1894.)

**A** PPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiffs in an action brought to recover damages for the utterance of an alleged slander. *Reversed.*

Plaintiffs were general contractors for public works; defendant was a sewer contractor; a committee of aldermen was appointed to investigate charges against the board of public works. Defendant appeared before it and made the following statement:

"I may be poor; I don't own as much money as the Blakeslees; but I tell you, you see the city property go up there, and see the Blakeslees' yard; see the cobble stones and paving stones belonging to the city; look at the city year book, and see how much they drew out of it; no wonder they be rich; and why cast reflections on my name, when I do my work?" By these words, as plaintiffs charged, defendant "meant to be understood and was understood by those who heard him, to mean that the plaintiffs did not honestly obtain said cobble stones and paving stones, and that they had either stolen the same, or they had fraudulently obtained them by collusion with the board of public works; and that

they had unlawfully taken into their possession and unlawfully appropriated to their own use a large quantity of paving stones and cobble stones, the property of the city of New Haven, with an attempt to defraud said city."

*Mr. William L. Bennett* for appellant.  
*Messrs. E. P. Arvine and R. S. Pickett,* for appellees:

The verdict taken with the charge shows that the jury have found that the words were malicious. Carroll departing from any issue before the committee simply took these two occasions to slander a rival firm of contractors.

1 Kent, Com. pt. 4, p. 23; *Fairman v. Ives*, 5 Barn. & Ald. 642; *Gould v. Hulme*, 8 Car. & P. 625; *Lathrop v. Hyde*, 25 Wend. 448; *Bradley v. Heath*, 12 Pick. 168, 22 Am. Dec. 418; *York v. Pease*, 2 Gray, 282.

The admission of the excluded question was claimed on the ground that the defendant might show that he made a complaint in good faith as a citizen, to the committee of the whole, believing his complaint to be true, and might show what he had heard in order to prove his good faith in the matter.

The committee of the whole was not a proper body before which to make such a complaint.

*Williams v. Miner*, 18 Conn. 464; *Swift v. Dickerman*, 31 Conn. 285; *Moser v. Stoll*, 119 Ind. 244.

The board of aldermen, sitting as a committee of the whole, are not in the sense as the law speaks of, courts of justice, or a court of justice, or a quasi judicial body. The words uttered before them are not absolutely privileged, whether uttered in malice or not.

*Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 380; *Mover v. Watson*, 11 Vt. 536, 34 Am. Dec. 704; *McLaughlin v. Conley*, 127 Mass. 316; *Hooper v. Loveland*, 19 Barb. 111; *Smith v. Howard*, 28 Iowa, 51.

The false and malicious testimony of a witness upon a matter over which the tribunal before which he is testifying has no real or apparent jurisdiction is not privileged.

Starke, Libel & Slander, § 329; *Huntley v. Ward*, 6 C. B. N. S. 514; *Smith v. Howard*, *supra*; *White v. Carroll*, 42 N. Y. 161, 1 Am. Rep. 508; *Gilbert v. People*, 1 Denio, 41, 43 Am. Dec. 646.

The court left the questions of the good faith, or malice of the defendant, to the jury, where they properly belonged and the charge contains nothing to prejudice the defendant.

*Lathrop v. Hyde*, 25 Wend. 448; *Brow v. Hathaway*, 13 Allen, 289; *Locke v. Bradstreet Co.* 22 Fed. Rep. 771; *Gassett v. Gilbert*, 6 Gray, 94; *Bacon v. Michigan Cent. R. Co.* 66 Mich. 166.

The court was fully justified in charging the jury as it did, as to the character and powers of the tribunal, individual, or associated body of men, in question.

Heard, Libel & Slander, 101, 102, 104; *Brow v. Hathaway*, *supra*; *Honn v. Wood*, 3 Met. 193; 7 Wait, Act. & Def. 178, 174.

There is no claim anywhere, that the defendant had any intention of making any statement as a citizen, or that he made a complaint to the wrong body, believing or thinking that

**NOTE.**—The question of the privilege of a witness in respect to making defamatory statements when giving testimony, which is here applied to the case of testimony before a municipal investigating committee, is considered with respect to testimony in any judicial investigation in a note to *Cooper v. Phipps* (Or) 23 L. R. A. 836, 25 L. R. A.

he was making it to the right one. His entire evidence before the court was offered in support of the claim that he was testifying as a witness.

*Odgers, Libel & Slander*, 271; *White v. Nichols*, 44 U. S. 3 How. 266, 287, 289, 291, 11 L. ed. 591, 600, 601, 602; *Shadden v. McElwee*, 86 Tenn. 149; *Neeb v. Hope*, 111 Pa. 145; *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49.

Substantial justice has been done, which should not be disturbed by a conjecture, or extinguished by a shadow.

*Howard v. Miner*, 20 Me. 325; *French v. Stanley*, 21 Me. 512; *Hoitt v. Holcomb*, 32 N. H. 186; *Etting v. Bank of United States*, 24 U. S. 11 Wheat. 59, 6 L. ed. 419; *Elam v. Badger*, 23 Ill. 498.

**Torrance, J.**, delivered the opinion of the court:

This is an appeal by the defendant from a judgment in an action of slander. The complaint sets out the alleged slanderous words in full, and alleges, in substance, that they charge or impute a crime, and are false and malicious. The defendant in his answer, after admitting that he uttered the words set out in the complaint, but denying that they had the meaning therein ascribed to them, alleged, in substance—First, that they were true, and not false and malicious; second, that “said words were spoken by the defendant as a witness testifying under oath before a committee of the board of aldermen of the city of New Haven, a body having power through their presiding officer to compel the attendance and testimony of witnesses before them by the issue of subpoenas and the administration of oaths in the manner and according to the rules governing the same in courts of justice;” third, that “said words were spoken by the defendant as a witness at a certain hearing or investigation held by the board of aldermen of the city of New Haven, sitting as a committee of the whole, concerning the performance by the board of public works of said city, as then constituted, of the duties imposed upon said board of public works; and in connection therewith concerning the granting of contracts to persons connected with the government of the city of New Haven, and serving upon any of the boards of said city;” and “that it was the duty and privilege of the defendant, not only as a person employed and making his living in constructing sewers, but as a citizen interested as such in the good and economical government of the city, to bring to the attention of said board of aldermen at said hearing such matters as were believed by him to be true, and as were pertinent and relevant to the matters under consideration by said board; and that the words so uttered were pertinent and relevant, and were uttered without malice and in good faith.”

It is quite evident from the record that the main contention between the parties in the court below related to the question whether the occasion upon which the alleged slanderous words were uttered was what is called a “privileged occasion,” either absolutely or conditionally; and, if the latter, whether the defendant had exceeded his privilege, or

had been influenced by actual malice; and the questions involved in the present appeal relate almost entirely to the same matters. The reasons of appeal are somewhat numerous, assigning errors in the rejection of evidence, in the refusal of the court to charge certain requests, and in certain parts of the charge as given; but it is hardly necessary to consider them all separately or in their numerical order. One of the questions presented, and one that it seems well to consider first, is whether the occasion upon which the words in question were uttered was one of absolute privilege, as it is called, or only one of conditional privilege. It is settled law that in action of slander and libel the defendant is permitted to show, if he can, that the circumstances under which the defamatory words were published were such as to shield him from liability for what would otherwise be an actionable wrong. In such cases the occasion of the publication is, for the sake of common convenience and in the interests of society, said to free the defendant from the liability that would otherwise be imposed upon him, and is called a “privileged occasion.” These occasions are usually divided into two classes,—those absolutely privileged, and those conditionally privileged. The general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages recoverable in an action of slander; while such words spoken upon an occasion only conditionally privileged impose such liability, if spoken with what is called express malice. In the former class the freedom from liability is said to be absolute or without condition, as contrasted with such freedom in the latter class, where it is said to be conditioned upon the want or absence of express malice. The freedom from liability in the first class is founded upon the principle that in certain cases it is “advantageous for the public interest that persons should not be in any way fettered in their statements,” but should speak out the whole truth, freely and fearlessly. *Odgers, Libel & Slander*, \*186. This class is comparatively a narrow one, and is, speaking generally, strictly confined to legislative proceedings, judicial proceedings in the established courts of justice, acts of state, and acts done in the exercise of military and naval authority. In judicial proceedings the protection of the rule extends to judges, counsel, and witnesses. “I take this to be a rule of law not founded, as is the protection in other cases of privileged statements, on the absence of malice in the party sued, but founded on public policy, which requires that a judge in dealing with the matter before him, a party in preparing or resisting a legal proceeding, and a witness in giving evidence in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel.” *Kennedy v. Hilliard*, 10 Ir. C. L. Rep. 195; *Munster v. Lamb*, L. R. 11 Q. B. Div. 588; *Seaman v. Nethercliff*, L. R. 1 C. P. Div. 540; *Davkins v. Rokeby*, L. R. 7 H. L. Cas. 744. In the case last cited, which was the case of a

witness before a military court of inquiry, *Lord Penzance* thus states the foundation of the rule: "I wish to say one word on the supposed hardship of the law which is brought into question by this appeal. It is said that a statement of fact of a libelous nature which is palpably untrue—known to be untrue by him who made it, and dictated by malice—ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth and assumes the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man. But this is not the state of things, under which this question of law has to be determined. Whether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against so doing are simple and obvious. A witness may be utterly free from malice, and may yet, in the eyes of the jury, be open to that imputation; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expense and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands."

The existence of what is called an absolute privilege at common law in the case of a witness testifying in a court of law is generally recognized by the courts of this country, although they are not perhaps agreed as to the extent of the privilege, or as to the occasions which are absolutely privileged, to the extent of the rule as applied in England. *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 40 Am. Rep. 316; *Maurice v. Worden*, 54 Md. 283, 39 Am. Rep. 384; *White v. Nicholls*, 44 U. S. 3 How. 267, 11 L. ed. 591; *Bradley v. Fisher*, 80 U. S. 13 Wall. 335, 20 L. ed. 646; *Cooley*, Torts, p. 211.

According to the English authorities, the rule undoubtedly is that to a witness in a court of justice, testifying in a cause properly before the court, the occasion is one of absolute privilege from liability for damages in an action of slander. Whether the rule as it prevails in England and elsewhere as to such witnesses prevails in this state as to them, as claimed by the defendant, it is not necessary to determine, because we think the proceeding before the committee was not a judicial or quasi judicial proceeding within the meaning of the rule as to absolute privilege as it is held anywhere. It was a proceeding to investigate the truth of certain statements made to the board of aldermen, and the power and the duty of the committee were simply to obtain such informa-

tion as it could concerning those statements, and report to the board of aldermen for its action. The persons who were to make the inquiry had no judicial character or office, had no settled jurisdiction or fixed mode of procedure, and they had no judicial function to exercise, for they could decide nothing, and could only report their action to a board, which might altogether disregard what the committee had done. In no proper sense can the committee be called a judiciary body, or its proceedings judicial. A judicial proceeding within the meaning of the rule as to absolute privilege must, we think, be one carried on in a court of justice established or recognized by law, wherein the rights of parties which are recognized and protected by law are involved and may be determined. The proceedings before this committee were clearly not proceedings of that kind. But it is said that, under section 26 of the charter of the city, the presiding officer of the committee had "power to compel the attendance and testimony of witnesses . . . by the issue of subpoenas and the administration of oaths in the manner and according to the rules governing the same in courts of justice." This provision, however, cannot be held to confer judicial or quasi judicial power upon the presiding officer, and certainly not upon the committee. All it gives is power to the presiding officer to issue subpoenas for and administer oaths to witnesses whom the committee may desire to improve, and nothing more. If the witness refuses to obey the subpoena, neither the presiding officer nor the committee has power to issue a *capias*; and if the witness appears, but refuses to testify, neither the committee nor the presiding officer has power under section 26 to commit him for such refusal. *Noyes v. Byrbee*, 45 Conn. 382. We know of no authority for holding that the proceedings before this committee were either judicial or quasi judicial proceedings within the meaning of the rule now under consideration. The class of occasions where the utterance of defamatory words is absolutely privileged is, as before stated, confined within narrow limits, and the courts as a rule have steadily refused to enlarge those limits. *Odgers, Libel & Slander*, p. 184; *Stevens v. Sampson*, L. R. 5 Exch. Div. 53. In *Maurice v. Worden*, *supra*, the court enumerates the cases in which absolute privilege has been accorded, and says: "Beyond this enumeration we are not prepared to go. The doctrine of absolute privilege is so inconsistent with the rule that a remedy should exist for every wrong that we are not disposed to extend it beyond the strict line established by a concurrence of decisions." See also *White v. Nicholls*, *supra*. We see no good reason upon this record for enlarging it so as to include proceedings of the kind in question. The court below committed no error in refusing to charge that the occasion was one of absolute privilege.

The defendant further claims that, inasmuch as the second defense was not demurred to, the court should have charged the jury that the facts therein stated, if proved, constituted a complete defense to the action. For



the reasons already given, we think this claim is unfounded, and the court below committed no error in refusing to so charge.

The defendant further claimed in the court below that the occasion was one conditionally privileged. His grievance here and now is not that the lower court did not so charge, but it is that the instructions given upon this point were misleading in some respects, and erroneous in certain other respects, and failed to present the matter properly to the jury. He also claims that the court erred in rejecting certain evidence bearing upon the question of conditional privilege. We will consider first the claim last stated. From the evidence in the case, it appears that certain written statements of charges had been made to the board of aldermen of the city of New Haven concerning the purchase of a road roller by the board of public works of said city. This matter was, by the board of aldermen, duly referred for consideration and investigation to a committee of the whole of said board of aldermen; and it was before this committee, during its investigation of the matter aforesaid, that the words in question were uttered. The written statements or charges so preferred to the board of aldermen, together with the action of said board in so referring the matter, and a copy of section 26 of the charter of New Haven, constitute Exhibit 1, which was laid in evidence by the defendant in the court below without objection. It was let in "for the purpose of proving the authority and power of said committee before which the words were uttered, and to prove what matters were committed to it for investigation." In the lower court the defendant claimed that the committee did in fact investigate and hear evidence upon other matters than the matter thus specifically referred to it; that the words charged were spoken by the defendant as a witness before the committee with reference to such other matters, and were pertinent and relevant thereto; and that these facts made the occasion one of conditional privilege at least. The plaintiffs denied that the words were pertinent or relevant to any matter before the committee, or at least to any matter properly before the committee. It was to show that the committee did in fact investigate and consider outside matters so or speak, and that the alleged slanderous words were pertinent and relevant to such matters, that the rejected evidence was offered. The record states the matter as follows: "For the purpose of showing the scope of the investigation, and that the committee of the whole included in the investigation all matters of grievance which any person might have against the board of public works, and in order to show the pertinency and relevancy of the evidence of the defendant before the committee of the whole,

the defendant offered to produce in evidence the report of the committee of the whole concerning said investigation, and the record of the board of aldermen accepting said report." This was defendant's Exhibit 2. It was admitted that it contained no reference to the defendant's statement made before the committee. Upon a general objection, the exhibit was excluded. For the same

purpose the defendant then offered the stenographer's notes of the evidence taken at said investigation, which also, upon a general objection, were rejected. The defendant then for the same purpose offered the testimony of a number of the committee, who were present at all the hearings of the committee, but, on a general objection, the court excluded the testimony. The court thus apparently excluded all evidence of this fact from the jury; for if it could not be shown by the record evidence, nor by the parol testimony of those present at the meeting, it could hardly be shown at all. If the fact was admissible, clearly it must be proved, if at all, in one of these two ways; and we think it was admissible, and that the record offered was competent evidence to prove the fact sought to be established by it, namely, that the committee did in fact investigate and hear evidence upon matters outside of that which was specifically committed to it. In the first place, this record was a public document. By the charter (section 9) it is made the duty of the city clerk to make regular entries of all votes and proceedings of the board of aldermen; and all records kept by him have the same validity as the records of town clerks, and are expressly made "in all courts evidence of the truth of the matter therein recorded." By the express terms of the charter, then, it was admissible to prove the truth of the matters therein recorded. In the next place the record clearly shows that the committee did in fact investigate and hear evidence upon other and outside matters, and also shows in a general way what those matters were, and this was all the defendant claimed to prove by it. That the fact sought to be established by this evidence was admissible is we think quite clear.

The committee, it is true, were by the action of the board of aldermen charged only with the duty of acting upon certain specific statements or charges made against the board of public works. It might, and perhaps ought to, have confined itself to this specific duty, but if it saw fit to extend the scope of its investigation so as to embrace other charges against the board of public works, and invited, permitted, or compelled persons to come before it, and testify or make statements pertinent and relevant to the matters before it, we think the occasion would be, as to such parties making such statements or testifying in good faith, one of conditional privilege. Under the charter (sections 37 and 38) the members of the board of public works are elected by the board of aldermen, and may be removed by them for cause. This power to remove includes the power to investigate the official conduct of the board of public works; and this work of investigating may, at certain stages of it at least, be conducted, we think, by the board of aldermen sitting as a committee of the whole. The outside investigation as to charges or grievances against the board of public works, which it is claimed the committee did in fact make, was certainly a work which the board of aldermen might have originally referred to the committee, and was one of which the board of aldermen by its vote approved. It was thus a work over

which the committee had apparent authority, and to a person in the position of the defendant such apparent authority was sufficient to protect him, if his statements before it were pertinent and relevant to the matter in hand, and were made in good faith and without express malice. As the question whether the occasion was a privileged one depended so largely on the further question whether or not the words charged were pertinent and relevant to the matters actually before the committee, the importance of the rejected evidence becomes apparent. Unless the defendant was permitted to show by the record or by parol evidence that the committee did in fact investigate outside matters, and what those matters were, it might be difficult or impossible for him to prove that the admitted words were relevant and pertinent to any matter properly or improperly before the committee; and he would thus lose the benefit of evidence tending to show that the occasion was one of conditional privilege, and that he had complied with the condition. For these reasons we think the court erred in rejecting the record evidence offered by the defendant, and that this entitles him to a new trial.

The fact that a new trial must be granted renders it unnecessary to notice with any degree of particularity many of the other alleged errors assigned, and we will notice only one or two, and that briefly. In its charge to the jury, the court seems to say, in substance, that, in order to make the occasion a privileged one, the words must have been spoken in answer to questions; and the defendant claims that the court thus restricted the words privileged wholly to those uttered in response to questions. The charge as given in the record at pages 29, 30, and 31 seems to support this claim of the defendant. We hardly think the court intended to be so understood, but, if so, we think the

charge was erroneous and misleading. If the defendant, present before the committee as a witness or otherwise, was invited or permitted or called upon to make a statement by the committee, for their information, of matters pertinent and relevant to the investigation they were then actually conducting and apparently within their power, we think the mere fact that the words uttered were not in response to questions does not avoid the privilege. The law regards substance, and not form, in matters of this kind; it regards what is said, and the motives for saying it, rather than the precise form of statement. Of course the fact that a statement was officiously volunteered would be evidence to go to the jury upon the question of express malice, but that is quite another matter.

The defendant also complains that by the charge of the court he was deprived of the benefit of part of his third defense. We think there is some foundation for this complaint. The plaintiffs claimed that the defendant, when he uttered the alleged slanderous words, was before the committee, not as a witness, but as a volunteer, while the defendant claimed he was there only as a witness. As the jury might find according to the claim of the plaintiffs on this point, the defendant asked the court to charge, in substance, that in such case the defendant, under the circumstances, would have the right to go before the committee as a citizen of New Haven, and in good faith give such information as he might have touching the matter under investigation. Under the facts as they appear of record, we think the court should have complied in substance with this request.

We deem it unnecessary to notice any of the other alleged errors.

*There is error, and a new trial is granted*  
The other Judges concurred.

## KANSAS SUPREME COURT.

*Re J. D. SIMS.*

(.....Kan.....)

**"Paragraph 2543 of the General Statutes of 1889, so far as it attempts to confer on county attorneys the power to commit witnesses for contempt on account of a refusal to be sworn or testify as provided in this section, is unconstitutional and void.**

(July 6, 1894.)

**A**PPPLICATION for a writ of habeas corpus to procure the release of petitioner from custody to which he had been committed for failure to answer questions propounded to

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NOTE.—For a comprehensive decision of the question as to the power to punish for contempt, see, in connection with the above case, the Indiana case of *Langenberg v. Decker*, cited in the above case and reported in 10 L. R. A. 108.

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him by a prosecuting attorney. *Petitioner discharged.*

The facts are stated in the opinions.

*Messrs. Oscar Foust & Son* for petitioner.

*Messrs. Ewing & Bennett*, with *Mr. A. H. Campbell*, for respondent:

Unless the enactment under consideration is clearly unconstitutional it should be upheld.

*State v. Robinson*, 1 Kan. 17; *Atchison v. Bartholow*, 4 Kan. 124; *Leavenworth County Comrs. v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *Cherokee County Comrs. v. State*, 86 Kan. 337.

The enactment is not unconstitutional. There is nothing in the constitution of either this state or of the United States forbidding such a grant of power by the legislature.

Where the constitution provides that judicial power of the state shall be vested in specified courts, and "in such other courts as the legislature may from time to time establish" the legislature may vest a part of the jurisdiction of the constitutional courts in those tribunals which it creates by statute.

3 Am. & Eng. Encyclop. Law, p. 694.

It is not necessary that the legislature in order to confer judicial power should first in terms create a court.

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Such power may even be conferred on a ministerial or administrative officer.

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The very fact of the omission from the constitution of a grant of power to commit for contempt indicates that the framers of the constitution and the people who adopted it recognized the settled rule of law that such power is inherent in all courts and officers exercising judicial functions.

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Such right at least has been constantly exercised by the legislature, by all courts in the state, and by notaries public, with the sanction and approval of this court.

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Where a witness duly subpoenaed to testify in a cause before a notary public by giving his deposition, refuses to testify, he may be committed by the notary for contempt for such refusal.

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It was never intended that any case for contempt should be tried by a jury.

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*Langenberg v. Decker*, 16 L. R. A. 106, 181 Ind. 471, cited by petitioner is based wholly on the peculiar wording of the constitution of the state of Indiana.

In support of the enactment under consideration,—

See *Re Clayton*, 18 L. R. A. 66, 59 Conn. 510; *State v. Beaton*, 61 Iowa, 563.

*Allen, J.*, delivered the opinion of the court:

The petitioner was restrained of his liberty by the sheriff of Allen county, under a commitment issued by the county attorney for refusal to answer questions propounded to him touching violations of the prohibitory liquor law. Paragraph 2543 of the General Statutes of 1889 makes it the duty of the county attorney, when notified of any violation of the prohibitory law, to issue his subpoena, commanding witnesses to appear before him, to swear such witnesses, examine them, reduce their testimony to writing, and cause it to be subscribed by such witnesses, and expressly authorizes the county attorney to punish for contempt any witnesses disobeying his process or refusing to answer questions. If the testimony so taken discloses the fact that an offense has been committed, he is required forthwith to file the statements of the witnesses with his complaint or information against the person having committed the offense, and thereupon to proceed with the prosecution of the offender.

The single question presented for our consideration is whether that portion of the statute which authorizes the county attorney to

punish as for contempt is in violation of the constitution of this state. Nothing is more firmly fixed in the governmental systems of all English-speaking countries than the division of powers between the three great departments of government,—the executive, legislative, and judicial. The question before us is whether the legislature has power to confer on an executive officer, charged with the duty of searching out violations of the law, inquiring into the facts, instituting and carrying on prosecutions for violations of the criminal laws of the state, the power, at the same time and as ancillary to the performance of his duties as a prosecuting officer, to commit persons to jail as for a contempt of his authority. That a proceeding to punish for contempt is in its nature a criminal proceeding has been directly decided by this court (*State v. Dent*, 29 Kan. 416), as well as by the courts of other states, *Cartwright's Case*, 114 Mass. 230; *Puterbaugh v. Smith*, 131 Ill. 199. The right to appeal from an order punishing for a contempt has been frequently recognized by this court. *Re Peyton*, 12 Kan. 398; *Re Dalton*, 46 Kan. 253; *State v. Henthorn*, 46 Kan. 613; *State v. Vincent*, 46 Kan. 618; *Re Nickell*, 47 Kan. 784; *Re Noonan*, 47 Kan. 771; *Re Harmer*, 47 Kan. 262; *State v. Durein*, 46 Kan. 695.

An appeal to a superior court can only be taken from a judicial decision; never from one involving merely executive or legislative discretion. *Fulkerson v. Harper County Comrs.* 81 Kan. 125; *Kent v. Labette County Comrs.* 42 Kan. 534. In committing the prisoner for contempt, the county attorney therefore decided a case in its nature criminal, and in making such decision assumed to act in a judicial capacity. That the statute referred to gives him this power in terms is clear. Is the statute valid? The cases of *Re Abeles*, 12 Kan. 451, and *Re Merkle*, 40 Kan. 27, are cited in support of the proposition that power to commit for contempt may be given to other than a judicial officer, and it is said that it is not necessary in order to confer judicial power that the legislature should first in terms create a court. The constitution of this state provides that "the judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law." Section 1, art. 3. The legislature therefore is at liberty to confer judicial power, and to create courts inferior to the supreme court. It may be conceded that the legislature may confer judicial power on an individual who also fills an executive office. The prior decisions of this court go no further than this. The point here involved, whether executive and judicial power may be mingled and combined,—may be exercised by the same person at the same time and in the same proceeding,—has never yet been decided by this court.

The county attorney is peculiarly an executive officer. He is not only authorized to appear on behalf of the state, and prosecute all criminal cases arising in his county, but it is his duty to do so; and the act concerning the sale of intoxicating liquors imposes

which the committee had apparent authority, and to a person in the position of the defendant such apparent authority was sufficient to protect him, if his statements before it were pertinent and relevant to the matter in hand, and were made in good faith and without express malice. As the question whether the occasion was a privileged one depended so largely on the further question whether or not the words charged were pertinent and relevant to the matters actually before the committee, the importance of the rejected evidence becomes apparent. Unless the defendant was permitted to show by the record or by parol evidence that the committee did in fact investigate outside matters, and what those matters were, it might be difficult or impossible for him to prove that the admitted words were relevant and pertinent to any matter properly or improperly before the committee; and he would thus lose the benefit of evidence tending to show that the occasion was one of conditional privilege, and that he had complied with the condition. For these reasons we think the court erred in rejecting the record evidence offered by the defendant, and that this entitles him to a new trial.

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See *Re Clayton*, 18 L. R. A. 66, 59 Conn. 510; *State v. Seaton*, 61 Iowa, 563.

*Allen, J.*, delivered the opinion of the court:

The petitioner was restrained of his liberty by the sheriff of Allen county, under a commitment issued by the county attorney for refusal to answer questions propounded to him touching violations of the prohibitory liquor law. Paragraph 2543 of the General Statutes of 1889 makes it the duty of the county attorney, when notified of any violation of the prohibitory law, to issue his subpoena, commanding witnesses to appear before him, to swear such witnesses, examine them, reduce their testimony to writing, and cause it to be subscribed by such witnesses, and expressly authorizes the county attorney to punish for contempt any witnesses disobeying his process or refusing to answer questions. If the testimony so taken discloses the fact that an offense has been committed, he is required forthwith to file the statements of the witnesses with his complaint or information against the person having committed the offense, and thereupon to proceed with the prosecution of the offender.

The single question presented for our consideration is whether that portion of the statute which authorizes the county attorney to

punish as for contempt is in violation of the constitution of this state. Nothing is more firmly fixed in the governmental systems of all English-speaking countries than the division of powers between the three great departments of government,—the executive, legislative, and judicial. The question before us is whether the legislature has power to confer on an executive officer, charged with the duty of searching out violations of the law, inquiring into the facts, instituting and carrying on prosecutions for violations of the criminal laws of the state, the power, at the same time and as ancillary to the performance of his duties as a prosecuting officer, to commit persons to jail as for a contempt of his authority. That a proceeding to punish for contempt is in its nature a criminal proceeding has been directly decided by this court (*State v. Dent*, 29 Kan. 416), as well as by the courts of other states, *Cartwright's Case*, 114 Mass. 230; *Puterbaugh v. Smith*, 131 Ill. 199. The right to appeal from an order punishing for a contempt has been frequently recognized by this court. *Re Peyton*, 12 Kan. 398; *Re Dalton*, 46 Kan. 253; *State v. Henthorn*, 46 Kan. 618; *State v. Vincent*, 46 Kan. 618; *Re Nickell*, 47 Kan. 784; *Re Noonan*, 47 Kan. 771; *Re Harmer*, 47 Kan. 262; *State v. Durein*, 46 Kan. 695.

An appeal to a superior court can only be taken from a judicial decision; never from one involving merely executive or legislative discretion. *Fulkerson v. Harper County Comrs.* 81 Kan. 125; *Kent v. Labette County Comrs.* 42 Kan. 584. In committing the prisoner for contempt, the county attorney therefore decided a case in its nature criminal, and in making such decision assumed to act in a judicial capacity. That the statute referred to gives him this power in terms is clear. Is the statute valid? The cases of *Re Abeles*, 12 Kan. 451, and *Re Merkle*, 40 Kan. 27, are cited in support of the proposition that power to commit for contempt may be given to other than a judicial officer, and it is said that it is not necessary in order to confer judicial power that the legislature should first in terms create a court. The constitution of this state provides that "the judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law." Section 1, art. 8. The legislature therefore is at liberty to confer judicial power, and to create courts inferior to the supreme court. It may be conceded that the legislature may confer judicial power on an individual who also fills an executive office. The prior decisions of this court go no further than this. The point here involved, whether executive and judicial power may be mingled and combined,—may be exercised by the same person at the same time and in the same proceeding,—has never yet been decided by this court.

The county attorney is peculiarly an executive officer. He is not only authorized to appear on behalf of the state, and prosecute all criminal cases arising in his county, but it is his duty to do so; and the act concerning the sale of intoxicating liquors imposes

on him the specific duty of making inquiries and investigations for the purpose of detecting violations of the prohibitory law, to compel witnesses to testify, to reduce their statements to writing, to cause them to be signed by the witnesses, to file them in the district or other court having jurisdiction, and with them his complaint or information charging offenders with such offenses as the testimony shows they are guilty of. In all these proceedings the county attorney acts as an administrative officer, prosecuting on behalf of the people. It is for the purpose of aiding him in the effectual execution of this duty that the power to commit for contempt is given him. It is given to him, not as a judicial officer, but as county attorney, and for the very purpose of aiding him in performing the duties of that office. Such a combination of powers is not in accordance with the theory of our government, nor with the orderly administration of justice as administered in this county and in England. The power to punish for contempt is never exercised except by legislative bodies or judicial officers. *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502; *Langenberg v. Decker*, 181 Ind. 471, 16 L. R. A. 108; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *Atty-Gen. v. McDonald*, 8 Wis. 805.

It is sought to distinguish the case before us from those cited, because of provisions in the constitutions of Wisconsin and Indiana with reference to the separation of executive and judicial powers. We think, however, that in our constitution these powers are as clearly separated as though the framers of the constitution had said so in terms. It needs but a suggestion to show that the combination of executive and judicial powers may become tyranny at once. The advancement in the science of government made in modern times is due to the separation of the three great co-ordinate departments. If the legislature may confer on the county attorney one of the highest and most distinctive attributes of judicial power,—that of punishing for contempt,—to aid him in ascertaining from witnesses the facts with reference to violations of law, might the legislature not also confer on any attorney the power to examine witnesses in civil cases in the same manner, and to commit them for contempt if they refuse to answer his questions? Might it not also give to any executive officer, from the governor down, the power to subpoena witnesses to inform his judgment, and to aid him in any executive decision or determination? And, if the rule is established, can it be doubted that the division between executive and judicial offices will be completely broken down, and all constitutional barriers removed from those forms of oppression which have always attended this combination? In this very case the county attorney, as a prosecuting officer, issued his subpoena. When the witness came before him, as a prosecuting officer, he asked him a question. When the witness refused to answer, he at once passed on his own right to ask the question, on its pertinency and propriety, judicially determined that he, as prosecuting attorney, had asked a proper question; and, as a judicial

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officer, declared and determined that the witness was guilty of a judicial contempt in refusing to answer the question which he himself had asked as a prosecuting attorney. This is a commingling and confusing of executive and judicial functions in a manner incompatible with the constitution, obnoxious to its whole spirit and to the spirit of free institutions, and the act to that extent is void.

*The petitioner will be discharged.*

**Horton, Ch. J.**, concurring specially:

Paragraph 2548, Gen. Stat. 1889, confers upon county attorneys of the state, when notified of any violation of the provisions of the prohibitory liquor law, the power to inquire into such violation, and for that purpose they are authorized to issue subpoenas for any person they believe has information or knowledge thereof to appear before them and testify. The testimony in every case must be reduced to writing, and signed by the witness, the same as a deposition in a civil cause. Power is also attempted to be conferred upon county attorneys to imprison any witness for refusal to testify concerning any violation of the statute, when required to do so. Laws 1885, chap. 149, § 8. Paragraph 2548 further provides that, if the testimony taken discloses any offense has been committed against the provisions of the statute, the county attorney taking the testimony must file the statement of the witness and a complaint or information against the offender in some court of competent jurisdiction. The complaint or information may then be verified by the county attorney upon information and belief. All of the provisions of the statute are for the purpose of assisting county attorneys in procuring testimony for violations of the act, and in preparing their cases for successful prosecution in the court. So far as the power conferred by the statute is ministerial or administrative, it is constitutional, and must be obeyed; but, if a witness refuses to testify, I do not think county attorneys have, or ought to have, the power to imprison such a witness for contempt. County attorneys are executive or administrative officers, but the power attempted to be conferred upon them, or any other officer taking depositions or testimony, to commit a witness for refusing to answer, is judicial in character. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377. If the statute is constitutional and open to no legal objection, county attorneys have the power to ask questions of the witnesses brought before them, and then to pass upon the competency or pertinency of the same, and, if the witness refuses to answer, to imprison him in the county jail, there to remain until he submits to testify. It is an old maxim of the law that "no man can be a judge in his own cause." This wise maxim is infringed upon by conferring on a prosecuting attorney judicial power to commit a witness called before him to testify in a case which he is preparing for trial, or in which he proposes, if his investigation warrants, to file a complaint or information. In such a proceeding, on the examination of a witness, the prosecuting attorney has a pecuniary,

professional, and official interest. He is not acting disinterestedly. The statute would be very similar, and liable to like objection, if it authorized notaries public and attorneys-at-law to personally take depositions or perpetuate testimony in actions they were intending to commence for other parties. In a civil action no deposition or affidavit can be taken before a relative or an attorney of either party, or before any one interested in the event of the proceeding. Civ. Code, § 350; *Foreman v. Carter*, 9 Kan. 681; *Warner v. Warner*, 11 Kan. 121. The rule in criminal cases ought to be as strict.

The legislature has full authority to confer the power to imprison a witness for contempt, prescribed in paragraph 2543, upon justices of the peace, probate judges, notary publics, clerks of courts, or on any individual not the prosecuting attorney or interested in the proceeding. I fully concur in the judgment pronounced in *Re Clayton*, 59 Conn. 510, 18 L. R. A. 66, but some of the reasons given are not satisfactory to me. In that case the examination was taken before a police judge, not before a prosecuting attorney or any one interested in commencing criminal proceedings upon the testimony which it was sought to compel the witness to disclose. I am of the opinion, as observed in that case, that "it is the duty of all good citizens, when legally required so to do, to testify to any facts within their knowledge affecting public interest, and no one has a natural right to be protected in his refusal to discharge this duty. Public policy does not forbid, but, on the contrary, often requires, legislation to facilitate the administration of justice." But the power to compel a citizen to testify should be exercised legally, not unconstitutionally. If this ruling shall in any way interfere with full and successful investigations on the part of county attorneys of violations of the provisions of the prohibitory liquor law, it can be remedied speedily. The legislature will convene in a few months, and the power to imprison recalcitrant witnesses, attempted to be conferred upon county attorneys by paragraph 2543, may, as before stated, be constitutionally and legally imposed upon any officer or individual not the county attorney or otherwise interested in the proceeding. My attention has been called recently to the case of *De Camp v. Archibald*, 81 Ohio L. J. 39, ruling that the power to commit a person for contempt for refusing to answer is not judicial in character. That decision, although made by an able court, is not supported by logical reasoning, is not in line with our own decisions, and is opposed to the great weight of authority.

**Johnston, J.**, concurring specially:

In the enactment of the provisions authorizing the county attorney to make preliminary inquiry as to the commission of offenses, the legislature appears to have proceeded upon the theory that the duties imposed and power conferred in that respect were not judicial in character. If they were executive or merely quasi judicial in their nature, the objections urged against the statute would

be without force; and the fact that they were imposed and conferred upon an executive officer indicates the legislative view, and may be some argument that they are not judicial. Some of the steps in the preliminary inquiry are clearly the exercise of executive functions, and whether or not any of them are judicial must be determined from their nature, rather than from the position or station of the one by whom the act is to be performed. Assuming that the authority to punish for contempt was an incident to the exercise of executive power, the legislature vested it in the county attorney; and this is not to be wondered at, in view of the fact that the supreme court of Ohio, in a recent case, has determined that the exercise of such authority is not the exercise of judicial power. *De Camp v. Archibald*, 81 Ohio L. J. 39. Although I entertain the highest respect for that tribunal, I am unable to reach the same conclusion. The authority to hear and determine a controversy upon both the facts and the law is judicial power. When the witness refuses to answer the question proposed, the county attorney must then determine upon the propriety of the question, and whether, under the circumstances, an answer should be compelled. At that stage of the proceedings an issue is formed, and a controversy arises between the state and the witness. A contempt of court is a substantive criminal offense, and to adjudicate a case of contempt, and to impose punishment for such offense, is generally said to be the highest exercise of judicial power. The county attorney not only inquires and decides, but he is given full power to enforce his decision, and that by one of the most severe methods known to the law. The authority to try one accused of a criminal offense, pronounce judgment against him, and enforce that judgment by imprisonment, is surely an exercise of judicial power. If, then, the power is to be regarded as judicial, it can only be exercised by one of the tribunals mentioned in section 1 of article 8 of the Constitution. Under this constitutional provision, the legislature may vest judicial power in such courts as it may see fit to create, provided, only, that they are inferior to the supreme court. Can the county attorney be regarded as a "court," within the meaning of this constitutional provision? The contention of the state that the legislature may create a court, or confer judicial power, without designating the tribunal created as a court, must be conceded. *Malone v. Murphy*, 2 Kan. 250; *State v. Young*, 8 Kan. 445. I am unable, however, to sustain the position of the petitioner, and hold that the vesting of judicial power in an executive officer, and requiring him to perform both executive and judicial functions, is a sufficient objection to the statute. It is highly important to separate the legislative, judicial, and executive functions, and that the officer of one department should not exercise the functions conferred upon another. Under our system, however, the absolute independence of the departments and the complete separation of the powers is impracticable, and was not intended. "It is true,

with some exceptions, that the legislature cannot exercise judicial or executive power, that the courts cannot exercise legislative or executive power, and that the executive department cannot exercise legislative or judicial power; but it is not true that they are entirely separate from each other, or independent of each other, or that one of them may not in some instances control one of the others." *Martin v. Ingham*, 88 Kan. 654. The governor has been vested with some judicial functions, and the legislature acts judicially when it tries a charge of contempt, and adjudges punishment therefor. Ministerial duties have been placed upon courts, and, while scrupulous care should be used to prevent an officer of one department from intruding to any extent upon the duties conferred upon an officer of another department, nothing in our state constitution, as there is in that of some other states, prevents the vesting of more than one function in a single individual. Illustrations of conferring more than one of these powers upon the same person are numerous. It has been held that the mayor of a city of the second class might, while acting as mayor, exercise the powers of a court, although the statute did not in terms create him a court. *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423. Judicial powers have been conferred on county commissioners and coroners, whose duties are mainly ministerial. Probate judges, whose duties are mostly judicial, have had conferred upon them many ministerial duties, and legislation giving such powers has been upheld. *Re Johnson*, 12 Kan. 102; *Intoxicating Liquor Cases*, 25 Kan. 759, 87 Am. Rep. 284.

Other instances might be cited, but these are sufficient to show that the legislature may confer judicial powers upon an executive officer, provided such duties are not inconsistent with those required of such officer. No case has been sustained, however, where the new duties conferred upon an officer were incompatible with those already imposed by such office. When the petitioner refused to answer the question, and a controversy arose, he was, in effect, accused of an offense. The state was the plaintiff, and the petitioner the defendant. The county attorney is the representative of the state, and required to appear in all prosecutions in its behalf. When the issue was thus formed, the positions of county attorney and judge became antagonistic, and the duties of the respective places incompatible. It is not within the power of the legislature to make a judge an arbiter in his own cause, and to give an attorney for one of two adverse parties the power to determine the controversy is wholly inconsistent with our system of jurisprudence. The legislature has not clothed the county attorney with the paraphernalia of a court, and it does not seem to have been its purpose to invest him with the attributes of a judicial tribunal. Manifestly, it proceeded upon the theory that the powers conferred were such as might be carried out by an executive officer, and are not "judicial," within the meaning of the constitution. As that view cannot be sustained, and as the authority to punish for contempt must be regarded as the exercise of judicial power, it follows that the statute cannot be upheld.

## FLORIDA SUPREME COURT.

STATE of Florida, *ex rel.* Daniel G. AMBLER,

*v.*

William A. HOCKER, Judge of the Fifth Judicial Circuit.

(.....Fla.....)

\*1. The previous relation of attorney and client, as shown in this case, disqualifies a judge in this state.

\*Headnotes by LIDDOX, Ch. J.

2. The principle of disqualification of a judge by reason of a previous relation of attorney and client should not be given a narrow and technical construction, but should be applied to all classes of cases and to all judicial officers.

3. A judge who, previous to his commission, was an attorney of record in a suit in which an execution issued, is disqualified to try a claim interposed to property levied upon under such execution.

4. A judge who, previous to his commission, was a solicitor of record for complainant in a chancery cause, brought for the

NOTE.—Disqualification of judge by prior connection with the case.

Statutory disqualification of judge, from having been counsel in the cause.

a. Generally.

Under the constitutional and statutory provision, prohibiting a judge from sitting in the trial of a cause when he has been of counsel therein, a judgment rendered by him in such a case will generally be held void. *Wigand v. Dejonge*, 8 Abb. N. C. 260; *Franco Texan Land Co. v. Howe*, 8 Tex. Civ. App. 315; *Fechheimer v. Washington*, 77 Ind. 866; *Chicago & A. R. Co. v. Summers*, 113 Ind. 10; *Bailey v. Kimbrough*, 37 Mo. 182; *Reams v. Kearns*, 5 Coldw. 217; *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604.

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And a recognizance given by a poor debtor to procure his discharge where the magistrate who took the creditor's affidavit, and made the certificate of the truth of the charges, was the attorney of the creditor, is also void. *McGregor v. Crane*, 98 Mass. 530. But see *Lovering v. Lamson*, 50 Me. 334.

So the judge, who has been employed or acted as counsel in the cause, should decline to try the case. *Nugent v. Stark*, 34 La. Ann. 623; *Hegwer v. Riff*, 31 Kan. 636; *Sumner County Comrs. v. Wellington Twp.*, 39 Kan. 137; *Smith v. Blakeman*, 8 Bush. 476; *Joyce v. Whitney*, 57 Ind. 500; *Kern Valley Water Co. v. McCord*, 70 Cal. 646; *Abrams v. State*, 31 Tex. Crim. Rep. 449; *Johnson v. State*, 29 Tex. App. 526; *Packwood v. State (Or.)* June 23, 1893; *Kahanek v. Galveston, H. & S. A. R. Co.* 72 Tex. 476; Van



purpose of having receivers appointed for certain property, is disqualified from trying a claim interposed by said receivers to said property, when the same is levied upon under execution in favor of third parties.

**5. A judge who, previous to his commission, has been an attorney in a case is disqualified to adjudicate not only all matters arising in that identical case, but also all supplemental matters or proceedings had or taken to enforce, or to resist the enforcement of, any judgment or decree rendered in such case.**

*Rensselaer v. Douglas*, 2 Wend. 290; *Darling v. Pierce*, 15 Hun, 543; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *State v. Wofford*, 111 Mo. 529; *Curtis v. Wilcox*, 74 Mich. 69; *Pack v. Simpson*, 74 Mich. 28; *East Rome Town Co. v. Cotheran*, 81 Ga. 859; *Thomson v. State*, 9 Tex. App. 649; *Slaven v. Wheeler*, 58 Tex. 23; *Carrington v. Andrews*, 12 Abb. Pr. 348.

And a judge is disqualified from trying a cause, where he had been under a general retainer from one of the parties. *Kern Valley Water Co. v. McCord*, 70 Cal. 646; *Lux v. Hargis* (Cal.) April 28, 1887.

And under a statute prohibiting a judge from trying a case in which he has been attorney or counsel, he cannot impose the payment of costs on the party demanding a change of venue, where the statute does not so provide. *O'Connell v. Gavett*, 7 Colo. 40.

Under Mo. Act, March 19, 1877, disqualifying a judge who has been of counsel, such judge cannot set aside an election by the bar, where the judge pro tem. is also disqualified for the same reason, but under the statute, the clerk of the court must hold another election. *Lacy v. Barrett*, 75 Mo. 469.

And a justice is prohibited by Mass. Rev. Stat., chap. 85, § 34, from trying any civil action commenced by his order or direction where he had an interest in the suit and instigated the prosecution of the same. *Richardson v. Welcome*, 6 Cush. 331.

And in *People v. Frederick*, 48 N. Y. 8, R. 302, the court held that a magistrate who had prosecuted the same matter before another justice was disqualified from trying the same cause, and stated that N. Y. Code, § 46, providing for disqualification where the judge is a party, related, or of counsel, is but a re-enactment of the common law and in a matter which if true reflects so scandalously upon the administration of justice, the appellate court will not indulge in any presumptions to sustain the judgment.

And a judge is disqualified from trying a divorce for voluntary abandonment, brought by the husband, where the judge had been attorney for the husband in a former suit for divorce brought by the wife on the ground of cruel treatment. *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604. But see *Cleghorn v. Cleghorn*, 66 Cal. 309, *infra*.

And an act disqualifying any judge who has heretofore been consulted or employed as counsel, is not limited to cases of consultation or employment before the passage of the act. *People v. Sagshaw* Circuit Ct. Judge, 28 Mich. 342.

Under Mo. Rev. Code 1835, p. 539, § 21, the St. Louis criminal court may, of its own motion, order the removal of a cause to the St. Louis circuit court, where the judge of the criminal court has been of counsel for the defendant. *State v. Houser*, 28 Mo. 238.

A defendant convicted of murder cannot be sentenced by a judge of another circuit, who was present and was called to preside by the judge who had been prosecuting attorney on the trial, as there is no such provision in the statute. *State v. Shea*, 95 Mo. 85.

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**6. The question of the disqualification of a judge, by reason of a former relation of attorney and client, is entirely distinct and independent of any question of present interest in the case, and of the payment of any fee or reward therein.**

**7. An act done by a partner in the firm name in the pursuit of its ordinary business is the act of the firm. A judge who, prior to his commission as such, was a member of a law firm which began a suit, using the name of such firm as attorneys for the plaintiff, is dis-**

In *Cottle*, Appellant, 5 Pick. 483, it was said that it is improper for a judge of probate to undertake to act as the attorney or agent of an heir, or person interested in an estate within his jurisdiction, but this was not the question involved.

In *Spencer v. Lapsley*, 61 U. S. 20 How. 266, 15 L. ed. 903, it was stated that 2 U. S. Stat. at L. chap. 51, p. 643, provides that in suits in the district courts of the United States the judge shall be disqualified when he has been of counsel for either party, but that was not the question involved in the case.

#### b. Where the causes are not identical.

There are some cases which deny the disqualification of the judge unless the cause, controversy, and parties are identical, or hold that a slight difference of issues or parties will be sufficient to remove disqualification of the judge.

As if the issues are different, a judge is not disqualified, although he had been counsel for the parties in two former suits. *Stewart v. Mix*, 80 La. Ann. 1036.

So in *McMillan v. Nichols*, 62 Ga. 36, it was held that an execution from the county court cannot be availed, on the ground that such county judge had filed a suit on a note as attorney for plaintiff in the superior court, and then withdrew it, and suit was then brought before him as county judge on that note. The "causes" are not the same and the defendant only protested to the trial and did not appeal as he might have done.

So where the judge had represented a receiver, in an application by a railroad company, claiming money due for a connecting line, he is not disqualified from sitting in an action testing the appointment of the receiver. *State v. Jacksonville*, P. & M. R. Co. 15 Fla. 201.

And in *Cleghorn v. Cleghorn*, 66 Cal. 309, it was held that a judge was not disqualified from trying an action of divorce for the adultery of the defendant, where such judge had been the attorney of this defendant in an action against him by the person with whom the alleged acts of intercourse had occurred and the issue was as to the fact of such intercourse. But see *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604.

That a magistrate drew up a lease, and a notice to quit and that he was the only subscribing witness to the lease, does not disqualify him from trying an action to recover possession of the same claimed under the lease, where the magistrate had not been advised with by either party or been employed except as stated above. *Cook v. Berth*, 103 Mass. 372.

So having given an opinion, as an attorney, in regard to the validity of the title to the land in controversy, does not disqualify the judge, as this is not the same, as shall have been of counsel in the case. *Hourton & T. C. R. Co. v. Ryan*, 44 Tex. 426.

That the presiding judge had been of counsel in another cause involving the same title does not disqualify him, as he had not been consulted by the parties to the suit before him. *Taylor v. Williams*, 26 Tex. 583.

In *The Richmond*, 9 Fed. Rep. 803, it was stated

qualified from trying a claim interposed to property levied upon by virtue of an execution issued in such main case, although the management of such suit may have been exclusively under the direction of the other member of such firm, and not within the knowledge of such judge.

**8. A judge who, previous to his commission, was an attorney of record in an attachment suit at the time of the levy of the writ of attachment upon certain property, is disqualified to try a claim interposed to said property, when the same is afterward levied upon under an execution issued in the same suit.**

(June 18, 1894.)

that "of counsel," as provided in U. S. Rev. Stat., § 615, means of counsel for a party in that cause and in that controversy, and if either the cause or controversy is not identical the disqualification does not exist, holding that a judge, who had been one of the parties in a suit in law for damages by a collision, was not disqualified from sitting in the trial on an appeal bond given in that cause, as the cause though growing out of the same cause is distinct.

In *Cullen v. Drane*, 88 Tex. 484, it was held that where S. R. Frost was one of plaintiff's attorneys, who brought an attachment suit and levied on and sold a lot claimed by a third party, which lot the plaintiffs bought, and then a suit was brought by plaintiffs before Frost as judge to try their title against such third party, it cannot thereafter be claimed that this judgment is void as it did not appear that Frost had ever been of counsel in the case tried before him, or expressed an opinion on the title.

And in *Kemp v. Wharton County Bank*, 4 Tex. Civ. App. 648, where an attachment against a banking firm was levied on a safe, it was held that although the judge had drawn a deed of assignment for creditors for the bank, and had counseled the assignee, and was also a creditor of the bank, he was not disqualified as this was only a foreclosure of a lien, and the rights of the assignee would not be affected as he was not a party, although it was claimed that this suit involved the validity of the assignment.

In *McLouth v. Myers*, 40 N. Y. S. R. 858, it was held that a justice who issued the summons was not disqualified although, a few days prior thereto, he had written the defendant a letter stating that the plaintiff had left the account with him for collection, and unless it was settled the plaintiff would bring an action to enforce its collection, as there is nothing to show that the account was left with him as an attorney for collection, although he was an attorney, and the case does not show that any statement was made to him of the facts of the case.

In *Karchoer v. Pearce*, 14 Colo. 557, it was held that it is not ground for change of venue in Colorado, that the judge had as county attorney formerly prosecuted the defendant in a criminal charge, and had been counsel for the other party. The case does not show that the matters were similar.

So a judge was not disqualified from trying a criminal case, by reason of his having been district attorney, during the time a county attorney of his district prosecuted the defendant for the offense charged, but the district attorney had taken no part in the prosecution. *Wilks v. State*, 27 Tex. App. 881.

And in *Hobbs v. Campbell*, 79 Tex. 380, it was held that counsel in a murder case does not make him counsel in the case of bail bond given in the murder case, and although when the bond was given such attorney in discussion with other attorneys stated that the bond was void, he was not

**MOTION to strike the answer of defendant for insufficiency in a proceeding brought to compel him to take jurisdiction in a certain case which had been brought before him for trial. Denied.**

The facts are stated in the opinion.

*Mr. Edgar P. Allen*, for relator:

At common law the relation of attorney and client does not disqualify a judge, and though there is no statute in Florida making this relation a ground of disqualification, yet this court has affirmed that such relation does disqualify.

*Tampa Street R. & Power Co. v. Tampa*

disqualified from presiding as judge on the trial of the bail bond.

A judge is not disqualified from trying the charge of murder, although before elected he had advised a party to take out letters of administration on the estate, such administration involving no inquiry as to who killed the decedent, and his former partner was employed to assist in the prosecution. *Woolfolk v. State*, 85 Ga. 60.

That a judge to whom a case was sent on a change of venue had been employed as counsel for some of the parties in a similar proceeding, does not disqualify him under the statute, although it was an impropriety for him to act. But one change of venue is allowed for any cause in Indiana. *Shoemaker v. South Bend Spark Arrester Co. (Ind.)* 22 L. R. A. 882.

A surrogate who had been an attorney for a testator in certain actions, which the deceased had pending, before and at the time of his death, in no way affecting the proof of the will, but whose relation as attorney in those matters had ceased, is not incompetent to sit on probate of such testator's will. *People v. Weiant*, 80 Hun, 475.

And a judge was not disqualified, where his name had been signed inadvertently and by mistake to interrogatories by the firm of which he was a member, when in fact he had never been of counsel in the case. *Ft. Worth & D. C. R. Co. v. Mackney*, 68 Tex. 410.

And the disqualification of one of four appellate judges, by reason of his having been of counsel, will not oust the court of jurisdiction. *Hammond v. New York, C. & St. L. R. Co.* 126 Ind. 597.

#### c. Where the parties are not identical.

There are some cases which hold that the judge is not disqualified unless he has been of counsel to a party in the cause then pending, and if the party who consulted him has no interest in the cause pending, he may try the case. *Bryan v. Austin*, 10 La. Ann. 612; *King v. Sapp*, 66 Tex. 519; *Glasscock v. Hughes*, 55 Tex. 461.

And noting as counsel in another case between two of the parties to the bill which involved some of the same issues does not disqualify a judge. *Blackburn v. Cranford*, 22 Md. 447.

#### d. Formal orders.

Although a judge may be disqualified from trying a cause from having been of counsel, yet he may make mere incidental orders as receiving an indictment. *Cock v. State*, 8 Tex. App. 659.

Or superintending the drawing of the panel of regular jurors. *People v. Ah Lee Doon*, 97 Cal. 171. If this is invalid an objection must be made before verdict. *Ibid.*

So he may issue a venire for the panel of jurors, where no names are on the list. *Littrell v. Wilcox*, 11 Mont. 77.

And may approve the agreement of parties, for

*Suburban R. Co.* 17 L. R. A. 681, 80 Fla. 595.

But while the trend of the case referred to in 30 Fla. seems to confine disqualification by relation of attorney and client to the trial of any issues arising or formed during the existence of this relation, or upon which advice to the client has previously been given by the attorney, this court in 30 Fla. 602, has cited without criticism the case of *Stewart v. Mir*, 30 La. Ann. 1036.

In the present case the issue is the right of property of the receivers. The validity of

none of the proceedings in the case of *Ambler v. Stevens, Graham & Co.* is involved, because their validity cannot be impeached by the receivers who are strangers to said suit. Neither are any of the questions involved in the main case put in issue in the claim case.

The relation of attorney and client does not extend to cases where the relation existed as to a case other than the one at bar. Having been of counsel in other suit involving the same, title to real estate does not disqualify.

*Taylor v. Williams*, 26 Tex. 533.

Having as counsel given opinion on title to

the appointment of a judge *pro tem.* *State v. Sachs*, 3 Wash. 691.

And a judge who has been of counsel, in a cause where decree has been taken by default, may allow an answer to be "filed" and then direct a change of venue, where the original decree was not set aside until final decree on cross-bill. *Bruen v. Bruen*, 43 Ill. 408.

Under Ga. Code, § 3447, authorizing a dismissal of a bill by complainant that does not prejudice the defendant, such bill may be dismissed, where the presiding judge has once been of counsel in the cause, although the first bill obtained an answer under oath, and the second suit on same bill waived a discovery. It may be that the answer under oath, extorted in the first case, would be binding on complainant. *Kean v. Lathrop*, 58 Ga. 355.

If a judge who is disqualified from sitting, impropiously dismisses a suit for want of prosecution, he may set aside such order of dismissal. *Garrett v. Gaines*, 6 Tex. 435.

*Disqualification without regard to statute, from having been of counsel in the cause.*

The decisions are not uniform, in the absence of statute, as to the propriety and necessity of a judge refusing to sit in a cause when he had been of counsel for a party, some cases maintaining that the judge should decline to sit and some that he is disqualified from acting, fully sustaining the doctrine in *STATE v. HOOKER*.

The courts in many cases in citing authorities do not distinguish between those founded on statutes and those based on common-law doctrine.

Chitry's Practice, 4, 9, states: "The greatest delicacy however, is constantly observed on the part of the judges, so that they never act when there could be the possibility of doubt whether they would be free from bias. Anciently a judge could not try a civil or criminal case in the county in which he was born or inhabited, but that impediment . . . was altered by statute."

So the vice-chancellor was disqualified from approving an appeal bond in a case in which he was solicitor or counsel previous to his appointment to office. *Ten Rick v. Simpson*, 11 Paige, 179, 5 L. ed. 98.

And where a vice-chancellor before his appointment had been counsel in the cause, the chancellor upon application to him may direct the cause to be heard before any other vice-chancellor at a stated term of his court. *Whitney v. Post*, 5 Paige, 36, 4 L. ed. 334.

So a master who has acted, or whose partner has acted as solicitor in a cause pending or to be brought, ought not to do any judicial act as master, although neither of them is the solicitor of record. *McLaren v. Charrier*, 5 Paige, 580, 3 L. ed. 417.

In *Tampa Street R. & Power Co. v. Tampa Suburban R. Co.*, 17 L. R. A. 681, 80 Fla. 595, it was held that the mere statement by the judge that he had been counsel for the appellant would not disqualify him, and that the defendant cannot disqualify him 25 L. R. A.

by alleging matters which are irrelevant and immaterial to the case made by the bill. But the court stated that a judge is disqualified from trying a cause where he has as attorney advised one of the parties as to his legal rights which are in controversy in the case, stating that there was no statute on that question in the state.

And in *Oakley v. Aspinwall*, 3 N. Y. 547, it was stated that a judge cannot be both judge and party, arbiter and advocate in the same cause, but the question involved in that case was relationship to party.

Where two of the justices of the supreme court had been of counsel and declined to sit, a judgment of the third and remaining member rendered by stipulation of the parties was valid. *Walker v. Rogan*, 1 Wis. 597.

Other cases hold that a judge cannot be challenged because he has been of counsel for a party in the cause.

By the laws of England also in the times of Bracton and Fleta, a judge might be refused for good cause but now the law is otherwise and it is held that judges and justices cannot be challenged." 3 Bl. Com. 361.

In *Townsend v. Hughes*, 2 Mod. 151, *Scroggs, J.*, said he was of counsel with the plaintiff before he was called to the bench and might be supposed to give judgment in favor of his former client or against him, but now he had forgot all former relation thereto, and thereupon delivered his opinion.

And in *Thellusson v. Rendlesham*, 7 H. L. Cas. 420, it was held that a counsel in a cause having been raised to the bench is not disqualified from hearing the case, but he may decline to take part.

And in *Morgan v. Hammett*, 23 Wis. 30, it was held that the statute did not disqualify a county judge from acting, who had been counsel for the parties, and the fact that he had been of counsel for some parties interested in the matter did not disqualify him from making an order of sale on application of the administrator.

After a continuance and trial, a new trial will not be granted on the ground of surprise, in that the party was not present, that he did not expect a trial to be had as the judge had been engaged by the adverse party as counsel, and if he had known that the court would have tried the case that he would have had material evidence on hand, the failure to object was a waiver. *Owings v. Gibson*, 2 A. K. Marsh. 515.

And in *Lloyd v. Smith*, T. U. P. Charit. 143, it was held that the statute providing for the disqualification of the judge of the superior court where he is a "party" or "interested" does not affect him, where as a member of the bar, he had formerly been retained as of counsel for the defendant.

So in *Denn v. Tatem*, 1 N. J. L. 184, it was held not to be a valid objection to a judge before whom a jury was to be struck that he had been of counsel for one of the parties.

And in *Bank of North America v. Fitzsimons*, 3 Binn. 454, it was held in a case submitted to the court by three persons where the chief justice had

the land in controversy, it not being shown that the opinion was given of the case before the court, is no disqualification.

*Houston & T. C. R. Co. v. Ryan*, 44 Tex. 426.

So as to having acted as counsel in cases growing out of the same transaction and involving the same question.

*King v. Sapp*, 66 Tex. 519.

The interest that disqualifies a judge under the statutes is a property interest in the action or its result.

*Ex parte Harris*, 6 L. R. A. 718, 26 Fla. 77.

*Messrs. Cooper & Cooper* for respondent.

**Liddon, Ch. J.**, delivered the opinion of the court:

This is a case of original jurisdiction. The petition filed May 1, 1894, alleges, in substance, that the relator began on February 10, 1893, an action by attachment against G. O. Stevens and H. H. Graham, copartners under the firm name of Stevens, Graham & Co., in the circuit court of Marion county; that the case having been referred to Jesse J. Finley, a practicing attorney, the relator on December 15, 1893, obtained a judgment against Stevens, Graham & Co., the defendants, for \$11,216.66 and costs; that execution issued upon said judgment and was levied upon certain personal property, being the same property upon which attachment had

been levied; that said property was advertised for sale on the first Monday in March, 1894, but that before the legal hours of sale on said day, Enoch W. Agnew and John A. Bishop, receivers appointed by the United States circuit court for the northern district of Florida, filed a claim to said property and obtained possession thereof from the sheriff; that on the following day the relator, in the circuit court of Marion county, caused said case to be called for trial, whereupon the Hon. William A. Hocker, the defendant, judge of said court, adjudged himself disqualified to sit in the trial of said claim case, and refused to do so, alleging the following ground of disqualification, to wit: That he was one of the attorneys of record in the principal case of *D. G. Ambler v. Stevens, Graham & Co.* The petition further alleges that prior to said suit or promises, to wit, in November, 1892, the relator brought the written contract therein sued upon to the said William A. Hocker, then a practicing attorney, but thereafter the said Hocker formed a copartnership with the present attorney of the relator, and when action was brought thereafter on the 10th day of February, 1893, the management of the matters pertaining thereto were turned over to the latter, and although William A. Hocker's name appears as an attorney of record in the case in the firm name of Hocker and Allen until his (Hocker's) appointment to the cir-

given an opinion while at bar in favor of one, and another of the judges was a stockholder in plaintiff's company, that giving an opinion as counsel was not cause of challenge.

In 1843 the constitution and laws of Texas did not disqualify a judge from sitting in a cause, where he had been of counsel, but the present constitution does disqualify him. *Chambers v. Hodges*, 22 Tex. 104.

And in *Loving v. Lamson*, 50 Me. 394, it was held that the discharge of a poor debtor by two justices was not void, where one had counseled and aided the debtor in preparing for his discharge, although he should not have acted. No statute appears to have been cited in the case. But see *McGregor v. Crane*, 98 Mass. 530.

*Disqualification from having tried the case before.*

A judge having once tried a cause is not thereby disqualified from hearing the same case in a subsequent proceeding, or from being a member of the court reviewing the former judgment, in the absence of statutory prohibition. *Turnbull v. O'Hara*, 4 Yeates, 446; *Bachelder v. Norse*, 35 Vt. 643; *Heflin v. State*, 88 Ga. 151; *Pearson v. Hopkins*, 2 N. J. L. 181; *Fry v. Bennett*, 28 N. Y. 324; *Wetmore v. Winans*, 8 Paige, 370, 4 L. ed. 466; *Beckham v. Rice*, 1 Tex. Civ. App. 261; *Edwards v. Wife*, 9 La. Ann. 321.

And under a statute disqualifying a committing magistrate from sitting as a member of the examining court, a justice acting as coroner is not disqualified from acting as member of the examining court. *Forde v. Com.* 16 Gratt. 547.

And in a suit to enjoin the storage of inflammable oils, the fact that the judge had been a member of the city council which had also passed on that question does not disqualify him. *Waters-Pierce Oil Co. v. Cook* (Tex.) March 29, 1894.

And that a judge belonged to a vigilance organization whose committee exiled the defendant on grounds unconnected with the present charge does

not disqualify him from sitting in the cause. *People v. Mahoney*, 18 Cal. 185.

Under N. Y. Const. 1821, art. 5, § 1, the chancellor and justices of the supreme court were forbidden to take part in the affirmance or reversal of their own decrees and this was made part of 2 Rev. Stat., 275, but the omission of this clause from the constitution of 1846 virtually repealed the statute, the court saying there is nothing improper in a judge reviewing his own judgments. *Pierce v. Delamater*, 1 N. Y. 17.

This was changed and now N. Y. Const., art. 6, § 3, provides that no judge shall sit at general term in review of his own decision. *Pistor v. Hatfield*, 46 N. Y. 249.

But a commissioner of appeals is not a judge of the court of appeals, and section 8 applies only to the court of appeals and supreme court. *Settle v. Evrea*, 49 N. Y. 238.

And where a case was heard at general term before the election of 1890, adopting article six of the New York constitution, but the decision was not made until after the result of the election showing the adoption of the amendment, such amendment did not apply to such decision. *Real v. People*, 42 N. Y. 270.

And the New Hampshire statute providing that no justice shall sit in any case in which he has acted as judge in the court below applies only to the supreme court. *Stearns v. Wright*, 51 N. H. 600.

And in *Queen v. Justices of London*, 18 Q. B. 421, note, it was held that the presence of the magistrate at the hearing of an appeal from his court would not be sufficient to set aside the order made at such hearing, if he did not take part, and did not influence the court, but that it was indiscretion on his part. The question was as to the seating capacity of an omnibus which was exhibited at the hearing and the alderman who tried the case went in the omnibus and seated himself while it was being exhibited.

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cult bench, that he at no time took any part in the direction of said case, and since his appointment as aforesaid has had no interest in said case or its outcome by reason of fees or otherwise. The petition further states that the issues in the claim case which the said Judge William A. Hocker refuses to try, are not in any way connected with the issues in the main case in which said Hocker was attorney of record, and have arisen since said Hocker was appointed a judge of the circuit court of Florida, and long after his connection with said case had been severed. The petition concludes with a prayer for an alternative writ of mandamus, commanding the defendant to try the aforesaid claim case, or show cause why he should not do so. This writ issued and the defendant has answered the same.

The answer expressly admits all of the allegations of the petition in reference to the suit by the relator against Stevens, Graham & Co., and the issuing and levying of the execution. The answer also admits that the defendant adjudged himself disqualified for the reasons alleged in the petition, and that the allegations of the petition are true which state his connection with the suit of *Ambler v. Stevens et al.*, and that he had turned over all matters connected with said case to Mr. Edgar P. Allen, as his attorney, and that he had no interest in the same. The answer sets up other matters of disqualification of the defendant, besides those alleged in the petition.

In view of the conclusion we reach in the case, it is only necessary to notice one of these additional matters, which is the allegation that the defendant was one of the attorneys of record of John C. McKibbin, in the suit instituted by him (McKibbin) in the circuit court of the United States for the northern district of Florida, against the said Stevens and Graham, and in which the said Enoch W. Agnew and John A. Bishop, who interposed said claim, were appointed receivers. The defendant admits that at the time said claim was filed he had ceased to have any relations with said suit as attorney or solicitor. The relator moves to strike out the answer on the ground that it is insufficient. This motion is in the nature of a demurrer to the answer, and of course admits the truth of all of its material allegations.

Two reasons are assumed in the pleadings stated herein for the disqualification of Judge Hocker: The first is that he was disqualified to try the claim case on account of his connection, as an attorney of record for the plaintiff, with the suit in which the execution, which was levied upon the property in dispute, was issued; the second is that he was disqualified by reason of having been an attorney of record for the complainant McKibbin in the case wherein McKibbin sought and obtained the appointment of the receivers who, by virtue of their appointment, interposed said claim. That the previous relation of attorney and client disqualifies a judge, has been determined in that state. *Tampa Street R. & Power Co. v. Tampa Suburban R. Co.* 30 Fla. 595, 17 L. R. A. 681.

As to the first matter, the connection of

the defendant with the suit of the relator against Stevens *et al.*, it is contended by the relator that the defendant, Judge Hocker, is not disqualified, because he was only connected with the main case, and that the claim case presents issues entirely foreign to the main case. It may be true, strictly speaking, that the defendant was not an attorney of record in the claim proceedings, but when we consider that the claim arose and is sought to be maintained in resistance to an effort to enforce the execution issued in a case in which the defendant was once an attorney of record, and that the result of his judgment must be that the execution can or cannot be enforced by a sale of the property levied upon, it must appear that the distinction claimed by the relator is too narrow and technical. The rule of disqualification of a judge who has been of counsel for one of the parties, in the matter of the litigation, or matters intimately connected therewith, is but an evolution of the elementary maxim that no man should be a judge in his own lawsuit. The law which disqualifies a judge who has been of counsel in the case intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent. The great principle should not have a narrow or technical construction, but should be applied to all classes of cases where a judicial officer is called upon to decide controversies between the people. 12 Am. & Eng. Encyclop. Law, p. 40; *Hall v. Thayer*, 105 Mass. 219, 223, 27 Am. Rep. 513; *Curtis v. Wilcox*, 74 Mich. 69; *Gains v. Barr*, 60 Tex. 676; *Moses v. Julian*, 45 N. H. 53, 84 Am. Dec. 114; *Slaven v. Wheeler*, 58 Tex. 23. Not only is a judge who has been an attorney in a case prohibited from acting in a judicial capacity, in the identical case in which he has been such attorney, but he cannot act in any supplemental or other proceedings closely connected with such case. *McLaren v. Charrier*, 5 Paige, 530, 3 L. ed. 817.

That the defendant, Judge Hocker, has no interest whatever in the claim suit, which the relator seeks to compel him to adjudicate, cannot affect the question. The matter is simply one of having been of counsel, and is entirely independent and distinct from any question of pecuniary interest, or of the payment to any fee or reward. *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Slaven v. Wheeler*, *supra*. That the main suit of *Ambler v. Stevens* was entirely in charge of another member of the law firm in which defendant was a partner, does not alter the principle. What a partner does in the firm name in the pursuit of its ordinary business is done by the firm, and upon the firm's responsibility. *East Rome Town Co. v. Cottrill*, 81 Ga. 359, 365; *McLaren v. Charrier*, *supra*.

The next question presented by the pleadings as stated is whether the defendant is disqualified by reason of his connection with the suit of *McKibbin, Complainant v. Stevens et al., Defendants*. In this suit the complainant sought and obtained the appointment of the receivers who interposed the claim in question. It was contended in brief of re-

lator that *Judge Hocker* would not be disqualified, by reason of having been attorney for the relator, in the suit of *Ambler v. Stevens et al.*, for the reason that a claimant could not attack the validity of the proceedings in which the execution issued, and that therefore *Judge Hocker* would not be called upon to determine the validity or invalidity of any proceeding in a suit in which he was of counsel. It is not contended, however, nor does it appear to us, that the validity of the appointment of the claimants as receivers might not be involved in the claim case, and that *Judge Hocker* might not in such a case be called upon to adjudicate such matter. The authorities are clear, and the principle is virtually admitted in the brief for the relator, that a judge is disqualified to adjudicate upon the validity of proceedings had and taken in a case in which he was of counsel. *Darling v. Pierce*, 15 Hun, 543. This matter was one in which Agnew and Bisop, the receivers, appointed at the instance and for the benefit of McKibbin, *Judge Hocker's* client, were taking such action, probably at his (McKibbin's) instance, as they thought legal and necessary to the performance of their duty, and to reap for him the benefit of their appointment as receivers. It was a proceeding intimately connected with a case in which the defendant had been of counsel. Much that has been stated as to the first question presented by the pleadings is equally applicable to this, and need not be repeated.

We hold that the connection of the defendant with the main suit of *Ambler v. Stevens et al.*, and with the case of *McKibbin v. Stevens et al.*, were either, and each of them, sufficient to disqualify him from trying the claim case of Agnew and Bishop, as receivers, mentioned in the pleadings herein.

*The motion to strike the answer is denied.*

F. R. OSBORNE, *Plff. in Err.*,

v.

STATE of Florida.

(33 Fla. 162.)

\*1. A state cannot tax or regulate interstate commerce, or make the payment of a tax or the taking out of a license a condition precedent to carrying interstate commerce. A state statute which does so, either expressly or in effect, is offensive to the commerce clause of the Constitution of the United States, and void at least to that extent. The same is true as to foreign commerce.

2. A state statute which imposes a tax, in general terms, on the doing of specified kinds of business, or the pursuit of designated occupations, in the state, and requires that a license shall be taken out before

\*Headnotes by RANEY, Ch. J.

NOTE.—As to the validity of state taxes or licenses which affect interstate commerce, see authorities collected in *Rothermel v. Meyerle* (Pa.) 9 L. R. A. 803, and note; and see also the case next following this one.

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any such business or avocation shall be done or engaged in, should not be construed to apply to any business of the kind that may constitute interstate commerce, but only to business that is domestic or state commerce and to persons engaged or intending to engage in such domestic or state business.

3. Although interstate commerce cannot be taxed or regulated by state legislation, and the commerce clause of the Federal Constitution exempts all such commerce from regulation or taxation by state authority, yet the doing of business that constitutes interstate commerce by a person who is also at the same time engaged in business, of the same kind, that constitutes state or local commerce, cannot be made a bar or exemption of the local or state commerce business from taxation or regulation by state authority.

4. The ninth section of the General Revenue Law of 1893 (chapter 4115, approved June 2, 1893), provides that no person shall engage in or manage the business, profession, or avocation mentioned therein without first taking out a state license as provided therein and paying the occupational tax and license fee prescribed thereby; and it authorizes counties and incorporated cities and towns to impose further taxes. As to express companies its special provisions, substituting figures for words, are as follows: "All express companies doing business in this state shall pay in cities of 15,000 inhabitants or more, a license tax of \$200; in cities of 10,000 to 15,000 inhabitants, \$100; in cities of 5,000 to 10,000 inhabitants, \$75; in cities of 3,000 to 5,000 inhabitants, \$50; in cities of 1,000 to 3,000 inhabitants, \$25; in towns and villages of less than 1,000 and more than fifty inhabitants, \$10." Any express company violating these provisions, or any person that knowingly acts as agent for any express company before it has paid the tax payable by such company is guilty of a misdemeanor, and punishable as therein provided: *Held*,

(a) The act does not tax or regulate or apply to interstate commerce, as distinguished from state or local commerce carried on by an express company, but applies only to express business that is local or state commerce.

(b) That so long as an express company confines its operations to express business that constitutes interstate or foreign commerce it is exempt from the above legislation, but if it engages in business that is state or local, as distinguished from interstate or foreign commerce, it becomes subject to the statute, notwithstanding it may at the same time engage in interstate or foreign commerce.

(c) The effect of the section, in so far as it imposes license taxes on express companies, is that each company doing any business that constitutes local or state commerce, as contradistinguished from interstate or foreign commerce, shall pay a state license tax and take out a state license when it proposes to do business in any city or town or village having more than fifty inhabitants, the amount of such tax being as above indicated according to the population. When there are

As to how far shipments within a state are part of interstate or foreign commerce, see note to *Missouri Pac. R. Co. v. Sherwood, Thompson & Co.* (Tex.) 17 L. R. A. 643.

in one county several cities or towns or villages belonging to one or more of the stated classes, the company must take out a separate state license for each city, town, or village it may intend to do business in, and pay the tax and the fee for the same. Any county may require each company doing business within its limits to pay, for doing business in any city, town, or village in the county and within the provisions of the act, a license tax not exceeding fifty per cent of the amount paid the state for doing business in such city, town, or village. And any incorporated city or town may impose a tax of as much as fifty per cent of the state tax on any company doing business therein.

(d) That the amount of the tax is not shown to be prohibitory or destructive of the business of express companies, even if it be that any judicial action could be based on such a showing.

(e) The act is of uniform operation throughout the state as to all persons standing in the situation made the test of such taxation.

(f) The ascertainment of population involved in the act is not one that the courts are incapable of dealing with successfully.

(January 16, 1894.)

**ERROR** to the Circuit Court for Duval County to review a judgment denying plaintiff's application for a writ of habeas corpus to obtain his release from custody, to which he had been committed for acting as agent of an express company without a license. *Affirmed.*

Statement by **Raney, O. J.:**

Section 9 of chapter 4115, Laws approved June 2, 1893, provides that: "No person shall engage in or manage the business, profession, or occupation mentioned in this section, unless a state license shall have been procured from the tax collector, which license shall be issued to each person on receipt of the amount hereinafter provided, together with the county judge's fee of twenty-five cents for each license, and shall be signed by the tax collector and the county judge, and have the county judge's seal upon it. Counties and incorporated cities and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper, when the business, profession, or occupation shall be engaged in within such county, city, or town. The tax imposed by such city, town, or county shall not exceed fifty per cent of the state tax. But such city, town, or county may impose taxes on any business, profession, or occupation not mentioned in this section, when engaged in or managed within such city, town, or county. No license shall be issued for more than one year, and all licenses shall expire on the first day of October of each year, but fractional licenses, except as hereinafter provided, may be issued to expire on that day at a proportionate rate, estimating from the first day of the month in which the license is so issued, and all licenses may be transferred, with the approval of the comptroller, with the business for which they were taken out, when there is a *bona fide* sale and transfer of the property used and employed in the business as stock in trade; but such transferred license

shall not be held good for any longer time, or for any other place, than that for which it was originally issued."

The same section, in various subdivisions, then enumerates divers business occupations and professions that are required to procure licenses, and prescribes the amount of tax that each shall annually pay therefor, until we reach the 12th subdivision of the section, that provides, among other things, that "all express companies doing business in this state, shall pay in cities of 15,000 inhabitants or more, a license tax of \$200; in cities of 10,000 to 15,000 inhabitants, \$100; in cities of 5,000 to 10,000 inhabitants, \$75; in cities of 3,000 to 5,000 inhabitants, \$50; in cities of 1,000 to 3,000 inhabitants, \$25; in towns and villages of less than 1,000 and more than 50 inhabitants, \$10. Any express company violating this provision, and any person that knowingly acts as agent for any express company before it has paid the above tax, payable by such company, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$50, or confined in the county jail not less than six months." Besides the criminal penalty above, section 10 of the same Act provides that "the payment of all license taxes may be enforced by the seizure and sale of the property by the collector." For an alleged violation of this statute, in knowingly acting as agent at Jacksonville, in Duval county, Florida, for the Southern Express Company, a corporation created under the laws of the state of Georgia, but doing business in Florida, without having paid such license, F. R. Osborne, the plaintiff in error, was arrested upon affidavit and warrant, and required to give bond for his appearance before the criminal court of record for Duval county to answer said charge. Upon his refusal to give such bond he was committed to the common jail of the county, there to await trial. Whereupon he applied to the judge of the circuit court for the writ of habeas corpus to test the legality of his arrest and detention. Upon the hearing on habeas corpus the arrest and detention of the plaintiff in error on the charge alleged against him under this statute was adjudged to be legal, and he was remanded to the custody of the sheriff, and this order he brings here for review by writ of error.

The cause was submitted to the court below upon the following agreed statement of facts: "That the said F. R. Osborne is the agent of the Southern Express Company, and that said company is a corporation created, existing, and being under the laws of the state of Georgia. That said Southern Express Company is doing a business in the state of Florida ordinarily done by express companies in the United States, of carrying goods and freight for hire from points within the state of Florida to points in said state, and also of carrying goods and freights for hire from points within the state of Florida to points without the state of Florida in other states in divers parts of the United States, and in carrying goods and freights for hire from points in other states of the United States to points within the state of Florida, and that it has been engaged in such business for more than twenty years, and was so engaged on the 8d day of October, 1893.

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That of the business done by the Southern Express Company 95 per cent thereof consists of traffic carrying of goods and freights from the state of Florida into other states and bringing and carrying from other states of the United States to points within the state of Florida, and 5 per cent thereof consists of carrying goods and freights between points wholly within the state of Florida. That F. R. Osborne did knowingly act as the agent of said express company on the 3d day of October, 1893, in the city of Jacksonville, Duval county, Florida, a city having more than 15,000 inhabitants, the said Southern Express Company having then and there failed and refused to pay the license tax as required by article 12, section 9, of an Act entitled 'An Act for the Assessment and Collection of Revenue,' of the Laws of Florida, approved June 2d, 1893. That the Southern Express Company does business in and has agents in more than one town in nearly every county in the state, and that said towns differ in population, and that it has an office and agent and does business in Polk county, Florida, in the following incorporated towns with a population as follows: Bartow, 1,600 inhabitants, Ft. Meade, 600 inhabitants, Columbia, 600 inhabitants, Lakeland, 800 inhabitants, and Winter Haven, 200 inhabitants; in Orange county, Apopka, 500 inhabitants, Orlando, 10,000 inhabitants, Sanford, 5,000 inhabitants, Umatilla, 3,000 inhabitants, Winter Park, 600 inhabitants, and Zellwood, 800 inhabitants; in Alachua county, Campville, 400 inhabitants, Archer, 150 inhabitants, Grove Park, 110 inhabitants, Gainesville, 5,000 inhabitants, Hawthorne, 800 inhabitants, High Springs, 500 inhabitants, and Island Grove, 200 inhabitants; in Duval county, Jacksonville, with a population of over 15,000, Baldwin, 125 inhabitants."

**Mr. John E. Hartridge**, for plaintiff in error:

The word "commerce" has been so extended as to scarcely have any boundary. "Commerce is a term of comprehensive import. It includes intercourse for the purposes of trade in any and all forms. The effort to regulate, says the Supreme Court of the United States, embraces all the instruments by which such commerce may be conducted."

Rorer, *Inter-State Law*, p. 405.

The Constitution of the United States places commerce between the several states exclusively within the control and regulation of congress.

Id. p. 406.

No state may in any manner fetter or obstruct interstate commerce.

Id. p. 408, and authorities there cited.

To require a license tax before one can act as an agent of an express company is to fetter or obstruct interstate commerce, where that company is engaged in such business.

Until congress exercises its authority upon the subject interstate commerce is free.

Rorer, *Interstate Law*, p. 409; *Leisy v. Har- den*, 185 U. S. 109, 34 L. ed. 132, 3 Inters. Com. Rep. 86.

It cannot be said in any seriousness that the act of the legislature of the state of Florida under discussion is a police regulation, as it 25 L. R. A.

does not protect property, health, or the safety of a person.

No matter whether the state law is or is not a police regulation, if it is in conflict with the Constitution of the United States, either as expressed in terms or by its silence, it is not valid.

*Patterson v. Kentucky*, 97 U. S. 504, 24 L. ed. 1116; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Western U. Teleg. Co. v. Pen- dleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Re Rahrer*, 140 U. S. 554, 35 L. ed. 574; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota v. Bar- ber*, 186 U. S. 318, 34 L. ed. 455, 3 Inters. Com. Rep. 185.

The following state taxes directly regulating the subjects of commerce have been declared unconstitutional:

A tax on every ton of freight carried by the railroads of the state, as far as it applied to interstate freight.

*State Freight Tax Case*, 82 U. S. 15 Wall. 232, 21 L. ed. 146.

On all messages of a telegraph company, as far as it applied to messages sent to or received from points in other states.

*Western U. Teleg. Co. v. Texas*, 101 U. S. 460, 26 L. ed. 1087.

In the form of a license to sell the products of other states.

*Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565.

On all persons soliciting orders, as far as it applied to those soliciting for persons outside the state.

*Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241.

On all nonresidents who sold liquor.

*Walling v. Michigan*, 116 U. S. 443, 29 L. ed. 691.

On common carriers for each person carried out of the state.

*Crandall v. Nevada*, 78 U. S. 6 Wall. 35, 18 L. ed. 745.

On a steamship company for every alien pas- senger landed at the ports of the state.

*New York v. Compagnie Generale Trans- atlantique*, 107 U. S. 59, 27 L. ed. 383.

A tax in the form of a bond from the cap- tains of all vessels to insure that the alien pas- sengers shall not become a charge on the state.

*Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543.

In the form of a license for all drummers, as far as applied to those selling the products of other states.

*Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45.

Or in the form of a license to sell such prod- ucts not the product or manufacture of the vendor.

*Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50.

The following state taxes, regulating indi- rectly the subjects of commerce, though the means of commercial intercourse, have been declared unconstitutional:

A tax in the form of a license for the offi- cers of all foreign corporations, as far as it falls on those engaged in interstate commerce.



*McCall v. California*, 136 U. S. 104, 34 L. ed. 392.

In the form of a license for all occupations, as far as it falls on the business of running tug boats to the Gulf of Mexico.

*Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653.

On the gross receipts of common carriers, as far as applied to the receipts from interstate business.

*Fargo v. Stevens*, 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308.

On the gross receipts of a telegraph company, as far as it applied to receipts from messages sent to or received from points outside the state.

*Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59.

A tax in the form of a license for ferry boats owned in other states, touching at the wharves of the state.

*St. Louis v. Wiggins Ferry Co.* 78 U. S. 11 Wall. 423, 20 L. ed. 192.

On the capital stock of all companies, so far as it applied to ferry companies chartered in another state whose boats touch at the wharves of the state.

*Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 332.

On all vessels touching at the wharves of the state, as applied to those engaged in interstate business.

*Inman S. S. Co. v. Tinker*, 94 U. S. 238, 24 L. ed. 118.

On all cars used on the roads in the state, not owned by the common carrier resident in the state, as far as it applied to cars engaged in interstate traffic.

*Pickard v. Pullman Southern Car Co.* 117 U. S. 84, 29 L. ed. 785.

In the form of a license for a telegraph company established by congress.

*Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134.

On the franchise of a railroad which franchise had been granted by congress.

*California v. Central Pac. R. Co.* 127 U. S. 1, 32 L. ed. 152, 2 Inters. Com. Rep. 153.

On the tonnage of vessels, though to support quarantine inspection.

*Peets v. Morgan*, 86 U. S. 19 Wall. 581, 22 L. ed. 201.

A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.

*Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 118, 34 L. ed. 394, 396, 3 Inters. Com. Rep. 178; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24.

*Mr. William B. Lamar, Atty. Gen.*, for the State.

*Raney, Ch. J.*, delivered the opinion of the court:

In the case of *Osborne v. Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470, decided in 1872, the ordinance then in question provided that every express or railroad company doing a

business in the city of Mobile, Alabama, and having a business extending beyond the limits of that state, should pay an annual license of a stated amount, and every such company doing a business within the limits of the state, and every such company doing business within the city, should take out a license, paying therefor other amounts. Osborne was there, as here, the agent of the Southern Express Company, a Georgia corporation, which transacted a general express business within and extending beyond the state of Alabama. The company fell under the first clause of the ordinance, and notwithstanding its terms that clause was held unobjectionable to the commerce clause of the Federal Constitution. The decision is founded expressly on the rule laid down in the case of *State Freight Tax*, 82 U. S. 15 Wall. 232, 21 L. ed. 146, where it was said that it is not everything which affects commerce that amount to a regulation of it within the meaning of the constitution, and was also admitted that the ultimate effect of the tax on such receipts might be to increase the cost of transportation, but was held that the right to tax the receipts, though derived in part from interstate transportation, was within the general authority of the state to tax persons, property, business, or occupations within their limits. In *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, the decision in the case of *State Freight Tax*, was considered and questioned, it being held by a unanimous court that a state tax upon the gross receipts of a steamship company incorporated under its laws, such receipts being derived from the transportation of persons and property by sea between different states, and to and from foreign countries was a regulation of interstate and foreign commerce, and in conflict with the exclusive powers of congress. That the *Osborne Case* has been overruled by that of *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, decided in 1888, cannot be denied, and it is clear that the first clause of the ordinance did in terms and effect impose a tax on that class of express companies which might be engaged in interstate commerce, as a distinct class from the other classes engaged, one in business not extending beyond the state, and the other in that not extending outside of the corporate limits.

In the *Leloup Case*, *supra*, an ordinance, adopted in 1883, imposed an annual license tax of \$225 "on telegraph companies. Leloup was the agent of the Western Union Telegraph Company at Mobile, and the license tax not having been paid, a civil action was brought in the circuit court against Leloup to recover a pecuniary penalty which had been adjudged in another tribunal under the ordinance for its violation, the complaint in the circuit court alleging that the company was a New York corporation, having a place of business at Mobile, and had been engaged there in the business of transmitting telegrams from and to points within Alabama, and between private individuals of that state, as well as between citizens thereof and of other states. The plea al-

leged, in substance, Leloup's agency and that the company's charter authorized it to construct and operate lines of telegraph in and between the various states of the Union, including Alabama; and further, that on June 5, 1867, the company accepted the restrictions and obligations of the Act of Congress of July 24, 1866, and that in accordance with its charter the act of congress and agreements with the railroad companies, it constructed, and was at the time of the alleged breach of the ordinance, maintaining and operating, its lines of telegraph on various specified public railroads leading into Mobile, and through Alabama and several other named states, and into others, and over all the principal railroads, post-roads, and military roads in the United States, said roads being public highways, and the daily mails being regularly carried thereon under authority of law and the direction of the postmaster general; and under and across navigable streams in said states, but without interruption to navigation of the streams, or travel on such military and post-roads. That before and during the year 1883, it had been and still was engaged in the business of sending and receiving telegrams over such lines for the public between its office in Mobile and other places in other states and territories of the United States, and to and from foreign countries, also in sending telegraphic communications between the several departments of the government of the United States and their officers and agents, giving priority to said official telegraphic communications over all other business, such official communications being sent at rates fixed by the postmaster general annually since June 5, 1867. To this plea there was a demurrer which was sustained by the circuit court and judgment was given for the plaintiff, and this judgment affirmed by the supreme court of Alabama. The Supreme Court of the United States reversed the judgment, and decided: (1) That the license tax imposed by the ordinance was purely a tax on the privilege of doing the business in which the telegraph company was engaged, the company being also required to pay taxes on its property as other corporations and individuals, and also a tax on its gross receipts within the state; (2) Stating that the question was squarely presented, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another, and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the Act of Congress of July 24, 1866, and other acts incorporated in title LXV. of the Revised Statutes. Proceeding to answer this question, it held that a state cannot tax a business occupation when it cannot tax the business itself; and that a tax on the occupation of doing a business is a tax on the business. That communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different states it is commerce among the several states and directly within the

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power of regulation conferred upon congress, and free from the control of state regulations except such as are strictly of a police character. In reply to the argument that a portion of the company's business was internal to the state and therefore taxable by the state, it is said that such fact does not remove the difficulty; that the tax affects the whole business without discrimination, and that there are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the entire operation of the company. The cases of *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, and *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, are also referred to approvingly, and the conclusion reached in *Leloup's Case* is declared to be plainly within the principles of the decisions in *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 695, 1 Inters. Com. Rep. 45, and *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, and the case is held to be parallel with that of *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678, and the court declares that the fairest and most just construction of the constitution in all its parts "leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to congress."

It will be well to notice here the cases of *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, and of the same company v. *Texas*, referred to *supra*. The former case is one in which it was held that the above act of congress in so far as it declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company shall not after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the states, and appropriate legislation to execute the powers of congress over the postal service; and is not limited in its operation to such military and post-roads as are upon the public domain. This act, it will be found, gives to all telegraph companies organized under the laws of any of the states the right to construct telegraph lines through and over any portion of the public domain of the United States, and over and along any of the military and post-roads of the United States, and over and across the navigable streams and waters of the United States, with certain conditions as to construction; and grants the right to occupy land and use materials; and enacts that telegraphic communications between the several departments of the general government and their officers and agents shall in their transmission over

the lines of such companies have priority over all other business, and be sent at rates to be annually fixed by the postmaster general; and also enacting that before any company shall exercise the powers and privileges conferred thereby it shall file its written acceptance with the postmaster general of the restrictions and obligations required by this act. And in *Western U. Teleg. Co. v. Texas*, where a Texas statute required every chartered telegraph company doing business in that state to pay a tax of one cent on every full-rate message, and one half cent for every message less than full rate, the state sued to recover the tax for messages of which a large number were sent to places outside of the state and by officers of the general government on public business. There was judgment for the state, no deductions being allowed by the state courts for messages sent out of the state or by government officers on government business. The Supreme Court of the United States, in reversing the judgment, says: "The . . . company having accepted the restrictions and obligations of this provision by congress, occupies in Texas the position of an instrument of foreign and interstate commerce and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States. . . . As such, so far as it operates on private messages sent out of the state, it is a regulation of foreign and interstate commerce and beyond the power of the state. That is fully established by the cases already cited. As to the government messages, it is a tax by the state on the means employed by the government of the United States to execute its constitutional powers, and therefore void." The conclusion was that the judgment in so far as it included taxes for government messages or those sent out of the state, was erroneous, it being observed that any tax which the state might put on messages sent by private parties, and not by the agents of the general government, from one place to another exclusively within the jurisdiction of the state, will not be repugnant to the Federal Constitution, and that whether the state law of Texas, in its present form, could be used to enforce the collection of such a tax, was a question entirely within the jurisdiction of the courts of the state, and as to which the supreme court had no power to review. Still another case involving the effect of the act of congress referred to above and tending also to elucidate the question before us independent of such legislation, is *Western U. Teleg. Co. v. Atty-Gen. of Massachusetts*, 125 U. S. 550, 81 L. ed. 790. The valuation of the entire capital stock of the company was obtained from the company, and from this there were made certain deductions allowable in determining the assessable value of such en-

tire stock, and the value of the property of the company in the state was ascertained upon the basis of the proportion of the length of the lines within the state to the length of its lines throughout the country, and this value was assessed at the uniform rate of \$14.14 on each \$1,000 of valuation. The company contended that, in view of the act of congress, which it had accepted, no tax could be claimed for that part of its line,—2834.55 out of 2883.05 miles—that was over, under, or across post roads. The Massachusetts law had a provision to the effect that upon a failure to pay the taxes required to be paid to the treasurer, he might commence an action for the recovery of the same, and further, that all penalties denominated by the act might be collected by informations, and that upon such information the court might issue an injunction restraining the further prosecution of business by the corporation, company, copartnership, or association until all such taxes due, or penalties incurred, should be paid, with interest and costs. The tax was held by the supreme court to be essentially an excise on the capital of the corporation, imposed in an attempt by the commonwealth to ascertain the just amount which any corporation engaged in business within its limits should pay as a contribution to the support of its government on the amount and value of the capital employed by the company therein; or as elsewhere said the tax though nominally upon the shares of the capital stock is in effect a tax upon that organization on account of property owned and used by it in the state, and the proportion of the length of its lines in the state to their entire length throughout the whole country, is made the basis for ascertaining the value of that property. While, says the opinion, the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights, is liable to be taxed upon its real and personal property as any other person would be; and that it never could have been intended by congress in conferring upon a corporation of one state the authority to enter the territory of another and erect its poles and lines therein to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support. The tax was held to be valid, but that part of the state legislation which authorized an injunction was decided to be void, the court observing that the effect of the injunction was to utterly suspend the business of the company and defeat its operations within the state; that if congress had authority to say that the company might construct and operate its telegraph over these lines, the state can have no authority to say it cannot be done; but that in holding this portion of the act to be void, it was not meant to deprive the state of the power to assess and collect the tax.

In *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, a statute of Kentucky made it unlawful for any agent of any express company, not incorporated by the laws of that state, to carry on the business of transportation in that state without first obtaining a license therefor from the auditor, and before the auditor could issue such license to any agent of any company incorporated by any state of the United States, there had to be filed with such officer a copy of the company's charter and a sworn statement showing the assets and liabilities of the company, amount of capital stock, how paid, and of what the assets of the company consist, and, in short, the financial condition of the company, and that it was possessed of \$150,000 either in cash or safe investments inclusive of stock notes; such statement to be renewed annually. A fee of \$5 to be paid by the company or agent was allowed to the auditor for issuing the license, and a like fee for filing copy of charter, and of ten dollars for filing original and annual statements. Crutcher was indicted for doing business as the agent of the United States Express Company, an express company not incorporated by the laws of Kentucky, but trading and doing business as a common carrier by express of goods and other things of value in and through the county of Franklin and state of Kentucky without having any license so to do, either for himself or for such company, and on a plea of not guilty, was found guilty and sentenced to pay a fine. There was an agreed statement of facts, including in its admissions the agency, the incorporation and absence of license, and the doing of business ordinarily done by express companies in this country, of carrying goods and freight for hire not only between points in the state, but also from points in the state to points out of it, and *vice versa*. The statement also showed the total amount of business done at the Frankfort office in November, 1888, and that not quite one fourth of it was local to the state, and the balance was between places in the state and places outside of it. The court of appeals of Kentucky affirmed the judgment of conviction; but the Supreme Court of the United States reversed it, and in doing so said of the statute that it required from the agent of every express company a license before he can carry on any business for the company in the state, and that this of course embraced interstate business as well as business confined wholly within the state, and was a prohibition against the carrying on of interstate business without a compliance with the state law. The requirement of the statement as to \$150,000 investment is also held to be a regulation of such commerce in its application to corporations or associations engaged in that business and a subject belonging to the jurisdiction of the national, and not the state legislature. "If," says the opinion, "a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a

license therefor. To carry on interstate commerce is not a franchise, or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right unless congress should see fit to interpose some contrary regulation on the subject." In citing *Pickard v. Pullman Southern Car Co.*, 117 U. S. 84, 29 L. ed. 785, and other cases, observes the opinion, the court has frequently decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. Again, the court, addressing itself to the fact that the statement shows some business of a purely domestic character to have been done, says: "This is probably quite as much for the accommodation of the people of that state as for the advantage of the company. But whether or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce which was manifestly the principal object of its organization. These regulations are clearly a burden and restriction on that commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." The opinion also distinguishes the case from those of foreign corporations seeking to do a business which does not belong to the regulating power of congress, as insurance business, and manufacturing, and all other corporations whose business is of a local and domestic nature, as to all of which the state has full power to prescribe the conditions of their doing such business in its limits. *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 519, 10 L. ed. 274; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, 30 L. ed. 342. The act was held null and void as applied to the case of Crutcher.

The case of *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, cited by the attorney-general, holds, as the same is summarized in the syllabus, that a statute which requires every corporation, person or association, operating a railroad within the state, to pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of its gross transportation receipts, and further provides that when applied to a railroad lying partly within and partly without the state, or to one operated as a part of a line or system extending beyond the state, the tax shall be equal to the proportion of the gross receipts in the state, to be ascertained in the manner provided by the statute, does not conflict with the Constitution

of the United States, and the tax thereby imposed upon a foreign corporation operating a line of railway partly within and partly without the state is one within the power of the state to levy. By the terms of the statute passed in 1881 it was provided that "every corporation, person, or association, operating any railroad in this state, shall pay to the state treasurer for the use of the state an annual excise tax for the privilege of exercising its franchise in this state." The named railway company was a Canadian corporation having its place of business at Montreal. Its railroad in Maine had been constructed by a Maine corporation, whose charter authorized it to construct and operate a railroad from Portland to the boundary of the state; and with the permission of New Hampshire and Vermont it constructed a railroad from that city to a point in Vermont. In 1858 the Maine company leased its rights and privileges to the Canadian company which, since then, had operated the road and used its franchises. The manner of ascertaining the amount of the tax was as follows: The amount of gross transportation receipts for the year ending September 30 preceeding the levying of the tax was to be divided by the number of miles of railroad operated, to ascertain the gross receipts per mile, and the tax was to be fixed on a scale of percentage varying according to the average receipts per mile, not to exceed in any event a stated per centum; and when a road lay partly within and partly without the state, or is operated as a part of a system extending beyond the state, the gross transportation receipts of the railroad line or system over its whole extent within and without the state were to be divided by the total number of miles operated to obtain the gross receipts per mile, and the gross receipts in the state were to be taken to be the average gross receipts per mile multiplied by the number of miles operated within the state. The supreme court held the tax to be an excise tax upon the corporation for the privilege of exercising its franchise within the state of Maine, and it is said in the opinion that the privilege of exercising the franchise of a corporation within a state is generally one of value, and often of great value and the subject of earnest contention, and that as the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state in its judgment may deem most conducive to its interest and policy; and it may require the payment into its treasury each year of a specific sum, or may apportion the amount exacted according to the value of the business permitted as disclosed by its gains or receipts of present or of past years. And further, that the erroneous ruling of the lower court to the effect that the tax in question was a regulation of interstate and foreign commerce, was founded upon the assumption that a reference by the statute to the transportation receipts and adopting a certain percentage of the same for determining the amount of the excise tax, was in effect the imposition of the tax upon such re-

ceipts, and therefore an interference with interstate and foreign commerce; whereas the resort to the stated methods was not an interference with transportation, domestic or foreign, over the road of the railroad company or any regulation of commerce consisting in such transportation; and there being no levy by the statute on the receipts themselves, either in form or fact, they constituting merely the means of ascertaining the value of the privilege conferred. The case is assimilated by the court to that of *Home Ins. Co. of New York v. New York*, 134 U. S. 594, 38 L. ed. 1025, where a portion of the capital stock of the company was invested in bonds of the United States, and by an act of the legislature of New York it was declared that certain classes of companies with certain exceptions, incorporated under the laws of that state or of any other state or country and doing business in New York, should be subject to a tax on its corporate franchise or business to be computed at a varying percentage on its capital stock according as its dividends thereon should be more or less, or there should be no dividend, as stated in the act. The company resisted the payment of the tax, asserting that it was one upon the capital stock of the company, and that consequently there should be deducted from the amount of the tax a sum bearing the same ratio thereto that the amount invested in government bonds, which were exempt from taxation, bore to its capital stock, and that the law requiring a tax, without such reduction, was unconstitutional and void. It was held, however, that the tax was not on the capital stock nor upon any bonds of the United States composing a part thereof, but upon the corporate franchise or business of the company, and that reference was only made to the stock and dividends for the purpose of determining the amount of the tax to be enacted each year.

In 1879 the legislature of Pennsylvania enacted a statute to the effect, as far as it need be stated, that no foreign corporation, except insurance companies, that did not invest and use its capital in that commonwealth, should have an office or offices therein for the use of its officers, stockholders, agents, or employes, unless it should have first obtained from the auditor-general an annual license so to do, and for such license pay into the state treasury annually one fourth of a mill on each dollar of capital stock that it was authorized to have, such payment to be made before the license could issue. This statute has been before the Supreme Court of the United States in the case of *Pembina Consol. & Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, and in *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 8 Inters. Com. Rep. 178. In the former case it appeared merely that the appellant company, a corporation organized under the laws of Colorado, for the purpose of carrying on a general mining and milling business in that state, with its principal office there, had an office in the city of Philadelphia, Pennsylvania, for the use of its officers, stockholders, agents and employes, and

not having complied with the law, an action was brought to recover of it the tax and penalty authorized by the statute. The tax was sustained by the Supreme Court of the United States as not in conflict with the commerce clause of the constitution; and Judge Field speaking for the court said of the statute that it imposed no prohibition upon the transportation into Pennsylvania of the products of the corporation or upon their sale in the commonwealth, but exacted only a license tax from the corporation when it has an office in the commonwealth for the use of its officers, stockholders, agents or employes; and it is also observed by him, that the only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits, or hiring officers for that purpose or to exact conditions for allowing it to do business or have offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce interstate or foreign; that the control of such commerce being in the federal government, is not to be restricted by state authority. In the second case there was a different state of facts. The road of the railroad company, a corporation existing under the laws of Virginia and West Virginia, though entirely within the two states named, was a link in a through line of railroad by which passengers and freight were carried into Pennsylvania from other states, and from that state to other states; and it kept its office in Philadelphia for its stockholders, officers, agents, and employes for the "furtherance of its business interests in the matter of its commercial relations," and did not "exercise or seek to exercise any privilege or franchise not immediately connected with interstate commerce, and required for the purpose thereof." The Pennsylvania courts held that the company was subject to the tax imposed by the statute, but the Supreme Court of the United States decided that the office was maintained because of the necessities of the interstate business of the company, and for no other purpose, and that a tax upon the company was therefore a tax upon one of the means or instrumentalities of the company's interstate commerce, and as such was in violation of the commerce clause of the constitution.

In *McCall v. California*, 136 U. S. 104, 34 L. ed. 892, the appellant was an agent in the city and county of San Francisco for the New York, Lake Erie & Western Railroad Company, a railroad corporation having its principal place of business in Chicago, and operating a continuous line of road between Chicago and New York; and as such agent his duties consisted in soliciting passenger traffic in that city and county over such road. He did not sell tickets to passengers over that or any other road, but took the passengers to the Central Pacific Railroad Company where tickets were sold them. The only duty he was required to perform for such company was to induce people who contemplated taking a trip east to be booked over the line he represented, he neither receiving nor paying out any money or other valuable consideration on account thereof. An ordinance of 25 L. R. A.

San Francisco prescribed certain rates of license, and, among others, "for every railroad agency, twenty-five dollars per quarter," and made any violation of the ordinance a misdemeanor. McCall was convicted by the state court upon the above state of facts and the further circumstance that he had not complied with the ordinance. The tax was exacted of him as a condition precedent to carrying on the business. "It is admitted," says the opinion of the Supreme Court of the United States, reversing the state court, that "the travel which it was his business to solicit was not from one place to another within the state of California. His business therefore as a railroad agent had no connection direct or indirect with any domestic commerce between two or more places within the state. His employment was limited exclusively to inducing persons in the state of California to travel from that state into and through other states to the city of New York." The conclusion was, the business of the agent was interstate commerce, and that the tax was forbidden by the federal organic law.

In *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 618, 3 Inters. Com. Rep. 595, the decision was that a state statute imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the state, under which a corporation of another state engaged in running railroad cars into, through, and out of the state, and having at all times a large number of such cars within the state, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in that and other states over which its cars are run, does not, as applied to such a corporation, violate the interstate commerce provision of the Federal Constitution. In the opinion of the court, by Judge Gray, it is said, citing *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Pickard v. Pullman Southern Car Co.* 117 U. S. 84, 29 L. ed. 785; *Robbins v. Shelby County Taxing Dist.* and *Leloup v. Port of Mobile*, *supra*, that much reliance was placed by the plaintiff in error upon the cases in which it has been decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits, and is then observed that in each of those cases the tax was not on the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden on the commerce itself.

In *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, a Tennessee statute enacted that "all drummers and all persons not having a regular licensed house of business in the taxing district offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of \$10 per week or \$25 per month for such privilege, and no license shall be issued for a longer period than three months." Robbins, according to the agreed statement

of facts, was a citizen and resident of Cincinnati, Ohio, and was engaged in the taxing district of Shelby county, Tennessee, in the business of drumming—soliciting trade by the use of samples—for the firm of Rose, Robbins & Co., doing business at Cincinnati, all the members thereof being citizens and residents of Cincinnati, for which firm he worked as a drummer, the firm being engaged in the selling of paper and other articles used in the book stores of the stated taxing district. Robbins was arrested for drumming in the district without a license. There was judgment against Robbins, and on appeal it was affirmed by the supreme court of Tennessee, from which court the case was carried to the Supreme Court of the United States, where the judgment was reversed on the ground that the legislation, in so far as it applied to cases like that then under consideration, was a regulation of commerce among the states, and unconstitutional. In *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, Ficklen and Cooper & Co. were respectively commercial agents or brokers having an office in the district, and in 1887 took out licenses for their said business under a statute of Tennessee which provided that "every person or firm dealing in cotton or any other article whatever, whether as factor, broker, buyer or seller, on commission or otherwise, \$50 per annum, and in addition every such person or firm shall be taxed *ad valorem* ten cents on every hundred dollars of amount of capital invested or used in such business . . . . And provided further that if the person or persons taxed in this subsection have no capital invested they shall pay two and one half per cent on their gross year commissions, charges, or compensation for said business, and at the time of taking out said license they shall give bond to return said gross commissions, charges, or compensation to the trustee at the end of the year, and at the end of the year they shall make return to said trustee accordingly and pay him the said two and one half per cent." During the year for which they took out license all the sales negotiated by Ficklen were made on behalf of principals residing in other states, and the goods so sold were at the time of the sale in other states to be shipped to Tennessee as sales should be effected. During the same time at least nine tenths of the commissions of Cooper & Co. were derived from similar sales. They had no capital invested in their business. At the expiration of the stated year they applied for a renewal of their license for 1888, tendering each the tax and fee therefor, but as they had made no return of their commissions and no payment of the percentage on their commissions, the application was denied. Thereupon they filed a bill to restrain the collection of the percentage tax for the past year, and also to restrain any interference with their current business, claiming that the tax was a tax on interstate commerce. The Supreme Court of the United States held that if the tax could be said to affect interstate commerce in any way, it did so incidentally and so remotely as not to amount to a regulation of it; and that

under the circumstances the complainants could not resort to the court simply on the ground that the authorities had refused to issue a new license without the payment of the stipulated tax. Speaking here for all the court, except Harlan, J., who dissented, there being, however, one vacancy, *Chief Justice* Fuller said of the *Robbins Case*, *supra*, that the question involved there was, in the language of *Judge* Bradley, who wrote the opinion of the court: "Whether it is competent for a state to levy a tax or impose any other restrictions upon the citizens or inhabitants of any other state for selling or seeking to sell their goods in said state before they are introduced therein," and that it was decided that it was not; yet that it was conceded that commerce among the states might be legitimately incidentally affected by state laws when they, among other things, provided "for the imposition of taxes upon persons residing within the state or belonging to its population and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States." That in *Robbins' Case* the tax was held in effect not to be a tax on him, but on his principals, while in the *Ficklen Case* it was clearly levied upon the parties in respect of the general commission business they conducted, and their property engaged therein or their profits realized therefrom. "No doubt," he further says, "can be entertained of a right of a state legislature to tax trades, professions, and occupations in the absence of inhibition in the state constitution, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist for the time being wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution." Referring to what was said in *Lyng v. Michigan*, 135 U. S. 161, 166, 34 L. ed. 150, 153, 8 Inters. Com. Rep. 143, he observes, but here the tax is not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business, and that the complainants voluntarily subjected themselves thereto in order to do a general business. And as to *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 885, 27 L. ed. 419, where an annual license fee was imposed on a ferry company by the city of East St. Louis, Illinois, the company having been chartered by that state and being domiciled in the city, but its boats plying between there and St. Louis, Missouri, he quotes from the opinion therein as follows: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city as in this case the power to 'license, tax and regulate ferries,' the latter may impose a license tax on the keepers of ferries, although their boats ply between lands lying in two different states, and the

act by which this section is authorized will not be held to be a regulation of commerce;" and of *McCall v. California*, *supra*, he says that the decision was because the business of the agency was carried on with the purpose to assist in increasing the amount of passenger traffic over the road, and was therefore a part of the commerce of the road, and hence of interstate commerce; and of *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 123 U. S. 826, 80 L. ed. 1200, 1 Inters. Com. Rep. 808, he remarks that the specific gross receipts were taxed as such, taxed "not only because they are money or its value, but because they were received for transportation." Referring to *Maine v. Grand Trunk R. Co.*, *supra*, he says, since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the state, ascertained as it was there, it is difficult to see why a citizen doing a general business at the place of his domicile should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. "This tax is not on the goods, or on nonresident merchants, and if it can be said to affect in any way it is incidentally and so remotely as not to amount to a regulation of such commerce. . . . What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but has simply transacted business for nonresident principals, is an entirely different question which does not arise on this record."

The present case is also clearly distinguishable from *Pickard v. Pullman Southern Car. Co.*, 117 U. S. 84, 29 L. ed. 785, where a Tennessee statute imposing a privilege tax of \$30 per annum on every sleeping car or coach used or run over a railroad in that state, and not owned by the railroad on which it should be run or used, was held void in so far as it applied to interstate transportation of passengers carried over railroads in Tennessee into or out of or across that state in sleeping cars owned by a corporation of another state and leased by it for transportation purposes to Tennessee railroad corporations, the latter receiving the transit fare and the former the compensation for the sleeping accommodations. In the opinion it is said: "The car was equally a vehicle of transit as if it had been a car owned by the railroad company and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it was engaged in interstate commerce, was not taxable by the state of Tennessee; because the plaintiff had no domicile in Tennessee, and was not subject to its jurisdiction for purposes of taxation; and the cars had no situs within the state for purposes of taxation; and the plaintiff carried on no business within the state, in the sense in which the carrying on of business in a state is taxable by way of license or privilege." Here the express company has, as is well known, its local offices and local agents throughout the state, and is doing business as personally here, and

enjoying the protection of our government and laws over that business as much as any person in the state.

The statute now before us is clearly distinguishable from those involved in many of the preceding decisions. It does not impose any tax upon the value of the property of the company within the state, assessed either upon the principle adopted by the legislatures of Massachusetts and Pennsylvania, in the cases of *Western U. Teleg. Co. v. Atty. Gen. of Massachusetts*, and *Pullman Palace Car Co. v. Pennsylvania*, or otherwise; nor does it impose a tax on the mere right to exercise within the state a corporate franchise, estimating the value of such use as in *Maine v. Grand Trunk R. Co.*; again, it is not a tax on a corporation for merely having an office in the state for the use of its officers, stockholders, agents, or employes, as in *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, in all of which cases the statutes were sustained; nor one where the state has given exclusive right to a domestic corporation, and the question of the validity of that grant to the exclusion of another company which the act of congress gave the right to enter the same territory, and constituted a federal agency, as in *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, where the efficiency of the state grant to exclude the latter company was denied. Our statute is clearly one in which the tax is imposed on the person and for doing the business of an express company. It is an occupational tax, and is not imposed on any corporation because it is a corporation or for exercising its corporate franchise within the state, but it is imposed as are most of the occupational taxes to be found in the act, on any and every person, whether natural or artificial who may do the express business, and simply because of doing such business. It is moreover entirely clear that the statute does not anywhere show any intent to tax interstate or foreign commerce as such, or to tax any one because of doing business that constitutes interstate or foreign commerce, as contradistinguished from local business. That a state cannot tax interstate commerce either directly or otherwise, or that it cannot make the payment of a tax or the taking out of a license a condition precedent to carrying on interstate commerce, we do not deny; nor do we wish to be understood as meaning that a state tax which in effect burdens such commerce wherever it may be carried on, although not laid directly or expressly on interstate commerce, is not offensive to the commerce clause of the constitution, still we do believe that a state tax imposed on any avocation generally, such as those usually imposed on merchants, druggists, dealers in tobacco and others, for doing business in the state, is not itself, nor is the statute imposing it, unconstitutional. That the commerce clause of the constitution exempts from the burden of state taxation those who confine themselves to interstate commerce is a truth of which, at this day, knowledge must be imputed to the law-making power of the states, and in the absence of language that clearly connects such an intent with that power, it should not be held that there was a purpose to ignore such



truth or violate its principles; but that the doing of express or other business which constitutes interstate commerce along with and as a part of a general business which is also made up in part of business of the same nature that is local to the state, exempts those engaged in such general business from the tax which the law imposes upon it, we do not admit. Of course where such statutes make the payment of the tax, or the taking out of a license, a condition precedent to such general business they are never a bar to any one at any time entering upon or doing interstate commerce business, and as long as any one does only such business he is exempted by the commerce clause from the effect of the statute, and is in our judgment placed beyond the intent of the more general language usually adopted in imposing occupational taxes, but when he does not confine himself to such business, but engages indiscriminately in local and interstate business, he cannot by making the former a feature of that business relieve himself from the taxes, conditions, or regulations to which the latter subjects him. Engaging in the former business does not necessitate his engaging in the latter, and if he does not engage in the latter the former is in nowise burdened or even affected by the tax or the statute. but, on the contrary, he is as free to carry on interstate commerce unaffected by the provisions of this act, as if it was not on the statute book. He may, if he chooses, keep his local and interstate business entirely distinct, or carry them on each as a separate business, and if he does so the former will be subject to state taxation and regulation but the latter will be exempt from any legislation regulating or burdening the former. In our judgment it was never the purpose of the commerce clause to interfere with state taxation or state regulation of taxation so long as any regulation of interstate or foreign commerce, or commerce with the Indian tribes, is not interfered with.

It is obvious from several of the decisions cited above that there is a clear distinction between the unconstitutionality of a statute as such or of a specific provision thereof, tested by the commerce clause, and the application of a general provision, like that before us, of a statute to interstate commerce business which, but for the commerce clause, would be within the operation of such general provision. This is illustrated by the case of the Pembina Consolidated Silver Mining and Milling Company, and that of the Norfolk & Western Railroad Company, involving the Pennsylvania statute as to foreign corporations having offices in the state for the use of officers and others. In the former of these cases, where the imposition of the tax was sustained, it was said, and is evident, that the statute proposed no prohibition upon the transportation of the products of the corporation or upon their sale in the state, nor is there in the statute anything that shows an intent to affect interstate commerce in any way, but when it was attempted to subject to that statute a company which was using its offices solely for interstate commerce purposes, and the state court had decided both

that the statute applied to offices so used, and that the tax as thus applied was not contrary to the commerce clause, the supreme court reversed the decision, and held that as so applied the tax was unconstitutional. Again in the *McCall Case* where it is made prominent that the business of the agent was exclusively interstate in its character, it is entirely plain that it was not the meaning of the court that the statute or ordinance involved in these cases did not stand in full force and effect as to everything except interstate or other commerce falling within the terms of the commercial clause. And in the case of *Western U. Teleg. Co. v. Texas*, where telegrams sent between persons in Texas and those in other states and those sent to government officers were held to be exempted from the general provision of the act, taxing all messages, the former because they were interstate commerce, and the latter because of the character of the company as a governmental agency, it is apparent that telegrams themselves were the subject of taxation by the terms of the act, and those which were held to be exempt were purely interstate or governmental in their character. Again it is shown in the *Shelby County Taxing District Cases*. In one of them (*Robbins' Case*) the facts showed nothing but interstate commerce business, pure and simple; there being not a fact in it that makes the decision authority beyond the inability to tax such commerce as such. Of course no one would pretend to say that it committed the court to the view that in the doing of a general business of a particular character composed of both interstate and local commerce, the former component would relieve the entire business from a state tax or regulation to which it would be subject if there was no such component, or that the act was not entirely effectual except as to business covered by the commerce clause. In the *Ficklen Case*, however, the tax was, as it was imposed by the statute, as general as it was in the *Robbins' Case*, and yet because the parties had submitted themselves to the statute as persons intending to do a general business, or, in other words, one indiscriminate as to local or interstate commerce, it was held that they could not either because in the one case only interstate business was done, and in the other mostly such business, and only one tenth of local business, evade the provisions of the statute. We do not understand any case to hold that the protection of the commerce clause is confined to citizens of other states than that whose legislation is complained of. It is as much a shield to the Floridian who in Florida is doing such business with those in other states as it is the Georgian residing in Georgia who may be engaging in business with residents of Florida; the protection is to all interstate commerce.

We are not unmindful of the seeming conflict to those views to be found in the expressions embodied in the *Leloup*, and the *Crutcher cases*, but our judgment is that these expressions are to be viewed with reference to the circumstances under which the Supreme Court of the United States was then speaking. The state courts which it was re-

viewing had each declared in effect that these statutes were binding upon and effectual as to companies as doers of interstate business, or, in other words, were a bar to their doing interstate business without having complied with their requirements. *Port of Mobile v. Letoup*, 76 Ala. 401; *Orutcher v. Com.* 89 Ky. 7. This construction has become, in so far as the federal tribunals were concerned, binding upon the federal court as to the effect of each statute within the state enacting it, as much as if it had been expressly stated in the act. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 21, 85 L. ed. 613, 614, 3 Inters. Com. Rep. 595. This being so, the doing of local business could not affect the question. It gave to the statute the same effect on interstate commerce as if it had had a special clause as to such commerce, like the first clause of the Alabama statute in the case of *Osborne v. Mobile*, *supra*, which decision we regard, in view of that clause, as entirely overthrown by the subsequent decisions of the same tribunal. It cannot be where the state statute does not interfere with interstate commerce, but it can be carried on protected by the state courts against regulation or interference by state authority, that the mere fact that state commerce, if carried on, is regulated or burdened, operates as a regulation of or burden on interstate commerce.

It is not to be doubted that, under our statute, any citizen of the state, or of any other state, or any body corporate of either, that should enter upon the express business in this state proposing to confine itself to local or state business, or actually doing so, would be subject to all the provisions of this statute; and we cannot see how it can be that an engagement by any such person, natural or artificial, in local business, can be relieved from the provisions of the statute by an engagement at the same time in interstate commerce business, or how his engagement in the latter business can make the statute inapplicable to the other. Is it true that the merchant who may be doing a large local business can exempt himself from the statute by the fact that he may also do a regular business with customers in other states to whom he sells and ships goods? We do not think that anything but interstate and foreign business, or business with the Indian tribes, is protected by the clause in question, or that that clause is the basis either for interfering with a state's dominion over its own commerce, or for prescribing the mere form of its legislation as to its affairs.

Our state statute can have no effect as to any interstate or foreign commerce business which may be carried on by the Southern Express Company, the principal of the plaintiff in error, or by him as its agent, or in fact by any one. So long as he and the company confine their operations to express business constituting interstate or foreign commerce, they are exempt from any interference with them under state legislation. Such commerce is the subject of federal regulation, and is beyond the jurisdiction of state authority. That the Southern Express Company is engaged in such commerce, is admitted; and 85 L. R. A.

that it is engaged in domestic or state commerce, is also admitted, and nothing is clearer than that the right to engage in interstate or foreign commerce freed from any regulation or burden of the same by the states, gives no immunity from state regulation or state taxation of state commerce. The exclusion of state interference in the one case is no more perfect, nor any more essential, than the exclusion of federal interference in the other. In our judgment the Florida statute now under consideration is, in so far as its terms can be construed to apply to interstate or foreign commerce, of no effect, and besides this there is in the act, in so far as it applies to express companies, nothing that necessarily regulates, or that burdens or interferes with anything that is strictly interstate or foreign commerce, or that, in view of the commerce clause of the Federal Constitution, should or can properly be construed to apply to interstate or foreign commerce. Any person or persons, or body corporate, wishing to engage in the express business, and confine that business to interstate or foreign commerce, can do so, and any effort to apply to or enforce against him the provisions of the statute as to license, license tax, or license fee, must prove futile. The commerce clause of the Constitution of the United States protects him against any such interference. But because such person, or persons, or body corporate, may have this right, he or they have not as an incident to it the right to engage in state commerce, and the statute as a regulation of state commerce is entirely valid. It is a legal regulation of state commerce, and there is nothing in the Federal Constitution that exempts any person or persons, natural or artificial, from its provisions.

If the person engaging, or proposing to engage, in interstate commerce express business, finds that to engage in express business which is state commerce will or may take some of his interstate commerce express earnings to pay the license taxes and fees of the state commerce business, he has only to refrain from the latter business to avoid incurring such exaction from such earnings. It is undeniable that taxes on property employed in interstate commerce business do not constitute a regulation of such commerce (*Maine v. Grand Trunk R. Co.*, and *Western U. Teleg. Co. v. Atty. Gen. of Massachusetts*, *supra*, and *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 85 L. ed. 613, 3 Inters. Com. Rep. 595); and this must be true notwithstanding that the payment of such taxes cannot be met from the earnings of state or local commerce. It is not sufficient to constitute a regulation of such commerce that the thing complained of affects it indirectly, incidentally and remotely. *Sherlock v. Alling*, 98 U. S. 99, 103, 28 L. ed. 819, 820; *Smith v. Alabama*, 124 U. S. 465, 81 L. ed. 508, 1 Inters. Com. Rep. 804; *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5, 30, 81, 21 L. ed. 787, 791.

II. We fail to discover any uncertainty or obscurity in the statute as to the sums required by it to be paid by express companies as a state license tax, or, we may add, as a county or a city or town license tax. The

obvious meaning of the act, in so far as its provisions relate to these companies, is that each company shall pay a state license tax and take out a state license, when it proposes to do business in any city or town or village having more than fifty inhabitants; the amount of such state license tax being \$200 for cities of fifteen thousand, or more, inhabitants, and \$100 for cities of from ten to fifteen thousand inhabitants, \$75 for cities of from five to ten thousand, \$50 for those of from three to five thousand, \$25 for those of from one to three thousand, and \$10 for towns and villages of more than fifty inhabitants. Where there are in one county several cities, or towns or villages belonging to one or more of these classes, the company must take out a separate state license for each one of them that it may intend to do business in, and pay the tax and fee for the same as stated. It of course takes out no license for any city, town or village that it does not do business in. Any county may impose on a company doing business within its limits a license tax of not more than fifty per cent of the state tax, and thus require the company to pay it not more than fifty per cent of the amount such company has to pay to the state as a license tax for doing business at any city, town or village, within the provisions of the act. If one company is doing business in, say, three places, one of which belongs to one class, another to another class, and the third to still another, the county may impose a tax on the company for each of the three places not exceeding fifty per cent of the amount of the state tax for that place. Likewise any incorporated city or town may impose on any such company doing business within its limits a municipal license tax not exceeding fifty per cent of the state license tax imposed upon it for that place by the statute. Whether or not this construction of the statute will result in rendering it impossible for express companies to carry on within our borders business that is local to the state, is a consideration for the lawmaking power, but it cannot be invoked properly to influence a construction that is contrary to the plain meaning of the statute, made more palpable still by a comparison of it with former legislation as to the same matter. Acts 1872, p. 87; 1881, p. 26; 1891, p. 8. By the legislation cited, the tax was imposed first on the agents, and afterwards changed to the companies, the tax on the companies being confined to simply a state tax payable to the state treasurer, without any license from collectors of revenue, or any county or municipal taxation under the general provisions of the license tax section of the statutes; while now the state tax is payable to the collectors of revenue, and the license is signed and delivered according to the general provisions of the ninth section of the Revenue

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Law of 1893, just as in the cases of many other if not all the occupations made subject to license by that section; its county and municipal taxation features being likewise applicable to these companies just as they are to merchants, keepers of hotels, liquor dealers and banks, and others too numerous to designate. Upon most deliberate consideration we are satisfied beyond doubt that any other construction of the act on this point would be strained and inconsistent and contrary to its meaning and the manifest purpose exhibited by the statute. The amount of the tax, if not a matter solely of legislative discretion, is still not shown by this record to be prohibitory or destructive of business; and if there be one or more counties in the state in which there is not even a village of fifty inhabitants, the fact does not bring the act in conflict with any provision of our constitution, nor does it impair the uniform operation of the act throughout the state as to all persons standing in the situation which the act makes the test of taxation. The question of the population of any city, town, or village has, as the petition shows, presented no insuperable difficulty to petitioner or his counsel, nor, as is shown by the stipulation between counsel, any to the state authorities; and, when it shall be made an issue it will be one of fact, and not beyond the power of the courts to deal with successfully; and it is entirely clear, from the case before us, that the law affords a hearing as to the enforcement of the criminal features of the statute, and it would be improper to intimate any opinion as to its provisions that give resort to levy and sale of property, when no such levy has been made.

It cannot be said that the detention of the plaintiff in error is without jurisdiction, and therefore he could or should have been discharged on habeas corpus from the custody in which he was when the writ issued. *Ex parte Prince*, 27 Fla. 196. The plaintiff in error was properly remanded by the circuit judge for a hearing before the criminal court of records of Duval county, upon the charge. That hearing must be conducted on principles consistent with the conclusions we have reached, and particularly with an eye to the fact that our legislation has and can have no effect upon interstate commerce, but is applicable alone to state or local business. The Southern Express Company may carry on any and all business that constitutes interstate or foreign commerce, free from regulation by or under our laws; but business strictly of a state or local character cannot be exempted from our laws or put beyond our authority by its engaging at the same time in interstate or foreign commerce.

*The judgment will be affirmed* and the cause remanded for proceedings not inconsistent with this opinion.

*Affirmed*, 164 U. S. 650, 41 L. ed. 586.

## NEW JERSEY SUPREME COURT.

STATE of New Jersey; LUMBERVILLE  
DELAWARE BRIDGE CO., *Prosecutors*,

v.

STATE BOARD OF ASSESSORS *et al.*

(55 N. J. L. 529.)

\*1. The Federal Constitution will not invalidate a state tax imposed upon domestic corporations generally because it incidentally affects one that, under state authority, is engaging in interstate commerce.

\*2. The yearly license fee imposed upon miscellaneous corporations under the Act of April 18, 1884 (Supp. Revision, p. 1016), is levied upon the right of the company to exist in corporate form, without regard to the powers that under such form it may exercise. Such a fee may be exacted by the state from which the right is derived, without reference to the nature of the business the corporation may be authorized to carry on, and is constitutional, even as against a domestic corporation created for the purpose of engaging in commerce with an adjoining state.

\*3. The right of corporate existence is, in its nature, indivisible, and the fee therefor must necessarily be an entirety, no matter where the property of the company is situated, or how its capital is invested or employed.

(February Term, 1893.)

CERTIORARI to review tax assessments.  
*Assessments affirmed.*

Statement by GARRISON, J.:

The following state of facts is agreed upon for the purpose of the argument of the above-stated cause:

"First. It is admitted that by the compact between New Jersey and Pennsylvania, dated May 27, 1788 (Nix. Dig. p. 864), it is declared that the river Delaware, from the northwest corner of New Jersey to the circular boundary of the state of Delaware, in the whole length and breadth thereof, is, and shall continue to be and remain, a common highway, equally free and open for the use, benefit, and advantage of the contracting parties, and that each state shall enjoy and exercise a concurring jurisdiction within and upon the water between the shores of said river.

"Second. It was admitted that the Lumberville Delaware Bridge Company was incorporated by the concurrent legislation of said states, viz.:

"By an act of the legislature of the state of Pennsylvania entitled 'An act to incorporate the Lumberville Delaware Bridge Company,' approved April 7, 1835 (Pa. Pub. Laws 1834-35, p. 114), and by an act of the legislature of the state of New Jersey entitled, 'An act to incorporate the Lumberville Delaware Bridge Company,' passed Feb. 12, 1836, N. J. Pub. Laws 1836, p. 79.

\*Headnotes by GARRISON, J.

NOTE.—See, in connection with the above case the one immediately preceding it and the note appended thereto.

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"Third. It is admitted that the incorporators duly organized, built, erected, and constructed a bridge across the river Delaware, from shore to shore, between said states, at or near Lumberville, in the county of Bucks, and state of Pennsylvania, and erected its tollgates on the westerly bank of said river, and have always demanded and collected all tolls thereat.

"Fourth. It is admitted that the president and treasurer of said company are residents of the state of Pennsylvania, and the secretary thereof is a resident of New Jersey, and that all meetings of said company are held at the office of said company established at Lumberville, Penn.

"Fifth. It is admitted that the prosecutors pay annually to the authorities of New Jersey taxes on one half of said bridge, including the abutments and piers to the center of the river upon the New Jersey side, as part of the structure, without reference to the extent of travel upon it, or the profits derived therefrom, and that the prosecutors pay annually to the authorities of the state of Pennsylvania one half of the taxes assessed under and by virtue of the acts of the legislature of said state, passed June 7, 1879, and June 1, 1889.

"Sixth. It is admitted that the prosecutors have paid to the state of New Jersey, under protest, all taxes assessed against it under and by virtue of the act entitled 'An act to provide for the imposition of state taxes upon certain corporations, and for the collection thereof,' approved April 18, 1884,' and the several supplements thereto.

"Seventh. It is admitted that the state of Pennsylvania has never concurred in the passage of the last-mentioned act.

"Eighth. It is agreed that either party may refer to all laws, agreements, documents, or papers made or passed by either state in reference thereto.

The following are the reasons relied upon:

"First. Because the said tax or impost is tax upon interstate commerce, and in violation of the Constitution of the United States.

"Second. Because the said Lumberville Delaware Bridge Company is not incorporated under the laws of the state of New Jersey, within the meaning of the terms of the act entitled 'An act to provide for the imposition of state taxes upon certain corporations, and for the collection thereof,' approved April 18, 1884, and the several supplements thereto, passed by the legislature of the state of New Jersey.

"Third. Because, upon the principles of public law, it is clear that the power of erecting a bridge, and taking tolls thereon, over a navigable river which forms the coterminous boundary between two states, can only be conferred by the concurrent legislation of both states; and such charters are subject to alteration, amendment, or repeal by like concurrent legislation only.

"Fourth. Because the legislature of the state of New Jersey cannot impose a tax by way of a license fee upon a foreign corporation, or its franchises, carrying on its business, or any part thereof, without the jurisdiction of the state of New Jersey.

"Fifth. Because the assessment was made upon an erroneous principle; that is to say, it was measured by the amount of its capital stock issued by the laws of the state of Pennsylvania, as well as the amount thereof issued by virtue of the laws of the state of New Jersey, whereas it should have been measured by one half of the total amount of its capital stock issued and outstanding.

"Sixth. Because the Act of April 18, 1884, and the supplements, do not authorize the imposition of any tax, by way of license fee or otherwise, upon foreign corporations. It only applies to domestic corporations.

"Seventh. Because the said corporation is a foreign corporation, and demands and receives all tolls at its gates erected and maintained within the jurisdiction of the state of Pennsylvania.

"Eighth. Because the title of the Act of April 18, 1884, and supplements, does not embrace foreign corporations, and if it did the same would be void for duplicity.

"Ninth. Because the said assessments are, in divers and other respects, uncertain, erroneous, and illegal, and ought to be set aside and reversed."

Argued before Van Syckel and Garrison, JJ.

**Mr. W. S. Gummere** for prosecutors.

**Mr. William Y. Johnson**, for defendants:

The act passed by the state of New York is entitled: "An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations."

Pub. Laws 1880, 763; Pub. Laws 1881, 482.

This act so far as it relates to foreign corporations simply imposes a tax upon the business of such corporations done within that state. So far as the act imposes a tax upon the corporate franchises, its operation is confined to domestic corporations.

*People v. Home Ins. Co.* 92 N. Y. 828.

Such a tax upon foreign corporations the legislature has authority to impose and the mode prescribed is constitutional.

*People v. Equitable Trust Co. of New London*, 96 N. Y. 887.

The Lumberville Bridge Company is a corporation incorporated under the laws of the state of New Jersey within the meaning of the taxing act, and liable to the tax imposed.

*State v. Metz*, 82 N. J. L. 199, 200; *Phillipsburgh Bank v. Lackawanna R. Co.* 27 N. J. L. 207; *McGregor v. Erie R. Co.* 35 N. J. L. 118; *Sprague v. Hartford, P. & F. R. Co.* 5 R. I. 233; *State v. Northern Cent. R. Co.* 18 Md. 194; *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286, 17 L. ed. 180; *President, Managers, and Co. for Erecting Bridge over River Delaware at or near Trenton v. Trenton City Bridge Co.* 18 N. J. Eq. 46; *Atty-Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 649.

The compact between New Jersey and Pennsylvania has never been construed as a limitation upon the right of each state to tax the property of all bridge companies.

*Com. v. President, Managers, and Co. for Erecting Bridge over River Delaware at or* 25 L. R. A.

*near Trenton*, (Pa.) 9 Am. L. Reg. 298; *State v. Metz*, 81 N. J. L. 878; *State v. Hull*, 25 N. J. L. 561; *Com. v. Standard Oil Co.* 101 Pa. 119.

Every state has within its own limits exclusive sovereignty over all matters touching the title to real and personal property, the mode of its transfer, the rights of persons and artificial bodies, in short everything pertaining to the functions of government, subject only to its obligation to the general government.

*Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 486; *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 519-558, 10 L. ed. 274, 807; *Horn Silver Min. Co. v. New York*, 143 U. S. 814, 38 L. ed. 168, 4 Inters. Com. Rep. 57; *Penacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 12, 24 L. ed. 708, 711; *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, 1 Inters. Com. Rep. 411.

The agreement of 1783 provides that each state shall enjoy and exercise a concurrent jurisdiction within and upon the water, and not upon the dry land, between the shore of said river.

*State v. Davis*, 25 N. J. L. 887.

In *Re Devoe Mfg. Co.*, 106 U. S. 418, 27 L. ed. 767, *Justice* Blatchford said: "Whether it affects the boundary line itself, or only amounts to a concession of extraterritorial jurisdiction to the one state and the other, beyond the territorial boundary, is not necessary to be decided in the present case."

Generally a corporation may, through its agents, extend its operation into other states, and thus, metaphorically speaking, go there, but it never travels and its franchises exist only at the place of its domicile and residence.

*Plempson v. Bigelow*, 98 N. Y. 592.

But the corporation, so far as it exists under our laws could draw to itself such part of its peculiar corporate entity as would accomplish the object of the charter here, and it would be liable to pay one half the tax imposed.

*State v. Metz*, 82 N. J. L. 200; *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75; *Standard Oil Co. v. Com.* 101 Pa. 147; *Com. v. President, Managers, and Co. for Erecting Bridge over River Delaware at or near Trenton*, *supra*; *Com. v. Pittsburgh & C. R. Co.* 2 Pearson, 389; *Pittsburg, Ft. W. & O. R. Co. v. Com.* 66 Pa. 73, 5 Am. Rep. 844.

The tax imposed by the act is a franchise tax exacted from the company as the price of the right and privilege which is received from the state of being a corporation, and is not levied upon the corporate property or business.

*Honduras Commercial Co. v. State Board of Assessors*, 54 N. J. L. 278; *Home Ins. Co. v. New York*, 184 U. S. 594, 33 L. ed. 1025; *Horn Silver Min. Co. v. New York*, 143 U. S. 817, 38 L. ed. 169.

Either state may pass acts imposing taxes upon such corporations without obtaining the assent of the other notwithstanding the agreement of 1783.

*President, Managers, and Co. for Erecting Bridge at or over River Delaware near Trenton v. Trenton City Bridge Co.* 18 N. J. Eq. 46; *Montclair Twp. v. New York & G. L. R. Co.* 45 N. J. Eq. 496; *Tucker v. Ferguson*, 89 U. S. 22 Wall. 537, 22 L. ed. 805; *State Board of Assessors v. Paterson & R. R. Co.* 50 N. J. L.

446; *Western U. Teleg. Co. v. Atty-Gen. of Massachusetts*, 125 U. S. 580, 31 L. ed. 790.

Each state must have the right to tax the entity of bifold corporations existing within its own territory, notwithstanding such corporations act as one corporation by reason of their dual organization.

*Delaware Railroad Tax Case*, 85 U. S. 18 Wall 206, 21 L. ed. 888; *Green's Brice, Ultra Vires*, 546-549; *Racine & M. R. Co. v. Farmers Loan & T. Co.* 49 Ill. 831, 95 Am. Dec. 595; *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286, 17 L. ed. 180; *Com. v. Texas & P. R. Co.* 98 Pa. 90.

The Lumberville Delaware Bridge Company was created for the purpose of carrying on commerce between said states; but the tax imposed is a franchise tax on the corporate entity conferred by the act of New Jersey, and is not a tax upon the right to carry on business at all.

*Standard Underground Cable Co. v. Atty-Gen.* 46 N. J. Eq. 270; *Home Ins. Co. of New York v. New York*, 134 U. S. 594, 33 L. ed. 1025; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Honduras Commercial Co. v. State Board of Assessors*, 54 N. J. L. 278; *Erie Railway v. State*, 31 N. J. L. 531, 86 Am. Dec. 226; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 25, 35 L. ed. 617; *Moran v. New Orleans*, 112 U. S. 69-74, 28 L. ed. 658, 654; *Pickard v. Pullman's Southern Car Co.* 117 U. S. 34-43, 29 L. ed. 785-788; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489-497, 30 L. ed. 694-698; *Leloup v. Port of Mobile*, 127 U. S. 640-644, 32 L. ed. 811-813; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 21, 22, 36 L. ed. 606.

The rule of apportionment adopted by our state courts and the federal courts can be properly applied to this case.

*Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 19, 35 L. ed. 613; *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75; *Hudson County Chosen Freeholders v. State*, 24 N. J. L. 718; *Milnor v. New Jersey, R. & Transp. Co.* 16 L. ed. 799; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 217, 29 L. ed. 166, 1 Inters. Com. Rep. 382.

The tax imposed is upon the corporate entity in this state, and falls within the definition of the tax described by *Justice Field* in *Home Ins. Co. of New York v. New York*, 134 U. S. 599, 33 L. ed. 1029; *Delaware Railroad Tax Case*, 85 U. S. 18, Wall. 232, 21 L. ed. 896; *Horn Silver Min. Co. v. New York*, 143 U. S. 818, 36 L. ed. 169, 4 Inters. Com. Rep. 57; *Crutcher v. Kentucky*, 141 U. S. 57, 35 L. ed. 652; *Maine v. Grand Trunk R. Co. of Canada*, 142 U. S. 227, 35 L. ed. 996, 3 Inters. Com. Rep. 807; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 200, 36 L. ed. 674, 4 Inters. Com. Rep. 87; *Ratterman v. Western Union Teleg. Co.* 127 U. S. 411-424, 32 L. ed. 229-232, 2 Inters. Com. Rep. 59; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419.

**Garrison, J.**, delivered the opinion of the court:

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The Lumberville Delaware Bridge Company, a corporation created in 1836 by the legislature of this state, resists the payment of the license fee imposed under the fourth section of "An act to provide for the imposition of state taxes upon certain corporations, and for the collection thereof." Pub. Laws 1884, p. 232.

The pertinent provision of this section is in these words: "All other corporations incorporated under the laws of this state, and not hereinbefore provided for, shall pay a yearly license fee or tax of one tenth of one per cent on the amount of the capital stock of such corporations."

The first ground of opposition is that the imposition of this tax upon the prosecutor is a burden upon, and hence a regulation of, commerce between the states, in violation of the exclusive jurisdiction of the federal congress.

It is not questioned that the power to regulate commerce between the states has been, by the constitution of the United States, committed exclusively to congress; and it is furthermore established that the omission of congress to legislate with reference to the matter thus committed to it implies, not that the states may legislate with respect thereto, but that commerce shall be free from all statutory regulations until congress see fit to impose them. *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, and cases there cited.

It is also established law that no state has the right to lay any impost upon interstate commerce, in any form, whether by way of duties upon the subject of transportation, or by way of license fee imposed upon the occupation or business of carrying it on.

These doctrines, while they secure to congress the exclusive right to make laws having for their object the control of commerce among the states, and the regulation of any and all of the incidents of that commerce, do not invalidate state laws, otherwise legitimate, merely because they casually affect interstate commerce. In *Robbins v. Shelby County Taxing Dist. supra*, *Mr. Justice Bradley*, speaking of the exclusive right of congress to make express regulations for interstate commerce, says: "It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities . . . the imposition of taxes upon persons residing within the state or belonging to its population. . . . But in making such internal regulations . . . no discrimination can be made, . . . adversely to the persons or property of other states; and no regulation can be made directly affecting interstate commerce."

And in *Leloup v. Port of Mobile*, 127 U. S. 648, 32 L. ed. 814, 2 Inters. Com. Rep. 184, the same judge again says: "We may here repeat, what we have so often said before, that this

exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the like."

Numerous decisions illustrate the application of these principles by the highest federal court, and serve to elucidate their meaning. The cases in which state legislation has been set aside as an unwarrantable regulation of commerce fall naturally into the following groups:

(1) Those in which the state law has made discriminations adversely to other states. *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Walling v. Michigan*, 116 U. S. 448, 29 L. ed. 601; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 868, 3 Inters. Com. Rep. 241; *Stoutenburgh v. Hennick*, 129 U. S. 141, 33 L. ed. 637.

(2) Those in which the impost was upon the subject of transportation. *State Freight Tax Cases*, 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Hannibal & St. J. R. Co. v. Huesen*, 95 U. S. 465, 24 L. ed. 527; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143.

(3) Those in which the state tax was, in effect, a tax upon the business engaged in interstate commerce, because imposed upon its agencies (*Robbins v. Shelby County Taxing Dist.*, 120 U. S. 439, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *McCall v. California*, 186 U. S. 104, 34 L. ed. 892; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 894, 3 Inters. Com. Rep. 178; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649), its earnings (*Fargo v. Stevens*, 121 U. S. 230, 30 L. ed. 688, 1 Inters. Com. Rep. 51; *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308), its methods (*Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 29 L. ed. 785), or directly upon its business. *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 81; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 847, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Ratterman v. Western U. Teleg. Co.*, 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59; *Leoup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 811, 2 Inters. Com. Rep. 134.

Upon the other hand, state legislation has been upheld, notwithstanding commerce was incidentally affected thereby, in respect to the licensing of ferries (*Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419; *Maine v. Grand Trunk R. Co. of Canada*, 143 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807), the imposition of fees for wharfage (*Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Northwestern U. Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. ed. 690; *Cincinnati, P. R. & P. Packet Co. v. Catlettsburg Trustees*, 105 U. S. 563, 26 L. ed. 1171; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 698, 27 L. ed. 587; *Quachita & M. R. Packet Co. v.*

*Aiken*, 131 U. S. 444, 30 L. ed. 977, 1 Inters. Com. Rep. 879), the taxation of property, including capital stock (*Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Western U. Teleg. Co. v. Atty. Gen. of Massachusetts*, 125 U. S. 530, 31 L. ed. 792; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595), the taxing of franchises or corporate privileges derived from the state; (*Delaware Railroad Tax Case*, 85 U. S. 18 Wall. 206, 21 L. ed. 898; *Maine v. Grand Trunk R. Co. of Canada*, 143 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57), and in a recent case a state tax upon a general occupation was sustained notwithstanding the special business taxed consisted in negotiating sales with non-resident merchants. *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 72.

In the case of *Horn Silver Min. Co. v. New York* this language is used: "The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation."

"The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation." The franchise here referred to as property subject to the taxing power is likewise the subject of remark in the case of *Minot v. Philadelphia, W. & B. R. Co.*, 85 U. S. 18 Wall. 206, 21 L. ed. 898 (the *Delaware Railroad Tax Case*): "The exercise of the authority which every state possesses, to tax its corporations, and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business, or income, or by the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports, exports, or tonnage, or transportation to other states, cannot be regarded as conflicting with any constitutional power of congress." The tax imposed by the act in question affects commerce among the states, and impedes the transit of persons and property from one state to another, just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result, of itself, constitutes no objection to its constitutionality. As was very justly observed in this court in a recent case (*State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284, 21 L. ed. 164), "every tax upon personal property, or upon occupations, business, or franchises, affects, more or less, the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution." This language is quoted, not

because the word "franchise" is used in the precise sense to be presently ascribed to it, but for the purpose of showing that a payment for a state privilege may incidentally affect commerce without being, in a constitutional sense, a regulation of it.

The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is the right to exist in corporate form, without reference to the powers that, under such form, the company may exercise. This distinction, although formulated by *Mr. Justice Field* in *Horn Silver Min. Co. v. New York*, 148 U. S. 805, 86 L. ed. 164, 4 Inters. Com. Rep. 37, was not strictly adhered to in his subsequent expressions, probably because there was nothing in that case to call for a nice use of terms. In this state we tax each of these so-called franchises. The former, as in the case of the right to own and operate a railroad, is taxed as property having a true value, which it is the duty of the state board to ascertain for the purposes of constitutional assessment. On the other hand, the naked right of existing in corporate form is taxed, as in the case before us, not at its true value, as it would have to be if it were property, but at a sum arbitrarily imposed by the legislature as an annual fee, the amount of which is to be computed by reference to the capital of the company as a criterion. It is, in short, a poll tax levied upon domestic corporations for the right to be. Such a tax is not upon property or assets, and does not in any way concern the nature of the business the company may be authorized to carry on. If the business chance to be one of commercial intercourse with other states, the burden incidental to corporate existence does not, under the federal decisions just cited, constitute a regulation of that commerce.

*Standard Underground Cable Co. v. Atty. Gen.*, 46 N. J. Eq. 270, is not in point. It held merely that the manufacture of an instrument of commerce was not itself commerce.

In *Honduras Commercial Co. v. State Board of Assessors*, 54 N. J. L. 278, the license fee under the Act of 1884 was held to be constitutionally imposed upon a corporation created by certificate in 1887 for the purpose of engaging in foreign commerce. That decision is an authority for this. The case of a corporation created by special act prior to 1884 for the express purpose of engaging in interstate commerce does not come under any different rule. The taxing act is general, and the yearly fee provided by it falls as an incidental burden upon miscellaneous corporations, without regard to the businesses in which they may be severally engaged. Such a tax is not, in my

opinion, open to any constitutional objection.

This determination, and the ground upon which it rests, are a sufficient answer to the 2d, 3d, 4th, 6th, 7th, and 8th reasons filed by the prosecutor, all of which proceed upon the notion that the tax is imposed upon something besides the right of the domestic corporation to exist as such.

There remains for consideration the fifth reason, viz., that, if the imposition of the tax be legal, yet it is computed upon erroneous principles. The contention in this respect is that inasmuch as the erection of the bridge was a joint enterprise, requiring the concurrent legislation of two states, the capital to be taken as the criterion of the license fee should be one half of the capital the domestic corporation was authorized to have. This argument was, in all probability, suggested by the decision of this court in *State v. Metz*, 32 N. J. L. 199. That case has, however, no application. The tax there considered was imposed directly upon the capital and surplus which, so the court held, was intended by the legislature to embrace one-half of an enterprise resting in dual legislation. Since the last amendments of the constitution, such a tax is a legal impossibility, and the construction placed by the court upon the legislative intent with respect to the amount of property to be embraced in the tax is of no aid in the present case, where the tax is not upon capital or property put to the common use of a domestic and a foreign organization, but is the price the domestic company must pay for the right of corporate life. Such a right is, in its nature, indivisible, and the fee therefor must necessarily be an entirety. In computing such a fee the board of assessors has no discretion. The legislative mandate is plain, and cannot be departed from by the assessors, nor modified by the courts. In *State v. State Board of Assessors*, 47 N. J. L. 36, the business in which the capital of the corporation was invested was considered by this court for the purpose of determining whether it was a "manufacturing company," within the meaning of the statute. And in *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75, the court, finding that the corporation was in one sense, and as to a distinct part of its capital, a manufacturing company, adopted as the criterion for the ascertainment of the amount of the tax which, under the Act of 1881 (Supp. Revision, p. 602), the court was required to impose, the capital of the corporation not within the exemption. In the present case no such questions arise. The tax, therefore, was rightfully computed at one tenth of 1 per cent of the whole capital stock of the prosecutor, and is, in that shape, affirmed.



## SOUTH CAROLINA SUPREME COURT,

D. H. CHAMBERLAIN, Receiver of the  
New York & Charleston Warehouse &  
Steam Navigation Co. *et al.*, *Appts.*,

NORTH EASTERN R. CO., *Resp't.*

(.....S. C. ....)

1. Land is taken by purchase and not by condemnation when, in pursuance of an agreement with the owner, a decree is obtained for payment to him and denying the alleged rights of other persons who have given notice not to pay him.
2. A deed by a railroad company of land purchased by it in fee simple for a right of way is not void until so declared in proceedings by the state, although the company had abandoned its purpose of using the land for a railroad.

(June 2, 1894.)

*NOTE.—Validity of sale of real estate by railroad corporation.*

It seems that the validity of sales of real estate by a railroad company cannot be questioned by any one except the state, where the railroad company has obtained a conveyance of the land from the former owner; but there are not many decisions directly on the question. These sustain the doctrine in *CHAMBERLAIN V. NORTH EASTERN R. CO.*

So under the charter of the Mohawk & Hudson Railroad Company authorizing the purchase of real estate necessary for the construction and operation of its railroad, land purchased will be presumed to have been acquired for this purpose, and under a conveyance in fee, where such lands are no longer necessary for the purposes of the corporation, it had the right to sell the same. *Yates v. Van De Bogert*, 56 N. Y. 527.

And under Ohio Stat. (Starr & C. 573), providing that a railroad company may acquire by purchase or gift any land in the vicinity of said road so far as may be deemed convenient or necessary by said company to secure the right of way, and the same to hold or convey, if the company abused its power but paid for the land and sold and conveyed the same away, the title became indefeasible, and the vendor is estopped by his deed, and there is no provision of law for the land escheating. *Walsh v. Barton*, 24 Ohio St. 28.

And in *Land v. Coffman*, 50 Mo. 243, under a statute providing that "a railroad company may hold, use, possess, and enjoy the fee simple or other title in and to any real estate, and may sell and dispose of the same," it was held that no one but the state could question a conveyance made by a trustee of the road.

But a sale and conveyance of lands by a railroad corporation to pay an ordinary debt is void, where the grantee knew that under the statute authorizing a sale of the lands the proceeds could only be applied in payment of mortgage bonds. *Standifer v. Swann*, 73 Ala. 68.

A railroad company obtaining a right of way by condemnation cannot convey to another road the right also to use such right of way. *Blakeley v. Chicago, K. & N. R. Co.* 34 Neb. 284; *Platt v. Pennsylvania Co.* 43 Ohio St. 228; *Missouri Pac. R. Co. v. Allen*, 71 Tex. 373.  
25 L. R. A.

**A**PPEAL by plaintiffs from a judgment of the Common Pleas Circuit Court for Charleston County in favor of defendant in an action brought to recover possession of certain real estate, which action failed because of the alleged defect in plaintiff's title. *Reversed.*

The facts sufficiently appear in the opinion.  
*Messrs. Smythe & Lee and Mitchell & Smith* for appellants.

*Messrs. Fitzsimons & Moffett*, for respondent:

There is no evidence of title in the South Carolina Railroad Company, and even if the land was condemned the condemnation proceedings did not vest a fee simple or transmissible title in the railroad.

The very act defining the quality of the estate declares the railroad company a trustee and defines the trust, *i. e.*, the land could only be taken and used for "the purpose of constructing and operating a railroad between Cincinnati and Charleston," and the *cestui que trust* are of the people of the state, for whose

And a railroad company cannot convey to a city for a street land where it has condemned an easement only for railroad use. *Heard v. Brooklyn*, 60 N. Y. 242; *Strong v. Brooklyn*, 68 N. Y. 1.

But it was held in *People v. Bel River & R. R. Co.* 86 Cal. 666, that it is not *ultra vires* for a railroad corporation to dedicate a portion of its land as a highway for public use, and this may be done without a formal resolution being entered on its records. The question in this case was whether a road had been dedicated where the land had been bought by the company for that purpose.

And in *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. ed. 136, and *Coe v. Columbus, P. & I. R. Co.* 19 Ohio St. 372, 75 Am. Dec. 518, it was stated that a railroad corporation could not make a voluntary conveyance of the right of way severed from its franchise, but this was not the question involved.

This case is quite similar to cases of transfer on foreclosure and reorganization of railroad companies. It is evident that as no diversion of the property from railroad uses is made by such transfers they are not within the reason of the rule that would deny the right of a railroad company to convey the land.

But in *Harrison v. Lexington & F. R. Co.*, 9 B. Mon. 470, it was held that a transfer by a railroad company under legislative authority of its chartered privileges passes all rights appertaining to the company and a grant of right of way to the former providing that "if said road should hereinafter be abandoned said ground to be reverted to me or my heirs again" does not work a forfeiture.

And in *Crolley v. Minneapolis & St. L. R. Co.*, 30 Minn. 541, it was stated that in respect to conveyances to or by a corporation that no one whose interests are not affected can call in question the capacity of the corporation either to convey or receive and hold the property, but in that case a statute authorized the company which built the road to acquire by purchase the right of way condemned by another company.

In this note cases of sales under mortgage foreclosures, land grants, and execution have not been included.

The judicial sale of property necessary to the exercise of a franchise as well as the sale of the franchise is touched upon in a note to *Brady v. Johnson* (Md.) 20 L. R. A. 737.

L. T.

benefit alone the private property of a citizen could constitutionally be taken and his title vested, against his will, in a private corporation. For the right of condemnation is conceded to rest solely upon the theory of eminent domain.

Whatever estate may in terms be conferred upon the trustee, it will be cut down or enlarged to suit the purposes of the trust.

*Blount v. Walker*, 81 S. C. 13; *Bratton v. Massey*, 15 S. C. 277; *Fuller v. Missroon*, 35 S. C. 314.

When the purposes of the trust are accomplished, and the land no longer needed or used for railroad purposes, then the estate ceases, or in the language of the decisions, "is cut down to make it commensurate with the trust imposed."

In this case the donor of the trust (the legislature), could not constitutionally confer any greater or higher interest than was commensurate with the trust imposed. That is it could only condemn such an estate in the land as was necessary for the public purpose of a railroad. If the fee simple in the act meant more than this the act would of course be unconstitutional.

*Cooley*, Const. Lim. 657, 660, chap. 15, 4th ed. p. 698, note; *South Carolina R. Co. v. Blake*, 9 Rich. L. 228; *Ex parte South Carolina R. Co.* 2 Rich. L. 486; *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. ed. 136.

Statutes providing for taking private property for public use must be strictly complied with.

*Cooley*, Const. Lim. 657, 660; chap. 15, 4th ed. p. 698, note; *Bridgeport*, 23 Conn. 189, 60 Am. Dec. 637; *Currier v. Marietta & O. R. Co.* 11 Ohio St. 228; *Bensley v. Mountain Lake Water Co.* 13 Cal. 306, 73 Am. Dec. 575.

A railroad can only acquire an amount of land commensurate with its necessity.

*Lake Shore & M. S. R. Co. v. New York C. & St. L. R. Co.* 8 Fed. Rep. 858; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110; *Re New York Cent. & H. R. R. Co's Petition v. Metropolitan Gaslight Co.* 68 N. Y. 326; *Cleveland & P. R. Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84; *Toledo & W. R. Co. v. Daniels*, 16 Ohio St. 390; *Tracy v. Elizabethtown, L. & B. S. R. Co.* 80 Ky. 259.

Where the right of eminent domain has been exercised, the use can only be exercised in accordance with, and for the purposes for which it has been taken.

1 Rorer, Railroads, 800; *Lance's App.* 55 Pa. 16, 93 Am. Dec. 722; *Geisy v. Cincinnati, W. & O. St. R. Co.* 4 Ohio St. 308; *Chagrin Falls & O. Pl. Road Co. v. Cane*, 2 Ohio St. 427; *Hooker v. Utica & M. Turnp. Road Co.* 12 Wend. 371; *Blake v. Rich*, 34 N. H. 282; *Green's Brice, Ultra Vires*, p. 111.

The property cannot lawfully be diverted to other use without legislative authority, even where the state itself or municipal corporation is the holder of the title after appropriation.

*Gilman v. Milwaukee*, 55 Wis. 328; *Rutherford v. Taylor*, 38 Mo. 315; *Imlay v. Union Branch R. Co.* 26 Conn. 249, 68 Am. Dec. 398.

By condemnation the railroad does not acquire fee simple, but only an easement.

*Alabama & F. R. Co. v. Burkett*, 42 Ala. 25 L. R. A.

83; *Henry v. Dubuque & P. R. Co.* 2 Iowa. 288; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; 1 Redf. Railways, \*247, 249.

The title which a city acquires by condemnation for streets is a qualified or determinable fee for street purposes only, which it holds, not as proprietor, but as an agency of the state in trust for the public for street purposes, and which it can neither sell nor devote to a private use.

*Fairchild v. St. Paul*, 46 Minn. 540.

The discontinuance of the use restores the whole estate discontinued to its owner.

*Imlay v. Union Branch R. Co. supra*; *Green's Brice, Ultra Vires*, p. 388, note a.

The surrender of land acquired under condemnation by a railroad company to private traders or manufacturers is wholly unauthorized.

*Proprietors of Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1.

If it turns out that more land was taken than necessary, such surplus of land cannot be retained by the corporation.

*Green's Brice, Ultra Vires*, p. 382; *Heard v. Brooklyn*, 60 N. Y. 242; *Strong v. Brooklyn*, 68 N. Y. 1; *Heath v. Barmore*, 50 N. Y. 302. See also *Hooker v. Utica & M. Turnp. Road Co.* 12 Wend. 373.

Where the land has not been used for ten years, abandonment may be presumed and the state is authorized to grant another.

*Henderson v. Central Pass. R. Co.* 21 Fed. Rep. 358; *Platt v. Pennsylvania R. Co.* 43 Ohio St. 228.

The words "fee simple" in the charter mean a qualified or conditional fee.

*Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

If, therefore, Toomer had the title, at the time of the alleged condemnation, and if the South Carolina Railroad Company had never abandoned the land, had never "ceased to use it for corporate purposes," it is clear that under *Kellogg v. Malin* the fee-simple title would still be in Toomer, and would pass by his conveyance subject only to the "easement" of the South Carolina Railroad Company.

But the evidence of abandonment is complete and appellants so far from acquiring the fee-simple title by their conveyance from the railroad company as alleged in their complaint did not and could not even acquire the easement.

*Coe v. Columbus & I. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518; *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. ed. 136; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018.

Mr. Redfield in his work on Railways, 5th ed. \*253, says: "Hence it seems to be admitted that even in cases where the statute provides for the taking of the fee, upon the discontinuance of the public use, the land reverts to the former owner."

See also *Pierce, Railroads*, pp. 157, 158; 2 Wood, Railway Law, § 242.

**McGowan, J.**, delivered the opinion of the court:

This is an action for the recovery of possession of one and one fourth acres of real estate, being part of a strip of marsh land upon the bank of a navigable stream, with its eastern

boundary on Cooper river, called, at that point, "Town Creek," and constituting part of the wharf front of the city of Charleston. The complainant, among other things, stated "that on and before April 8, 1891, the New York & Charleston Warehouse & Steam Navigation Company was lawfully seized, as owner in fee simple, of all that parcel of marsh land situate within the corporation limits of the city of Charleston, on the west side of Cooper river or Town creek, containing forty-three acres, more or less, bounded," etc., "said piece or parcel of land being commonly known as the 'Cleland Grant,' and that the said D. H. Chamberlain was in possession of the said parcel of land, holding the same for and on account of, and as the property of, the said New York & Charleston Warehouse & Steam Navigation Company, as receiver," etc., "that, the plaintiffs being so seized and possessed, the defendant, on the said April 8, 1891, unlawfully entered upon part of the said premises, to wit, upon all that portion containing about one and one quarter (1 $\frac{1}{4}$ ) acres, being of irregular shape, bounded," etc., "and on the west and south by Vardell's creek; and that it is still unlawfully in possession, withholding the possession from the plaintiffs, to their damage one hundred dollars." And they pray judgment for the possession. The defendant corporation answered, alleging "that it is in the possession of the tract of land therein described, and is lawfully seized and possessed of the same, as owner in fee simple thereof; and defendant denies that plaintiffs, or either of them, are now, or were at the commencement of this action, owners or owner, as alleged, of the said premises, or any part thereof, and denies that the plaintiffs, or either of them, are now, or were at the commencement of this action, entitled to the possession of the said premises, or any part thereof. On the contrary, the defendant avers that, long before the commencement of this action, this defendant became and was lawfully seized in fee of the said tract of land, with the appurtenances, and entitled unto and possessed of the same, in its sole and absolute right, and from them, at all times, down to the commencement of this action, has continued to be, and still continues to be, so seized in fee of every part and parcel thereof, and entitled unto and possessed of the same in its sole, absolute right," etc. And for a further defense the defendant interposes the statute of limitations, etc.

The cause came on to be tried before his honor, Judge Fraser, and a jury. To support the allegations of the complaint the plaintiffs offered their testimony, which consisted largely of parts of records and copies of deeds of conveyance, and, of course, cannot be set out at length here. But, as we suppose that a condensed outline of the most important parts proved may serve at least to make intelligible the points to be made and decided, we make the following statement: First. In June, 1785, a grant covering the forty-three acres of marsh in contention here was made to William Cleland, and is, throughout the case, called the "Cleland Grant." Second. Cleland conveyed the said forty-three acres of marsh to other persons, and the title passed down regularly until it rested in one Dr. Antony V. Toomer.

Third. Some time prior to 1856, it seems that the South Carolina Railroad Company desired to extend their road down to deep water, and, believing that the aforesaid forty-three acres of marsh was necessary for that purpose, they entered into an agreement with Dr. Toomer to purchase the same for \$10,000 in cash; that being the price asked for the whole of the marsh, and the fee simple title thereto. But certain other persons, who need not be named, claimed to have an interest in the marsh covered by the Cleland grant; and the railroad company had to file a bill of interpleader, calling in those persons to come in and ascertain the rights of the different parties, and also to enable the company to effect their purpose of purchase. Litigation followed, but it was finally decided that Toomer was the owner of the land; and the court, in that case, "ordered that the master do deliver to the said A. V. Toomer his bond taken by the said master, for the fund paid into court in this case," etc. Fourth. It was further shown that afterwards large judgments and executions were issued from the United States court against the South Carolina Railroad Company, and that, under and by authority of these judgments and executions, Absalom Blythe, Esq., United States marshal at the time, levied and sold the said marsh lands covered by the Cleland grant, as the property of the South Carolina Railroad Company, and on July 5, 1882, conveyed the same to John H. Barnes and others named, who, in time, conveyed the same to the South Carolina Railroad Company. Fifth. On December 31, 1885, the new South Carolina Railroad Company conveyed the said marsh lands to the New York & Charleston Warehouse & Steam Navigation Company, the plaintiffs, who brought this action.

At the conclusion of the plaintiffs' testimony, the defendants moved for a nonsuit, which was granted by the presiding judge, upon the following grounds: "(1) I think that there is certainly evidence of an execution and levy on the land sued for, and under which the United States marshal sold, to go to the jury, and it is not necessary for me to say whether I think it sufficient. (2) Under the construction given by the supreme court to the Act of 1874, in reference to the granting of lands on navigable streams, I am not able to hold that the grant under which plaintiffs claim title can in this case be held to be void, under the testimony before me. (3) The most serious question in this case, and it is one of great importance, is, whether the South Carolina Railroad Company, under which the defendants [plaintiffs] claim, ever had any title for other than railroad purposes, and which it could convey, or which could be conveyed either by the receiver of the company acting as special master or by the marshal, under an execution against the company to another person, for any other than the railroad purposes of the South Carolina Railroad Company. While I am inclined to hold that the company could make no higher title under a voluntary deed, even where a full price is paid, than it could take under proceedings for condemnation of the land for its purpose as easement only, I think that in this case the company, and those who hold under it, should be held to the proceedings in the court

under which this land was obtained, construed as proceedings for condemnation. The constitution did not permit the legislature, in the exercise of eminent domain, to take more land than was necessary for the purposes of the railroad, and when these purposes are accomplished the land should revert to the original owners. This I take to be the true meaning of the act under which the company derived its title. In the deed of conveyance to the New York, etc., Steam Navigation Company, it is recited that the land is no longer needed for the purposes of the railroad. I hold that there was nothing which the railroad company could convey to a grantee who does not appear to have any connection with the railroad company. I also hold that no formal, technical proceedings to declare a forfeiture are necessary, and the conveyance to the navigation company is simply void, and may be treated as such," etc.

We agree with the circuit judge that it will not be necessary to consider any of the points made, except the one stated above, upon which the nonsuit was granted. In *Waterman on the Law of Corporations* (vol. 1, p. 627, § 164), the rule of law as to the right of corporations to purchase property is stated as follows, viz.: "Among the powers or capacities incident to the corporations at common law, without any special mention of such power in the charter, is that of taking, holding, and transmitting in succession, and alienating property, real and personal, and contracting obligations, in the same manner as an individual. The only legal checks to the acquisition of lands by corporations consist in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects, and in the force to be given to the exception of corporations out of the statute of wills." The same doctrine is stated in *Angell & Ames on Corporations* (sec. 187), and other elementary writers, as follows: "Corporations aggregate have at common law an incidental right to alien or dispose of their lands and chattels, unless specially restrained by their charter or by statute. Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects, nor circumscribed as to quantity." The rule in this state is stated in *Ex parte Greenville Academies Trustees*, 7 Rich. Eq. 482, as follows: "All corporations, if not disabled by statute, have, by law, a general right of alienating their property; and their consequent power of appointing trustees, or any disposition made by them, is coextensive with this right," etc. As we understand it, at the time the railroad company acquired the land in question for the purpose indicated, neither the constitution nor any law of the state prohibited the company from acquiring the fee simple title to land, either by condemnation or simple purchase, paying, of course, its full value. Indeed, the right to condemn seems only to have been given "in the absence of any contract or contracts in relation to lands," etc. See the charter of the company, and Act 1835, §§ 32 and 36, 8 Stat. at L. 415. From the numerous records and copies of deeds introduced in evidence, it is difficult to determine the mixed

question of law and fact,—whether the railroad company acquired the land covered by the Cleland grant by enforced condemnation, under the bill filed by them, or by simple purchase from Toomer for the use of the road. But we incline to think that the company acquired whatever interest they had by purchase from Toomer, and that the interpleader proceedings, as to the other defendants, were resorted to merely as the means of settling a disputed title, and not, in fact, to condemn the land from an unwilling party. In the decree of the court, no reference was made to the condemnation proceedings. The bill sets forth that the company had purchased the land from Toomer for the full price of \$10,000; that the company was ready to pay the money to Toomer, and he was ready to receive it, but the other defendants had given notice not to pay. And the bill of the company prays that they may have leave to pay the money into court. The decree then goes on to discuss the title as between the parties, which it adjudges to be in Toomer,—the party with whom the company had contracted,—and to order the money previously paid into court to be paid to him, which was done. It seems to us that this was clearly a purchase of the land, and payment of the purchase money.

But assuming that the railroad company originally acquired the fee simple title by the payment of the purchase money, under the decree of the court, it is still earnestly urged by the defendant corporation that, as soon as the railroad company abandoned the purpose of extending their road down to the deep water, the title of the land so purchased, and for which they had paid \$10,000, was instantly rendered void; that the land reverted to the original owner; that there was nothing which the company could convey to a grantee who does not appear to have any connection with the railroad company; and that really no formal, technical proceeding to declare a forfeiture was necessary, and therefore, the plaintiffs having no title, it was proper to grant the nonsuit. Was this error? It must be admitted that the authorities upon the subject are in some confusion; but keeping in mind that the railroad company originally acquired, not merely an easement, but the fee simple title, by purchasing the whole land for full value, we cannot clearly see upon what principle we may declare the company divested of their title, which is "simply void," and that the land had reverted to its former owner. Reverted to whom? Certainly not to the representatives of Toomer, who sold the fee simple title for full value, leaving no interest of any kind whatever remaining. There could be no reverter to the original owner, for there was no reversionary interest, and none is claimed. In that case, where would be the title, which must vest in some one? It is stated in *Waterman on Corporations* (vol. 1, p. 632) as follows: "So where a purchase of real estate has been lawfully made by a corporation, the purchase does not cease to be legal, or the corporation cease to have a right to hold or convey the property thus acquired, merely because the object which induced the purchase has been accomplished, or no longer affords an inducement to retain it. Corpora-

dons, although limited in their own duration of life, may purchase and hold and convey, and they may sell such real estate whenever they find it no longer necessary." See the notes referred to, and especially the case of *Old Colony R. Corp. v. Evans*, 6 Gray, 25, 66 Am. Dec. 294. Restrictions imposed by the charter of a corporation upon the amount of the property it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it. *Jones v. Habersham*, 107 U. S. 188, 27 L. ed. 406. In the American & English Encyclopedia of Law (vol. 4, p. 233), the rule

is thus laid down: "In many of the states, statutes prohibit or limit foreign corporations from acquiring real estate. Under these or similar statutes, where a corporation is incompetent to take title to real estate, a conveyance to it is not void, but only voidable. The sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

*The judgment of this court is that the nonsuit granted below be set aside, and the case remanded to the Circuit Court for a new trial. McIver, Ch. J., and Pope, J., concur in the result.*

### ILLINOIS SUPREME COURT.

James P. FLETCHER, *Appt.*,

Walter C. TUTTLE, Clerk of Vermillion County.

W. C. BLAIR, *Appt.*,

W. H. HINRICHSEN, Secretary of State.

(151 Ill. 41.)

1. Chancery has no jurisdiction to protect purely political rights, such as those in respect to public elections.

2. An injunction cannot be granted to prevent the giving of election notices, or the certifying of nominees for districts created by any apportionment act, on the ground that such act is unconstitutional, since the rights involved are purely political and enforceable only at law.

(June 15, 1894.)

**A**PPEAL by complainant from a decree of the Circuit Court for Vermillion County dismissing a bill brought to enjoin defendant as county clerk from issuing notices of election, under the Election Law of 1893. *Affirmed.*

**A**PPEAL by complainant from a decree of the Circuit Court for Sangamon County dismissing a bill filed to enjoin the defendant as secretary of state from certifying the name of any one who may have been nominated as candidate for election to the general assembly from any district formed by the Acts of June 15, 1893, May 16, 1893, or May 6, 1892. *Affirmed.*

The facts are stated in the opinion.

Mr. E. S. Smith, with *Messrs. George*

Hunt and William J. Calhoun, for appellant Fletcher.

Mr. H. G. Jones for appellant Blair.

*Messrs. Maurice T. Maloney, Atty.-Gen., T. J. Scofield, M. L. Newell, S. G. Wilson, James M. Graham, and T. A. Moran*, for appellees:

The complainant has not such an interest in this suit as would entitle him to any relief in any proper forum in the courts of this state.

*Commissioners of Highways v. Deboe*, 43 Ill. App. 25; *Chicago v. Union Bldg. Assn.* 102 Ill. 879, 40 Am. Rep. 598; *Seager v. Kankakee County*, 102 Ill. 689.

The real questions involved in these suits being political in their nature, a court of chancery in this state will not take jurisdiction of them.

*Sheridan v. Colvin*, 78 Ill. 246; *Dickey v. Reed*, Id. 263; *Dodge v. Cole*, 97 Ill. 355, 37 Am. Rep. 111.

The questions involved in these suits being political in their nature, the constitution of this state has fully and completely clothed the general assembly with power to determine the same, and the judiciary being a co-ordinate branch of the government, has no power to alter, change, or interfere with such determination.

Const 1870, arts. 3, 4, § 6; *Sheridan v. Colvin*, *Dickey v. Reed*, and *Dodge v. Cole*, *supra*; *People v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *People v. Hatch*, 33 Ill. 115; *People v. Yates*, 40 Ill. 126; *Wilcox v. People*, 90 Ill. 186; *People v. Cullom*, 100 Ill. 472; 1 Kent, Com. 287, and *note*; *Opinion of the Justices*, 10 Gray, 613; *Wise v. Bigger*, 79 Va. 269.

Even if the court would under any circumstances entertain jurisdiction of a proceeding of this kind, the facts presented by this record would not warrant it in so doing, as the con-

**NOTE.**—Numerous cases have arisen the object of which has been to overthrow apportionment acts several of which have been reported in this series, as will be seen by reference to the note appended to *State v. Wrightson* (N. J.) 22 L. R. A. 548.

In *Parker v. State* (Ind.) 18 L. R. A. 567; *State v. Cunningham* (Wis.) 15 L. R. A. 561, and *State v. Cunningham* (Wis.) 17 L. R. A. 145, the objection that the court was without jurisdiction because the question was political and not judicial was held not

well founded. But this appears to be the first case in which the question of equity jurisdiction over such cases seems to have been discussed. In states having the reformed procedure the question is probably not a very material one but it is noteworthy that, except in the case of *State v. Cunningham*, cited in *FLETCHER v. TUTTLE* above in which the suit was distinctly brought as one in equity for injunction, the proceedings all seem to have been by mandamus.

stitution plainly vests the legislature with large discretionary powers in the premises, powers which they cannot be held to have overstepped in the Apportionment Act of 1893 or even in the Act of 1893.

Const. art. 4, § 6; *State v. Cunningham*, 17 L. R. A. 145, 88 Wis. 90; *People v. Rice*, 16 L. R. A. 836, 135 N. Y. 473; *State v. Campbell*, 48 Ohio St. 435, 22 L. R. A. 518; *Parker v. State*, 18 L. R. A. 567, 183 Ind. 178; *State v. Van Duyn*, 24 Neb. 5-6; *Giddings v. Blacker*, 16 L. R. A. 402, 93 Mich. 1.

#### Per Curiam:

The first of these cases was a bill in chancery, exhibited by James P. Fletcher in the circuit court of Vermillion county, praying that an act of the general assembly entitled "An act to apportion the state of Illinois into senatorial districts, and to repeal certain acts therein named," approved June 15, 1893, be declared unconstitutional and void, and that a writ of injunction issue to Walter C. Tuttle, county clerk of Vermillion county, restraining him from issuing, causing to be posted, notices of election calling an election for members of the house of representatives for the eighteenth senatorial district; that the injunction be made perpetual; and also a general prayer for relief. Tuttle, the county clerk, was the only party named as defendant.

The complainant, by his bill, professed to prosecute his action for himself, as well as for all the people of the state of Illinois. The averments of his bill are, in substance, that he is, and for more than thirty-nine years has been, a citizen of the county of Vermillion, and is a taxpayer and legal voter in that county; that, under the constitution of the state, he is entitled to equal representation in the general assembly of the state with each and every citizen thereof, so far as such equality of representation can be secured by an apportionment of the senatorial districts of the state, for the election of senators and members of the house of representatives in the general assembly among the several counties in the state; that, by reason of the matters thereafter recited, the petitioner's right of equal or proportionate representation in the general assembly of the state, as well as the like rights of every other citizen of the state, as provided by the constitution, have been infringed, violated, and in a large part destroyed, unless, through the intervention of the court, as a court of equity, the wrongs complained of shall be prevented. The bill then alleges that the population of the state, as ascertained by the federal census of 1890, was 3,826,351, and an exhibit is appended to the bill of the census bulletin, showing the population of the state by counties, and of the city of Chicago by wards, according to the census of 1890; that, for the purpose of apportioning the state into senatorial districts, it became and was the duty of the general assembly to divide the population of the state, as ascertained by the federal census, by the number of fifty-one, the quotient thereby produced to be the ratio of representation in the state; that it was then and there the duty of the general assembly to divide the state into fifty-one senatorial districts, such districts to be formed of contiguous and compact territory, bounded

by county lines, such districts to contain, as nearly as practicable, an equal number of inhabitants; that, when any county contained a population exceeding two full ratios, it was entitled to be divided into senatorial districts equal in number to the number of full senatorial ratios of inhabitants contained in the county, as shown by the census; that the senatorial ratio thus formed was 75,026; that the population of the County of Cook was 1,191,922; that the general assembly, in and by the above-mentioned act, gave and apportioned the county of Cook fifteen senatorial districts, and to the residue of the state thirty-six. The bill then specifies and points out a large number of the senatorial districts created by the Act, both in the county of Cook and elsewhere in the state, which, as it alleges, are not formed of contiguous and compact territory as required by the constitution, among them being the eighteenth senatorial district, composed of the counties of Vermillion and Ford. It also alleges that the act did not apportion the state into senatorial districts containing, as nearly as practicable, an equal number of inhabitants; but, on the contrary, that many of the districts contain numbers of inhabitants far in excess of the senatorial ratio, and greatly and unnecessarily unequal, when compared with other districts created by the act; and that many of the districts contain numbers of inhabitants greatly below the senatorial ratio, and grossly and unnecessarily unequal, when compared with other districts; and a large number of districts are specified and pointed out, in which it is alleged such gross and unnecessary inequality of population exists. It is therefore alleged that by reason of the unnecessary and gross inequalities of population among the several districts, and also by reason of the failure to form the several districts of the contiguous and compact territory, the Apportionment Act of 1893 is unconstitutional and void. The complainant further alleges that he is a candidate for election as a member of the house of representatives, which representatives are to be chosen at a general election to be held on the Tuesday next after the first Monday in November, 1894; that he has already been chosen for such candidacy by the voters of his party in Vermillion county, at the primaries already held in that county; that, as such candidate, he has a special personal interest in the question at issue in this case, and is entitled to prosecute this suit, to the end that he may be voted for in the district and throughout the district, of which Vermillion county legally forms a part, and that the legal voters of all the district may have an opportunity to vote for him, and if chosen by a plurality of the votes cast at such election, then he may be duly declared elected as a member of the house of representatives for such district; that the entire people of the state are interested in the question, to the end that the next general assembly of the state to be chosen may be chosen from districts legally formed, and that its acts may not be questioned by reason of the invalidity of the act of apportionment, and that the people may enjoy the right of representation, as provided by the constitution. The petitioner further alleges that under the pres-

ent system of holding elections, as provided for by the laws of this state, the holding of an election throughout the county of Vermillion necessitates a large expenditure of public moneys, to be paid out of the treasury of that county; that, as the apportionment act above referred to is invalid, it will entail upon the people and taxpayers of the county a large and unnecessary burden in holding elections for members of the general assembly themselves; and that the amount of public funds thus unnecessarily paid out of the county treasury will exceed \$50; and that the total cost of holding the election will exceed the sum of \$1,000. It is further alleged that Walter C. Tuttle is the county clerk of Vermillion county, and it is made his duty by law, at least thirty days prior to any general election, to make out and deliver to the supervisors of his county three notices for each election precinct or district in their respective townships, Vermillion county being under township organization, which notices are required to specify and gave the title of the several offices to be filled at such election, and which notices the supervisors are required to post up in three of the most public places in each election precinct in their respective townships, and such election will be held in pursuance thereof, as provided by law; that, by the law of the state, the county clerk will have charge of printing the ballots for the general election, and it is made his duty to furnish such ballots to the judges of election, and no ballots other than those thus furnished can be used at the election; that, notwithstanding the matters above set forth, said county clerk threatens and declares his intention to issue the notice of election in his county for the election of three members of the house of representatives for the eighteenth senatorial district, and to have the ballots for the election printed accordingly, so far as the same pertains to the representatives in the general assembly, by means whereof, and by reason of the premises, the legal voters of Vermillion county will be induced to and will cast their votes for members of the general assembly for a district of which Vermillion county does not legally form a part, and no vote can be cast at such election for members of the general assembly for the district of which the county does legally form a part, by means whereof the election of members of the general assembly will be invalid and of no effect; that, unless restrained by the order of the court from issuing or causing to be posted notices of election as above set forth, the county clerk will issue such notices, and cause them to be posted, and petitioner will be greatly damaged, and will be deprived of his constitutional right of becoming a candidate for member of the house of representatives in the district of which he is a resident, and of being voted for by the legal voters of that district, and also of the right of voting for candidates for the general assembly for that district; that, by reason of the matters above set forth, the people of this state will be deprived of the right of equal and proportionate representation, as provided and recognized by the constitution of the state. It is further alleged that if the Apportionment Act of 1893 is invalid, as the complainant is advised and believes, the legal voters of Vermillion county

are entitled to vote for and elect a member of the state senate in the next general assembly; that the county clerk threatens to and declares it to be his intention to omit from the election notices any call or notice for the election of a member of the state senate, and to omit from the ballots which he will cause to be printed for the election in the county the name of any candidate for the office of senator, so that the legal voters of the county, including the complainant, will be deprived of the constitutional right of voting for a candidate for state senator at the November election. It is also alleged that the general assembly passed another apportionment act, which was approved May 16, 1893, which act was in all respects identical with the act before referred to, except that it omitted from the seventh senatorial district the town of Riverside, and which act the act above referred to, and approved June 15, 1893, purports to have repealed; but it is alleged that the Act of May 16, 1893, is subject to all the objections above set forth in relation to the Act of June 15, 1893, and is for the same reasons unconstitutional and void. The prayer of the bill is that, upon the hearing of the cause, both acts be declared unconstitutional and void, and held to be of no effect; and that a writ of injunction issue to Walter C. Tuttle, county clerk of Vermillion county, restraining him from issuing, or causing to be posted, notices of election calling an election for the house of representatives for the eighteenth senatorial district; and that such injunction be made perpetual; and that the court grant to the petitioner and to the people all such other and further relief as the case demands.

The defendant answered, admitting the allegations of the bill, except that he denied that the complainant's rights were infringed by the matters thus alleged; that the senatorial districts created by the act in question are not compact and contiguous; and that the act is unconstitutional and void; and also excepting that the defendant says that he cannot answer whether the districts are as nearly equal as practicable, and whether the population of some of the districts is unnecessarily greater or less than the given ratio. A replication was filed, and a hearing was had upon the bill, the admissions made by the answer, and the replication; and, at such hearing a decree was entered dismissing the bill, at the complainant's cost, for want of equity.

In the other case, of which the title is given above, W. C. Blair filed his bill in chancery, in the circuit court of Sangamon county, against William H. Hinrichsen, the secretary of state, alleging that the complainant is a resident of the county of Jefferson, and a legal voter in that county, and qualified to hold the office of member of the general assembly, and is a candidate of his party for that office in and for the forty-seventh senatorial district, as formed by the apportionment act approved March 1, 1872, consisting of the counties of Jefferson, Hamilton, and White. The bill attacks the Apportionment Act of 1893 upon substantially the same grounds alleged in the bill of James P. Fletcher, and also attacks the Apportionment Act of May 6, 1893, dividing the state into senatorial districts on similar grounds, and praying to have both the Acts of

1893 and 1892 declared unconstitutional and void. The bill alleges that the secretary of state declares that it is his intention to certify the names of candidates who are nominated in the various ways now provided by law as candidates for the general assembly, from the districts as fixed by the Apportionment Act of 1893, if that act is constitutional, but that, if it is held to be unconstitutional, he will then certify the names of candidates nominated for the senatorial districts as fixed by the Act of 1892, and that he will so act unless restrained by the court from so doing, and the complainant will be deprived of his right to have his name printed upon the tickets and voted for at the next general election of members of the general assembly; that, if the secretary of state is not enjoined from certifying the names of such candidates, a large amount of money will be expended in and about printing the tickets containing the names of the candidates from districts formed by unconstitutional and void laws; that the public money used in printing such tickets will be wholly wasted; and that the complainant is a citizen and taxpayer of the state. The bill prays that both of the Apportionment Laws of 1893 and the Apportionment Act of 1892 be each and all declared unconstitutional and void, and that of 1872 be declared in full force; and that the secretary of state be enjoined from certifying the name of any candidate who may be nominated for election to the next general assembly from districts formed under either of the Acts of 1893, or under the Act of 1892; and that, at the hearing, the injunction be made perpetual; and also a general prayer for relief.

A general demurrer to this bill was sustained by the court; and, the complainant electing to abide by his bill, a decree was entered dismissing the bill, at the complainant's costs, for want of equity, and the complainant has appealed to this court. The two cases have been consolidated in this court for the purposes of argument, and, as they involve substantially the same legal propositions, they will be considered together.

From the foregoing statement of these two bills, it seems to be perfectly plain that the entire scope and object of both is the assertion and protection of political, as contradistinguished from civil, personal or property rights. In both the complainant is a legal voter, and a candidate for a particular elective office; and by his bill he is seeking the protection and enforcement of his right to cast his own ballot in a legal and effective manner, and also his right to be such candidate, to have the election called and held under the provisions of a valid law, and to have his name printed upon the ballots to be used at such election, so that he may be voted for in a legal manner. The rights thus asserted are all purely political; nor, so far as this question is concerned, is the matter aided in the least by the attempt made by the complainant in each bill to litigate on behalf of other voters or of the people of the state generally. The claims thus attempted to be set up are all of the same nature, and are none the less political.

As defined by Anderson, a civil right is "a right accorded to every member of a district community or nation," while a political right

is a "right exercisable in the administration of government." Anderson, Law Dict. 905. Says Bouvier: "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected. These are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying property, or exercising the paternal or marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of the civil rights, which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of the civil rights." 2 Bouvier, Law Dict. 597.

The question, then, is whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity. In *Sheridan v. Cotoin*, 78 Ill. 287, this court, adopting, in substance, the language of Kerr on Injunctions, said: "It is elementary law that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with the questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances, and where necessary for the protection of rights or property." In that case the police commissioners of the city of Chicago filed their bill in chancery against the mayor, the members of the common council, and certain officers of the city to restrain the enforcement of the city ordinance reorganizing the police force of the city, and depriving the complainants of their functions as police commissioners, it being claimed that the common council had no power to pass the ordinance, and that it was consequently void. It was held that the rights which were thus sought to be protected and enforced were purely political, and that a court of chancery, therefore, had no jurisdiction to interfere with the passage or enforcement of the ordinance. In *Dickey v. Reed*, 78 Ill. 261, a bill in chancery was filed by the state's attorney of Cook county, and by taxpayers of the city of Chicago, to restrain the members of the common council of the city and the city clerk from canvassing the returns of the elec-



tion held in the city April 28, 1875, upon the question whether the city would become incorporated under the general incorporation act. It was claimed that the election, for certain reasons, was void, and also that gross frauds had been perpetrated at the election, by depositing a large number of ballots in the ballot boxes which had not been cast by the voters, and that a large number of the illegal and fraudulent votes in favor of organization had been cast, and that various other irregularities, having the effect of invalidating the election, had intervened. A preliminary injunction having been awarded, it was disregarded by the city officers, who proceeded, notwithstanding, to canvass the vote and declare the result. Various of the city officers and their advisers were attached and fined for contempt, and, on appeal to this court from the judgment for contempt, it was held that the matter presented by the bill was a matter over which a court of chancery had no jurisdiction, and that the injunction was void, so that its violation was not an act which subjected the violators to proceedings for contempt. In *Harris v. Selrjock*, 82 Ill. 119, it was held that the power to hold an election is political, and not judicial, and that a court of equity has no jurisdiction to restrain officers from the exercise of such powers; and it was said that this was in accordance with repeated decisions of this court, and in support of that statement. *People v. Galesburg*, 48 Ill. 485; *Walton v. Develing*, 61 Ill. 201; *Darst v. People*, 62 Ill. 906; and *Dickey v. Reed*, *supra*, are cited. So in *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 287, it was held that a court of equity has no jurisdiction to entertain a bill to enjoin the mayor and aldermen of a city from removing a party from office, and appointing a successor, and from preventing the party from discharging his duties after removal by them, as the party's remedy at law is complete by quo warranto against the successor, or by mandamus against the mayor and councilmen. In *Georgia v. Stanton*, 78 U. S. 6 Wall. 50, 18 L. ed. 721, a bill was filed by the state of Georgia against the secretary of war and other officers representing the executive authority of the United States, to restrain them in the execution of the acts of congress known as the "Reconstruction Acts," on the ground that the enforcement of those acts would annul and totally abolish the existing state government of the state, and establish another and different one in its place, and would, in effect, overthrow and destroy the corporate existence of the state, by depriving it of all means and instrumentalities whereby its existence might and otherwise would be maintained; and it was held that the bill called for a judgment upon a political question, and that it would not therefore be entertained by a court of chancery; and it was further held that the character of the bill was not changed by the fact that, in setting forth the political rights sought to be protected, it averred that the state had real and personal property, such, for example, as public buildings, etc., of the enjoyment of which, by the destruction of its corporate existence, the state would be deprived, such averment not being the substantial ground of the relief sought. In *Re Sawyer*, 124 U. S. 200, 31 L. ed. 102, it was held 25 L. R. A.

that the circuit court of the United States had no jurisdiction to entertain a bill in equity to restrain the mayor and committee of a city in Nebraska from removing a city officer upon charges filed against him for misfeasance in office, and that an injunction issued on such bill, as well as an order committing certain persons for contempt in disregarding the injunction was absolutely void. In that case the court says: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, if to invade the domain of the courts of common law, or of the executive and administrative department of the government." In support of its decision, the court cites, among various other cases, the decisions of this court in *Delahanty v. Warner*, *Sheridan v. Colvin*, and *Dickey v. Reed*, above referred to, and quotes with approval the passage in the opinion in *Sheridan v. Colvin*, above set forth, taken, in substance, from *Kerr on Injunctions*. Other authorities of similar import might be referred to, but the foregoing are amply sufficient to show that wherever the established distinctions between equitable and common-law jurisdiction are observed, as they are in this state, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, may be sought in a court of law. The extraordinary jurisdiction of courts of chancery cannot therefore be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government. If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy; but his remedy must be sought in a court of law, and not in a court of chancery.

The only decision to which we are referred in which relief of the character of that sought in this case was given in what was in substance an equitable proceeding is *State v. Cunningham*, 88 Wis. 90, 17 L. R. A. 145. That was an original proceeding brought in the supreme court of Wisconsin, to test the validity of the apportionment law, passed by the legislature of that state, dividing the state into legislative districts. An injunction was prayed to restrain the secretary of state from publishing notices of an election of members of the senate and assembly in the legislative districts at

tempted to be created by that act, and from filing and preserving in his office certificates of nomination and nomination papers, and from certifying the same to the several county clerks. The court entertained jurisdiction of the proceeding, and, on final hearing, awarded a perpetual injunction as prayed for. We have carefully considered the case as reported, and, if we understand it correctly, it cannot, in our opinion, be regarded as an authority in favor of equity jurisdiction in the case before us. In this connection it may be borne in mind, as a matter of some importance, that the Wisconsin Code of Procedure attempts to abolish the distinction between actions at law and in equity; but as to precisely how far that statutory provision has been held to have broken down the distinctions between common-law and equitable remedies we do not pretend to be accurately advised. But, whether that distinction is held to remain practically unaffected by the statute or not, it appears from the opinion of the court that its jurisdiction to grant a remedy by injunction in that case was based solely upon that provision of the constitution of Wisconsin which gives to the supreme court jurisdiction "to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial rights, and to hear and determine the same. Const. art. 7, § 8. In construing this provision of the constitution, the court holds that these various writs, and injunction among them, are prerogative writs; and that the supreme court is thereby given original jurisdiction in all judicial questions affecting the sovereignty of the state, its franchises and prerogatives, or the liberty of the people; and that an injunction and mandamus are thereby made correlative remedies, so as to authorize resort to injunction to restrain excess of action in the same class of cases where mandamus may be resorted to for the purpose of supplying defects. Thus, the court, in the opinion, quoting the language of a former decision in which this constitutional provision is construed, says: "And it is very safe to assume that the constitution gives injunction to restrain excess in the same class of cases as it gives mandamus to supply defect; the use of the one writ or the other in each case turning solely on the accident of overaction or shortcoming of the defendant; and it may be that, where defect and excess meet in a single case, the court might meet both, in its discretion, by one of the writs, without being driven to send out both, tied together with red tape, for a single purpose." And again: "Inasmuch as the use of the writ of injunction, in the exercise of the original jurisdiction of this court, is correlative with the writ of mandamus, the former issuing to restrain where the latter compels action, it is plain that this case, as against the respondent, is a proper one for an injunction to restrain unauthorized action by him in a matter where his duties are clearly ministerial, and affect the sovereignty rights and franchises of the state, and the liberties of the people." It thus seems plain that in view of the construction of the constitution of Wisconsin adopted by the supreme court of that state, the prerogative writ of injunction of which that court is given original jurisdiction is a writ of a different nature, and having a differ-

ent scope and purpose, from an ordinary injunction in equity. Where the established distinction between equity and common-law jurisdiction are observed, injunction and mandamus are not correlative remedies, in the sense of being applicable to the same subject-matter, the choice of a writ to be resorted to in a particular case to depend upon whether there is an excess of action to be restrained or a defect to be supplied. The two writs properly pertain to entirely different jurisdictions, and to different classes of proceedings, injunction being the proper writ only in cases of equitable cognizance, and mandamus being a common-law writ, and applicable only in cases coming within the appropriate jurisdiction of courts of common law. Besides, it would seem that, in Wisconsin, the writ of injunction of which the supreme court is given original jurisdiction is not limited, as is the jurisdiction of courts of equity, to cases involving civil or property rights, but may be resorted to in all cases "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people," thus including within its scope the protection of political as well as civil or property rights. It thus seems plain that *State v. Cunningham* was decided under a judicial system differing essentially from ours, and that it cannot be resorted to as an authority upon the question of the jurisdiction of courts of equity in this state in cases of this character.

The jurisdiction of a court of equity is sought to be sustained in the present cases, however, on the ground that the bills are by taxpayers to restrain the misapplication of public moneys, and the incurring of an unauthorized municipal indebtedness. If it be admitted that a taxpayer may, in a proper case, file a bill in his own name, for such a purpose, — a question which we do not deem it necessary to discuss, — it seems plain that no case for the interposition of equity on that ground is here made out. It may be noticed, in the first place, that, while it is alleged that holding the election will necessitate a certain amount of election expenses, that fact does not seem to be set forth as an independent, substantive ground for relief, nor does either bill pray that the election itself be enjoined, so as to avoid the incurring of an illegal municipal indebtedness. The act sought to be restrained in one case is the issuing of notices of the election of members of the general assembly in and for the districts formed by the Apportionment Act of 1893, and the act sought to be enjoined by the other bill is the certifying by the secretary of state of the name of any candidate nominated for election under the Acts of 1893 or the Act of 1892; but it is not alleged or shown in any way, either directly or by inference, that either of the acts thus sought to be restrained will of themselves involve the expenditure of public money or the incurring of any indebtedness. The expenditures which the complainants, as taxpayers, might seek to avoid, if any such are to be incurred, will result from the holding of the election; and neither bill prays for an injunction to restrain the public officers from incurring the expenses incident to holding the election itself. Indeed, it is so well settled that courts will not enjoin the holding

of an election that, in drafting the bills, the pleaders did not venture to pray for that species of relief. Furthermore, as is of course well known, the election to be held in November, 1884, will not be confined to the choice of senators and representatives in the general assembly, but it will be for the election of state treasurer, members of congress, and certain county officers; and it is not pretended that, so far as those officers are concerned, the election will be in any respect illegal or unauthorized. Nor is it shown, at least by any clear or intelligible averment, that voting for senators and representatives in the general assembly in and for the districts created by the apportionment acts in question, will in any material degree increase the expense of holding the election. In no view, then, can it be held that the complain-

ants, as taxpayers, have made out a case for an injunction to restrain the public authorities from doing acts whereby an illegal indebtedness will be incurred.

After giving the cases patient consideration, we are unanimously of the opinion that these bills present no cases entitling the complainants to relief in a court of equity. Having reached that conclusion, it is unnecessary for us to express any opinion upon the other question raised by counsel in their arguments; but, upon the sole ground that the cases made by the bills are not within the jurisdiction of a court of equity, the decrees of the courts below dismissing the bills for want of equity will be affirmed.

*Decrees affirmed.*

### MISSOURI SUPREME COURT. (In Banc.)

C. P. ELLERBE, *Appt.*,

*v.*

Anthony E. FAUST, *Resp't.*

(.....Mo.....)

**1. A resolution of the masonic order denying membership to saloon keepers applies to existing members, if they continue thereafter in that business.**

**NOTE.**—*Effect of expulsion from a society to destroy right to insurance connected therewith.*

The above case seems to be the first in which a distinction has been considered between membership in a society or paternal order and the right to insurance connected therewith with respect to the effect of an expulsion from the order.

In all the cases hereinafter cited it seems to have been assumed that expulsion from the order forfeited all rights of the member to insurance belonging to membership. But these cases are here presented to show that valid expulsion for whatever cause has been uniformly held fatal to such insurance. Cases of forfeiture of insurance for nonpayment of dues have not been included here, as the forfeiture of insurance in such cases obviously results directly therefrom and not as an indirect result of expulsion. It should be noticed also that in the main case there were two distinct associations and membership in the benefit society was dependent on membership in the other and broader organization while in the following cases the expulsion was from the same organization which gave the insurance.

#### *Suits on the benefit certificate.*

Where the member has been regularly expelled on proper notice and fair hearing in accord with the constitution and by-laws of the order, no recovery can thereafter be had on the certificate. *Anacosta Tribe No. 12, Improved Order of Redmen v. Murbach*, 13 Md. 91, 71 Am. Dec. 635; *Black & White-Smiths' Soc. v. Vandyke*, 2 Whart. 309.

And an action for benefits cannot be maintained, where the claim was disallowed and an appeal taken and reversed, and appeal from this taken, pending which he was expelled for fraud in this claim, and on appeal from this the expulsion was considered by the society first and affirmed and held to be an adjudication of the other appeal. This is approved by the court. *Woolsey v. Independent* 26 L. R. A.

**2. The termination of membership in a masonic lodge, which is in substance and effect an expulsion, although not so in form, forfeits membership in a masonic mutual benefit association, which not only provides that expulsion from the lodge shall work a forfeiture of membership in the association, but also makes it a requisite for membership that the applicant be a mason in good standing.**

**3. Payments of assessments in a benefit**

*Order Odd Fellows, Lodge No. 23, of Bloomfield, 61 Iowa, 492.*

So where an expelled member brings suit for weekly allowances accruing prior to and since his expulsion, and a judgment is rendered that no recovery can be had for allowances claimed since the expulsion on account of its irregularity, this is a bar to any other action for a recovery of the same or for reinstatement. *Bachmann v. New Yorker Deutscher Arbeiter Bund*, 64 How. Pr. 442.

And where the constitution provides that a member in good standing is entitled to \$500 on the death of his wife, and he receives a withdrawal card from his lodge and then applies for admission to two other lodges but is rejected and no cause assigned, he cannot recover from the order, on the death of his wife, which occurred shortly after his last rejection, as he was not then a member in good standing. *Meyer v. American Star Order*, 2 N. Y. Supp. 492.

And in *Jones v. National Mut. Ben. Assn. (Ky.)* Jan. 6, 1887, it was stated that the decision of an officer within a corporation acting judicially on the expulsion of a member would be *res adjudicata* in the absence of fraud, but that was not the question involved.

And in *Com. v. Pike Beneficial Soc.*, 3 Watts & S. 247, in an action of mandamus it was stated that where the member has had a hearing according to the charter and there is no irregularity in the proceeding, the judgment of the society is conclusive and will not be inquired into by mandamus, or action, or in any other mode.

And in *Fritz v. Muok*, 62 How. Pr. 69, in an action to restore an expelled member where the court required him to be reinstated, it refused to pass on the question as to his right to recover weekly payments during the time of expulsion, as such was proper matter for the regular committee of the order and there was no charge of fraud or bad faith against it.

association after forfeiture of membership, but in ignorance of that fact, do not estop the member from denying his liability to pay subsequent assessments.

(February 12, 1894.)

**A** PPEAL by plaintiff from a judgment of the St. Louis Circuit Court in favor of defendant in a proceeding brought to compel payment of assessments made on behalf of a mutual insurance company. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. James E. Hereford and M. W. Huff* for appellant.

*Mr. Rufus J. Delano* for respondent.

*Martin, Special Judge*, delivered the opinion of the court:

The facts in this case are substantially like the facts in the case of *Ellerbe v. Barney* (Mo.) 28 L. R. A. 485, with one exception. That exception includes some facts which tended to show that the respondent was not a member of the Masonic Mutual Benefit Association at the date of the assessments, for the collection of which this suit was brought. The court below held that he was not a member of that date, and entered judgment in his favor, from which the superintendent of insurance has appealed.

But where no notice or hearing of the accused member was given, the society is liable on the certificate. *Downing v. St. Columba's R. C. T. A. B. Soc.* 10 Daly, 262; *Simmons v. Syracuse, B. & N. Y. & Oswego & S. Benev. Soc.* 32 N. Y. S. R. 423.

So where the expulsion was for a cause not recognized by the contract, constitution, and by-laws of the society, a recovery was allowed. *Mulroy v. Supreme Lodge K. of H.* 28 Mo. App. 453.

So where the suspension for ninety-nine years, which was the same as an expulsion, was groundless and the grand lodge had reversed such judgment after the death of the member, a recovery was allowed. *Vivar v. Supreme Lodge K. of P.* 52 N. J. L. 455.

And in a suit to recover the weekly stipend by an expelled member, a complaint stating that there was a waiver of the rule as to his being over age when admitted, and that he was expelled for leaving the sick room without the permission of the physician and the president of the association, will be held good on demurrer, as there is no allegation of power of the association to expel on that ground, and the rule that pleading is construed against the pleader is changed by N. Y. Code, § 159, providing that pleadings shall be liberally construed. *Olery v. Brown*, 51 How. Pr. 92.

A judgment of expulsion from a lodge based on appearance and admission of the member is not binding on him where he was insane at the time of such appearance and expulsion, as appearance implies consent which cannot be given by an insane person, and a recovery may be had on the certificate after his death by the beneficiary. *Supreme Lodge A. O. U. W. v. Zuhke*, 129 Ill. 298.

But, on the contrary, in *Pfeiffer v. Weishaupt*, 13 Daly, 161, it was held in an action on a benefit certificate, that it was a good defense that the member had been expelled on trial and hearing, notwithstanding his insanity, the court saying, "A person who has even been adjudged a lunatic and of whom a committee both of person and estate has been appointed may be sued at law and the judgment recovered against him is not void."

The case of *ELLERBE v. FAUST* holds that a member of masonic benefit society receiving his 25 L. R. A.

A clause in the constitution or charter of the association, as it existed in 1883, when the respondent became a member, provides that "a requisite qualification for membership shall be that the applicant be a Mason of good standing." The association was established for the benefit of Masons and their families. Another clause in the constitution or charter gave the board of directors power to make and amend by-laws relating to the forfeiture of membership, declaring the effect thereof, and the manner in which the same should be brought about. In October, 1883, the Grand Lodge of Free and Accepted Masons of Missouri, including the subordinate lodge of said order, to which the respondent belonged, passed a resolution barring and denying saloon keepers (including the respondent, who was and continued to be a saloon keeper) from the membership and privileges of said order of Masons. The respondent, upon receiving notice of this action, acquiesced in it, and withdrew from his lodge, and thereafter ceased to be a Mason in good standing. In October, 1890, the Masonic Benefit Association, to which respondent also belonged, as already stated, desiring to comply with the spirit and intent of the order of the grand lodge, passed a by-law to the effect that, if any of its members should become a saloon keeper or bar keeper, he should for-

feit card on account of a by-law excluding saloon keepers from the benefit of the order, is not liable for assessments made thereafter by the order. The cases on the question of liability on the certificate except this are cases in which the society is sued, and the liability depends generally on the effect of the judgment of expulsion. If notice, hearing, and trial are fairly given according to the constitution and by-laws such judgment will be conclusive and defeat a recovery on the certificate.

#### Damages.

There are not many cases on the question of damages for expulsion of a member of a benefit society and the cases conflict, some holding that he has property rights of which he could not be deprived, and at least is entitled to nominal damages where he was expelled without notice or trial. *Ludowski v. Polish Roman Catholic St. Stanislaus Koska Benev. Soc.* 29 Mo. App. 337.

And a recovery of damages to the extent of injury and value of sick benefits to which the member was entitled was allowed where he was expelled without notice as required by the constitution and by-laws. *Washington Beneficial Soc. v. Bacher*, 20 Pa. 423.

But *Lavalle v. Société St. Jean Baptiste de Woonsocket*, 16 L. R. A. 292, 17 R. I. 680, holds that damages are not recoverable for an expulsion, as such claim admits that the claimant is not a member, and besides it would be difficult to provide payment for such a judgment.

And in *Peyre v. Mutual Relief Soc. of the French Zouaves*, 90 Cal. 240, it was held that a recovery of damages could not be had as the expulsion was substantially in accord with the constitution, but if he should be entitled to reinstatement damages should not be awarded as this would punish his friends who voted against his expulsion.

And a judgment for damages for expulsion is a bar to an action of mandamus for reinstatement. *State v. Lipa*, 28 Ohio St. 665.

Cases of mandamus for restoration of expelled member are not included in this note. I. T.

feit his membership in the same, and all benefits therein, and his certificate of membership should thereby, *ipso facto*, become null and void. The by-law went further, and provided that a failure to give notice of the adoption of the by-law should have no effect on the forfeiture. It also declared it to be unlawful to pay any benefits under any such certificate, irrespective of any knowledge of the association, prior to the member's death, of the fact of forfeiture, or of the receipt of assessments after forfeiture. It also forbade the officers of the association, the executive committee, and the board of directors to receive any assessments from any member after notice of the existence of the facts constituting an *ipso facto* forfeiture of his membership. Another by-law, or section of a by-law, provided that an "expulsion from his lodge shall, *ipso facto*, work a forfeiture of membership in this association." The manifest intention of this action of the association was to keep in line with the lodges of the state, from which, alone, its members were recruited. After passage of the edict against saloon keepers by the united lodges of the state, no one pursuing the occupation of a saloon keeper, whether technically in, or formally expelled from, his lodge, could be received by the association as eligible to membership. It is argued by counsel for appellant that the respondent was not within the purview of the by-law recited by us, for the reason that he was a saloon keeper before and at the time it was passed, and therefore did not become one after its passage. The by-law must be interpreted so as to meet the abuse or thing prohibited, and to correct it, if possible. The intention is manifest to prevent any of its members from pursuing the occupation of saloon keepers or bar keepers. (Of course, it was not intended to affect the standing of any one who had pursued the occupation of a saloon keeper, but who, upon passage of the law, discontinued that occupation. I think it was intended to apply to only such as should be or become saloon keepers after its passage. As the respondent is admitted to have continued to be a saloon keeper after its passage, he comes within the operation of its provisions, and, according to the declared effect of it, lost his membership, *ipso facto*, without any formal action of the association.

But, irrespective of the by-law against saloon keepers passed by the association, it would seem that the respondent lost his membership in it by virtue of the action of the lodge to which he belonged debarring him from membership therein, and the by-law of the association which declared that, when a member of the association suffered expulsion from the lodge to which he belonged, he thereby, *ipso facto*, ceased to be a member of the association, without any action on its part.

It is contended by counsel for appellant that the respondent, although ceasing to be a member of the lodge to which he had belonged, was not formally expelled therefrom, and therefore did not strictly fall within the operation of the by-law which discontinued him as a member of the association, *ipso facto*, as soon as he was expelled from his lodge. The termination of his membership in his lodge was in substance and effect an expulsion, although not such in

form. He was, against his will, lebarred of all the rights and privileges of membership by the lodge, on account of his being and continuing a saloon keeper. After this, it is admitted that he took his "demit." I do not see what else he could have done. He had no rights in the lodge, and, as a law abiding citizen it was his duty to go away.

It is, however, contended by counsel for appellant that after this forfeiture the officers of the association still recognized and treated him as a member in good standing, and collected assessments from him, prior to the date of the assessments for which this suit is brought, and that the effect of this treatment was to restore him to his membership, by waiver of the forfeiture, notwithstanding he continued to pursue the occupation of a saloon keeper all the time. This position is attempted to be supported by an appeal to the doctrine of estoppel. There are several reasons against this position, some of which may be briefly attended to: It is possible that the board of directors could have changed the by-law directed against saloon keepers, and thus relieved the respondent from its effect. There is no evidence that the board did this, or that it approved of any act of its officers tending to continue the respondent as a member. Certainly, the executive committee, and the other officers of the association who are claimed to have made and collected assessments, were expressly forbidden by the by-law from doing this in respect to saloon keepers. The by-law could not be set aside by them. It also provides that no action by them in collecting assessments shall operate to relieve any member from a forfeiture. Moreover, if a forfeiture took place under the by-law relating to an expulsion from the member's lodge,—a forfeiture which, *ipso facto*, discontinued the respondent's membership,—the directors, as well as the officers, in restoring him, would seem to be acting in violation of the clause in the charter which authorized them to admit only Masons in good standing. Again, the elements of an estoppel in behalf of the association are evidently wanting. There is no evidence of fraud, misrepresentation, or imposition upon the association. An estoppel which might possibly be invoked by the respondent in a suit against the association is not available in behalf of the association in its suit against the respondent. The unbrought action of the respondent is not before us, and we could not safely pass upon its merits, in order to furnish the appellant with an estoppel. Lastly, it is admitted by the appellant that the payments by respondent were actually made by him in ignorance of the fact that his membership had been forfeited under the by-laws. He paid them under the impression and belief that he still owed them. The appellant, who received them under such circumstances, has no equity, as against the respondent, in attributing to them the effect of giving to him a membership which had been taken from him, especially as appellant knew that it had no right to receive them. The right of the respondent to plead his ignorance in the payments as a fact of estoppel belongs to him, and not to the association. In his answer, however, he disavows the supposed advantages of such a plea, and alleges that he does not claim,

and never has claimed since knowledge of the by-laws, any rights of membership in the association.

As the assessments were made after the respondent ceased to be a rightful member of the association, I am convinced that *the judgment of the court below was correct, and that it should be affirmed*, and it is so ordered.

All the other judges concur in the result, except **Brace** and **Macfarlane, JJ.**, not sitting.

**Black, J.:**

The judgment in this case should be affirmed for the reasons stated in the dissenting opinion in the case of the *Sams Plaintiff v. Barney*, 23 L. R. A. 435. Entertaining the views there expressed, it is not necessary to express any opinion as to the matters discussed in the foregoing opinion.

**Burgess, J.**, concurs.

## PENNSYLVANIA SUPREME COURT.

Andrew J. DUFFIELD, *Appt.*,

*v.*

WILLIAMSPORT SCHOOL DISTRICT.

(103 Pa. 476.)

1. A school board has power to adopt reasonable health regulations for the benefit of pupils and the general public.
2. A school board has the right to exclude from the schools those who do not comply with a regulation of the city authorities and the school board requiring a certificate of vaccination as a condition of attendance.

(July 11, 1894.)

**A**PPEAL by petitioner from a decree of the Court of Common Pleas for Lycoming County in favor of defendant in a proceeding by mandamus to compel the defendant to admit petitioner's child to its schools. *Affirmed*.

The facts are stated in the opinion.

**Mr. W. H. Spencer**, for appellant:

Any fair, reasonable doubt concerning the

existence of an asserted power is resolved by the courts against the corporation and the power is denied.

1 Dill. Mun. Corp. 3d ed. §§ 89, 91, and *note*; Cooley, Const. Lim. 6th ed. pp. 227, 231, 487; Endlich, Interpretation of Statutes, §§ 340, 352, and authorities cited; 15 Am. & Eng. Encyclop. Law, p. 1041; 2 Kent, Com. 12th ed. 298; Horr & Bemis, Mun. Pol. Ord. § 17.

Against the body of a healthy man, no man or body of men has any right of assault whatever under the pretence of public health, nor any more against the body of a healthy child.

*Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 828; *Slaughter-House Cases*, 83 U. S. 16 Wall. 116, 21 L. ed. 421; *People v. Marx*, 99 N. Y. 886, 52 Am. Rep. 84.

The police power is grounded upon inevitable necessity.

Cooley, Const. Lim. 6th ed. 705; 2 Kent, Com. 12th ed. 340; *Philadelphia v. Scott*, 81 Pa. 80, 23 Am. Rep. 788; 1 Dill. Mun. Corp. 3d ed. 141.

Such a power belongs to a class of extra-

### NOTE.—Compulsory vaccination.

The main case which holds it to be within the power of school authorities to require children to be vaccinated, as condition of attendance on the public schools, is directly supported by the California decision in *Abel v. Clark*, 84 Cal. 233, which decided in substance the same. These are the only American cases which we have found, that directly present the question, and it will be noticed that neither of these decides the question of power to compel vaccination, but merely decides that until vaccinated, the privilege of attendance on the public schools may be denied.

The vaccination of school children was incidentally involved in the case *Fort Wayne v. Rosenthal*, 76 Ind. 156, 39 Am. Rep. 127, in which a physician, who was a member of the board of health, made a claim for compensation for vaccinating school children under contract with the board of which he was a member. The statute under which this was done gave power to provide by ordinance for the compulsory vaccination, but no question on this point was raised.

In an early Vermont case, *Hazen v. Strong*, 2 Vt. 497, the validity of a tax to pay the expenses of vaccinating the inhabitants of a town, under order of the selectmen, was brought in question, but it was upheld under general statutory authority to take measures for the prevention of the spreading of disease.

In England the Act of 1867 (30 & 31 Vict. chap. 84) 25 L. R. A.

provided for compulsory vaccination, and has been enforced in various cases. It was held in *Rex v. Justices of the Cinque Ports*, L. R. 17 Q. B. Div. 191, that where a parent had been duly summoned, and the court found that notice to the parent to procure the vaccination of the child had been disregarded, the justice might order the child to be vaccinated, although no appearance was made by either parent or child in answer to the summons.

The same decision was made in *Dutton v. Atkins*, L. R. 6 Q. B. 373, 40 L. J. M. C. 157, 24 L. T. N. S. 507 19 Week. Rep. 790, except that the parent without the child appeared in that case.

Under the Act of 30 & 31 Vict., the parent may be fined successively for disobeying successive orders to have the child vaccinated. *Allen v. Worthy*, L. R. 5 Q. B. 163, 39 L. J. M. C. 36; *Tebb v. Jones*, 37 L. T. N. S. 576.

But under the prior Act of 16 & 17 Vict., one conviction was a bar to further prosecutions. *Pilcher v. Stafford*, 4 Best & S. 773, 38 L. J. M. C. 113, 10 Jur. N. S. 651, 9 L. T. N. S. 759, 12 Week. Rep. 407.

The act has also been construed in other particulars and enforced in other cases.

*Knight v. Halliwell*, L. R. 9 Q. B. 412, 43 L. J. M. C. 113, 30 L. T. N. S. 359, 23 Week. Rep. 699; *Broadhead v. Holdsworth*, L. R. 2 Exch. Div. 321, 46 L. J. M. C. 173, 36 L. T. N. S. 339; *Miller v. Rhind*, 29 L. T. N. S. 52.

But in no case has the general question of power to enforce compulsory vaccination been contested.

B. A. R.

ordinary powers that must be clearly conveyed.

4 Am. & Eng. Encyclop. Law, 212, 213, and *note*; *State v. Belvidere Treasurer*, 44 N. J. L. 350; *Horr & Bemis*, Mun. Pol. Ord. § 16; *Green's Brice*, *Ultra Vires*, 2d ed. 29, *note*; *Potter's Dwarr*, Stat. p. 255.

The Act of 1851, (Pub. Laws, 322), gives the city power to enforce its regulations by "fines and penalties incurring partial or total forfeitures."

The corporation is precluded from enforcing them in any other way.

2 Bl. Com. 267; 15 Am. & Eng. Encyclop. Law, p. 1042, § 8, and *note*; 17 Am. & Eng. Encyclop. Law, art. 28, p. 260; 1 Dill. Mun. Corp. 3d ed. §§ 336, 337, 339, and *note*, 410; *Horr & Bemis*, Mun. Pol. Ord. § 148; *Barter v. Com.* 3 Penr. & W. 253; *Leland v. Long Branch Comrs.* 42 N. J. L. 875; *Hart v. Albany*, 3 Paige, 381, 3 L. ed. 197.

By Act of May 8, 1854 (Pub. Laws, 621, § 23), the board of directors are required to make school provision for all the children in the district, between the ages of six and twenty-one years, who may apply for admission. This law gives to every child in the school district the right to attend the public schools; and the only requisites necessary for admission are age and residence in the district.

*Nicklas's Petition*, 146 Pa. 217; *School Laws* and Dec. ed. 1892, p. 34; *Cooley*, Const. Lim. 6th ed. 247; *Livingston v. Wolf*, 136 Pa. 533.

In all cases where persons are deprived of any rights, their forfeiture must be judicially determined.

1 Dill. Mun. Corp. 3d ed. § 347, *et seq.*; *Cooley*, Const. Lim. 6th ed. pp. 125, 316, 318, 442, 444; *Hodgson v. Millward*, 3 Grant, Cas. 406; *Horr & Bemis*, Mun. Pol. Ord. § 163; *Fetter v. Will*, 46 Pa. 460; *Tiedeman*, Pol. Powers, § 31a; *Taylor v. Porter*, 4 Hill, 146, 40 Am. Dec. 274; *Rockwell v. Nearing*, 35 N. Y. 302; *Wynehamer v. People*, 13 N. Y. 378.

While the municipal authorities may classify its inhabitants, and prescribe different regulations for different classes, the classification must be based upon some reasonable distinction, and unless it is so based, and unless the regulation is made to apply impartially to all who are similarly situated, it is void.

*Cooley*, Const. Lim. 6th ed. pp. 481, 484; 1 Dill. Mun. Corp. 3d ed. § 322; *Reimer's App.* 100 Pa. 182, 45 Am. Rep. 873; *Livingston v. Wolf*, *supra*; *Danville v. Peters*, 8 Luzerne, Leg. Reg. 273; *Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 326; *Gale v. Kalamazoo*, 28 Mich. 344, 9 Am. Rep. 81; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Shreeport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553; 1 *Cooley*, Const. Lim. 6th ed. 240; 1 Dill. Mun. Corp. 3d ed. §§ 319, 320, 322; 17 Am. & Eng. Encyclop. Law, p. 253.

Unless the parent permits the child to be vaccinated, he is unable to comply with the requirements of this ordinance. So that as to such children the ordinance prescribes an impossible condition.

*Morrow v. Wood*, 85 Wis. 59, 17 Am. Rep. 471; *Rulison v. Post*, 79 Ill. 567; *Lake View School Trustees v. People*, 87 Ill. 303, 29 Am. Rep. 55; 1 *Dillon*, Mun. Corp. 3d ed. § 319; *Cooley*, Const. Lim. 6th ed. 240.

25 L. R. A.

Article 10, § 1, of the Constitution contains a mandatory direction to the legislature to make school provision for all the children of the commonwealth above the age of six years; and by stating the conditions for admission, viz, residence and proper age, the constitution fixes the qualifications which school children must possess.

*Nicklas's Petition*, 146 Pa. 217; *School Laws* and Dec. ed. 1892, p. 34; *Cooley*, Const. Lim. 6th ed. 105; *Page v. Allen*, 53 Pa. 347, 98 Am. Dec. 272; *Patterson v. Burlow*, 60 Pa. 85; *Stuart v. Palmer*, 74 N. Y. 133, 30 Am. Rep. 289; *Henderson v. Wickham*, 92 U. S. 268, 23 L. ed. 548.

A school district is created for educational purposes and can exercise no power except for those purposes.

21 Am. & Eng. Encyclop. Law, p. 680; *Ford v. Kendall Borough School Dist.* 1 L. R. A. 607, 121 Pa. 543; *Erie School Dist. v. Fuesz*, 98 Pa. 600, 42 Am. Rep. 627; *Wright County Dist. No. 7 v. Thompson*, 5 Minn. 280; *Stevenson v. District No. 1*, T. 28 N. R. 14 W. *School Directors*, 87 Ill. 255.

The legislature has nowhere given to school boards in express terms the power to prescribe vaccination as a necessary qualification for admission into the common schools, or to suspend or expel pupils who fail to comply with a rule requiring vaccination.

*State v. Belvidere Treasurer*, 44 N. J. L. 350; *Green's Brice*, *Ultra Vires*, 2d ed. 29; *Potter's Dwarr*, Stat. 255; *Vanhorne v. Dorrance*, 2 U. S. 2 Dall. 816, 1 L. ed. 396.

The board has but a limited control over the children derived entirely from the parents, viz, that of restraint and correction, and then only for educational purposes.

1 Bl. Com. p. 453, and *note*; 17 Am. & Eng. Encyclop. Law, p. 352; 21 Am. & Eng. Encyclop. Law, p. 763; *Cooley*, Const. Lim. p. 415; *School Laws* and Dec. ed. 1892, § 101, p. 58; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156; *State v. Mizner*, 50 Iowa, 145, 32 Am. Rep. 128; *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471.

For all general purposes the parent's control follows the child into the schoolroom.

*Rulison v. Post*, 79 Ill. 567; *Lake View School Trustees v. People*, 87 Ill. 303; *Morrow v. Wood*, *supra*; *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343.

**Mr Frank P. Cummings**, for appellee: The directors acted within a sound discretion *Throop*, Pub. Off. § 542; *Dill. Mun. Corp.* § 832; *Rittenhouse v. Creasy*, 2 Luzerne Leg. Reg. 244.

Where there is nothing but an indiscreet exercise of a clearly granted discretion, a party will vex the judicial ear in vain, for the judicial arm can redress no such wrong.

*Wharton v. Cass Twp. School Directors*, 42 Pa. 363; *School Directors of Cogan House Twp.* 2 Pa. Co. Ct. Rep. 493; *Roth v. Marshall*, 158 Pa. 272; *Freeman v. Franklin Twp. School Directors*, 37 Pa. 385; *Re School Director's Petition*, 3 Luzerne Leg. Reg. 107; *Re Ohio Twp. School Directors*, 9 Pa. Co. Ct. Rep. 394; *Com. v. Cochran*, 5 Binn. 102; *Rittenhouse v. Creasy*, *supra*.

It is competent for the legislature to delegate to municipal corporations the power to

make by-laws and ordinances, with appropriate sanction, which, when authorized, have the force, in favor of the municipality, and against the persons bound thereby, of laws passed by the legislature of the state.

1 Dill. Mun. Corp. par. 908.

**Williams, J.**, delivered the opinion of the court:

The plaintiff seeks to compel by a writ of mandamus the admission of his minor son to the common schools of the city of Williamsport. The board of school directors admit that the child is of proper age, is in good health, and possesses the qualifications that are enumerated in the general school laws as those that entitle him to admission. They allege, however, that he is excluded because of noncompliance with a regulation adopted in the exercise of a proper measure of care for the public health. The facts appearing in the answer are substantially as follows: First. That the city of Williamsport provided by an ordinance adopted in 1872, and still in full force, that no pupil "shall be permitted to attend any public or private school in said city without a certificate of a practicing physician that such pupil has been subjected to the process of vaccination." Second. That smallpox now exists in Williamsport, and "is and has been epidemic in many near-by cities and towns." Third. That, in view of this situation, the attention of the school board was drawn to the subject by a communication from the board of health, requesting them to take action "to the effect that no pupil shall attend the schools of this city except they be vaccinated, or furnish a certificate from a physician that such vaccination has been performed." Fourth. That upon considering this communication, "and from the general alarm prevailing in the city over the report that a case of smallpox was in the city," they adopted a resolution in conformity with the recommendation of the board of health. Fifth. That this resolution is not enforced against those not at present in a condition to undergo vaccination; and as to those unable to bear the expense the board provide vaccination without charge. The plaintiff demurred to this answer, and the questions thus raised are over the power of the school board to adopt reasonable health regulations for the benefit of their pupils and the general public, and over the reasonableness of the particular regulation complained of in this case. It should be borne in mind that there is no effort to compel vaccination. The school board do not claim that they can compel the plaintiff to vaccinate his son. They claim only the right to exclude from the schools those who do not comply with such regulations of the city and the board of directors as has been thought necessary to preserve the public health. It would not be doubted that the directors would have the right to close the schools temporarily during the prevalence of any serious disease of an infectious or contagious character. This would be a refusal of admission to all the children of the district. They might limit the exclusion

to children from infected neighborhoods, or families in which one or more of the members was suffering from the disease. For the same reason they may exclude such children as decline to comply with requirements looking to prevention of the spread of contagion, provided these requirements are not positively unreasonable in their character.

Is the regulation now under consideration a reasonable one? That is to be judged of in the first instance, by the city authorities and the school board. It is only in the case of an abuse of discretionary powers that the court will undertake to supervise official discretion. Vaccination may be or may not be a preventive of smallpox. That is a question about which medical men differ, and which the law affords no means of determining in a summary manner. A decided majority of the medical profession believe in its efficacy. The municipal regulations of many, and I have no doubt of most, of the cities of this state and country provide for it. In the present state of medical knowledge and public opinion upon this subject, it would be impossible for a court to deny that there is reason for believing in the importance of vaccination as a means of protection from the scourge of smallpox. The question is not one of science in a case like the present. We are not required to determine judicially whether the public belief in the efficacy of vaccination is absolutely right or not. We are to consider what is reasonable in view of the present state of medical knowledge and the concurring opinions of the various boards and officers charged with the care of the public health. The answers of the city and the school board show the belief of the proper authorities to be that a proper regard for the public health and for the children in the public schools requires the adoption of the regulation complained of. They are doing, in the utmost good faith, what they believe it is their duty to do; and, though the plaintiff might be able to demonstrate by the highest scientific tests that they are mistaken in this respect, that would not be enough. It is not an error in judgment, or a mistake upon some abstruse question of medical science, but an abuse of discretionary power, that justifies the courts in interfering with the conduct of the school board or setting aside its action. It is conceded that the board might rightfully exclude the plaintiff's son if he was actually sick with, or was just recovering from the smallpox. Though he might not be affected by it, yet if another member of the same family was, the right to exclude him, notwithstanding he might be in perfect health, would be conceded. How far shall this right to exclude one for the good of many be carried? That is a question addressed to the official discretion of the proper officers, and when that discretion is honestly and impartially exercised, the courts will not interfere.

The learned judge of the court below reached a correct conclusion in this case, and his *decree is now affirmed*, at the cost of the appellant.



## TEXAS SUPREME COURT.

Dan. FORD *et al.*

v.

S. J. FORSGARD and Wife, *Plffs. in Err.*

(.....Tex.....)

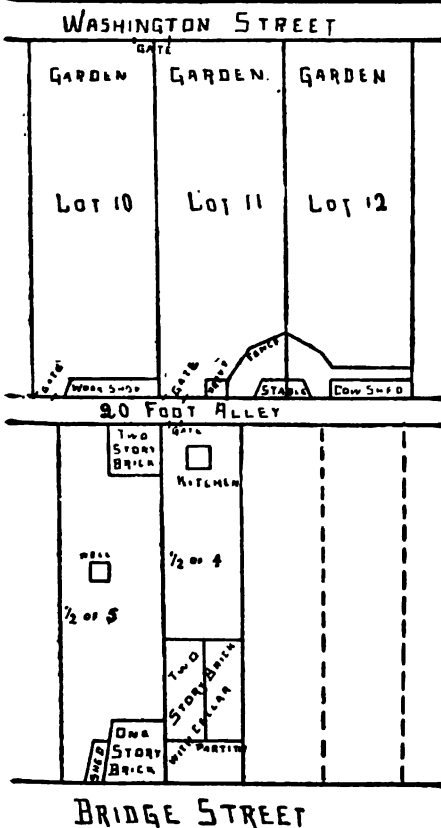
**Rooms in a house which stands on a homestead lot cannot be subject to forced sale, on the ground that the homestead as to them has been abandoned, under the Texas constitution and laws, by which the exemption is placed on the lots and not upon the improvements.**

(June 27, 1894.)

**ERROR** to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment modifying a judgment of the District Court for McLennan County in favor of plaintiffs in a suit brought to enjoin the execution sale of certain property belonging to the plaintiffs upon the ground that it was exempt from execution as homestead property. *Reversed.*

The facts are stated in the opinion.

The situation of the premises in controversy is shown by the following diagram:



**NOTE**—Upon the question of the division of a building in enforcing homestead exemptions, see note to *Cass County Bank v. Weber* (Iowa) 12 L. R. A. 87.

35 L. R. A.

**Messrs. Robertson & Davis**, for plaintiffs in error:

The homestead in a city, town, or village, shall consist of lot or lots not to exceed in value \$5,000 at the time of their designation as the homestead, without reference to the value of any improvements thereon, provided the same shall be used for the purpose of a home or as a place to exercise the calling or business of the head of a family; provided, also, that any temporary renting of a homestead shall not change the character of the same when no other homestead has been acquired, and if S. J. Forsgard and wife used the lots in question in connection with and for their homestead, and the same was and is necessary to their enjoyment of their homestead, a renting of part of two houses will not destroy their homestead right to said houses, provided parts of the same are necessary for family uses and for business purposes.

Texas Const. art. 16, §§ 50, 51; *Azer v. Bassett*, 68 Tex. 545; *Medlenka v. Downing*, 59 Tex. 32; *Shryock v. Latimer*, 57 Tex. 674; *Blum v. Whitworth*, 66 Tex. 350; *Willis v. Morris*, Id. 628, 59 Am. Rep. 634; *Bowman v. Watson*, 66 Tex. 295; *Malone v. Kornrumpf*, 64 Tex. 454.

Forsgard built the entire property on his lots as residence and business homestead. Parts of all of it being necessary for the use of his family and being used by his family, gave to all of it the character of residence homestead. Then when he cut off two small rooms in the two-story brick storehouse, using the rest of said house for family purposes, and it being necessary for such purposes, the renting of two small rooms would not destroy the homestead character of the house, and when he rented the partial use of one room in the one-story house, it did not destroy its homestead character, because the residue of said house was necessary for his family purposes. It is not like renting an entire house on homestead lots.

*Hancock v. Morgan*, 17 Tex. 583; *Andrews v. Hagadon*, 54 Tex. 571, and authorities above cited.

**Messrs. Baker & Prendergast**, for defendants in error:

Both storehouses are clearly subject to appellants' levy, and are not exempt to appellees, as either residence or business homestead.

He conducts no business nor follows any occupation in either of them. Has conducted no business in either of them for from five to eight years, but during all this time has kept them rented to others who did business in them. Never followed any occupation in either of them.

He has never used either of them as his residence. He resides with his wife and son—his only family, in a residence building 16×32 feet, two stories high, with kitchen detached, making five large rooms.

*Wynne v. Hudson*, 66 Tex. 1; *Medlenka v. Downing*, 59 Tex. 32; *Shryock v. Latimer*, 57 Tex. 674; *Hargadene v. Whitfield*, 71 Tex. 482; *Duncan v. Alexander*, 88 Tex. 441.

The constitution defines the homestead in a

city: "Shall consist of lot or lots not to exceed in value \$5,000, at the time of their designation as the homestead, without reference to the value of any improvements thereon: provided that the same shall be used for the purposes of a home."

These storehouses are in no way used for the purposes of a home.

*Pfeiffer v. McNatt*, 74 Tex. 640; *Oppenheimer v. Fritter*, 79 Tex. 108; *Houston v. Newsome*, 82 Tex. 80; *Blackburn v. Knight*, 81 Tex. 826; *Duncan v. Alexander*, 88 Tex. 441.

**Brown, J.**, delivered the opinion of the court:

This suit was instituted in the district court of McLennan county to enjoin the sale by Dan. Ford, sheriff of said county, of one half of lots 4 and 5, and all of lots 10, 11, and 12, in block No. 2 in the city of Waco. Mary A. Hanna recovered a judgment against S. J. Forsgard for \$4, 182.80, and defendants, T. J. Harper, M. M. Harper, Mary A. Hanna, F. J. Vesey, and J. B. Vesey recovered judgment against said Forsgard for \$1,079.48, upon each of which judgment execution was issued, placed in the hands of sheriff, and by him levied upon the property described above. The plaintiffs, Forsgard and wife, claimed the lots as part of their homestead, and the district judge issued a writ of injunction, enjoining the sale of the lots, which, upon trial before the court, were found to be exempted, as part of the plaintiff's homestead, and the injunction was perpetuated. Upon appeal the court of civil appeals (25 S. W. Rep. 445) found that so much of lot 5 as is covered by a one-story brick building was subject to forced sale, and that all of that half of lot 5 involved in the suit was part of the homestead, and exempted, but that two rooms on the first floor of the building were not exempted, and decreed that these rooms be sold; dissolving the injunction as to so much of lot 5 as was covered by the one-story brick building, and as to the two rooms in the building on lot 4. Under the findings of facts by the court of civil appeals, the judgment of that court, as to the one-story brick and that part of lot 5, must be affirmed.

The facts as found by the court, with reference to the half of lot 4, are, in substance, that lot 4 fronted on Bridge street 25 feet, with a two-story house upon it, covering the entire front, and running back 85 feet. Under the entire house, running up to the front, was a cellar. The first floor above the cellar was divided into three rooms by running a partition across the house 25 feet from the front, and another partition dividing the front into two rooms fronting on the street. The court of civil appeals finds that the entire lot under the house is exempted, as homestead, by reason of its use; that the rear room on the first floor and the second story are likewise exempted; but that the two front rooms on the first floor are not exempted, they having been abandoned as homestead, and rented out for other uses. The question presented is, Can a part of a house standing on a lot that is homestead be subjected to forced sale, under our constitution and laws? The house upon lot 5 was a fixture, within the meaning of the law, and, as such, was a part of the land itself. A sale of the land

would carry the house, and every part of it, *Hutchins v. Masterson*, 46 Tex. 555, 26 Am. Rep. 286; *Sinker v. Compas*, 62 Tex. 476. The house, being attached to, and a part of, the realty, could not be seized and sold separately from the land. *Willis v. Morris*, 66 Tex. 628, 59 Am. Rep. 684.

The constitution of this state (art. 16, § 51) defines an urban homestead in this language: "The homestead in a city, town, or village, shall consist of lot or lots not to exceed in value \$5,000 at the time of their designation as a homestead without reference to the value of any improvement thereon; provided, that the same shall be used for the purposes of a home or as a place of business to exercise the calling or business of the head of the family; provided, also, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired." By this provision of the constitution the exemption is placed upon the lots, and not upon the improvements. This is emphasized by the further provision that the value of improvements shall not be included, in determining the right. The use of the lot or lots impresses upon the land the homestead character. Whatever is so attached to the land as to become a part of it must partake of the character of the land, and if the land is subject to sale the improvements upon it will be subject. If, however, the land cannot be sold, neither can the structures built upon it as permanent buildings adapted to its use, and intended by the owner for such purposes. It would not be contended, if this lot were not exempt from forced sale, that the sheriff could seize and sell the two rooms, under these executions, nor would it be asserted that a sale of the lot would not carry the whole house. If the house, as a whole, be part of the realty, as it evidently is, how can it be said that a portion of the house is not a part of the land? And, if it be a part of the lot, under what rule of procedure can it be separated from the lot for the purposes of seizure and sale under execution? Let us suppose that the house should be destroyed by fire. The purchasers of these rooms would not be entitled to participate in the erection of another building upon the lot. The result of such a doctrine would be that the land under the house would be protected by the constitution, but the use of a part of it would not be. The purchaser of the two rooms would not dare, without the consent of the owner, to set foot on the soil, for if he did so he would be a trespasser; and the owner of the soil upon which the house stands would likewise be a trespasser, if he, without consent, entered the two rooms which rest upon the soil. This doctrine has been asserted and acted upon in Iowa, under the statutes of that state. *McCormick v. Bishop*, 28 Iowa, 239. In that case the lots and the lower rooms were sold, and the upper rooms held to be homestead. It is evident that the statutes of that state are very different in their provisions from our constitution, or the decision is not correct. The court says in that case that: "The owner might grant the right to use a part of the house, or he might sell the lot, and reserve a use in part of it,—the building; and why is it that the like result cannot be reached by forced sale?" The reason is plain. The owner

is not inhibited by the constitution from disposing of the homestead as he and his wife may deem best; but the officers of the law have no rights, by the process of courts, to enter the precincts of the homestead, to parcel out the use and ownership of that which the constitution has exempted from the claims of creditors and the powers of courts and officers. In Wisconsin the supreme court has held that no part of the house upon the lands exempted can be sold. One member of the court dissented, but we think that the reason of the law is with the majority of that court. *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244.

The court of civil appeals erred in holding that the two rooms in the house on lot 4 were subject to forced sale, for which error *the judgments of the District Court and Court of Civil*

*Appeals are reversed*, and this court now renders such judgment as the court of civil appeals should have rendered on the facts found by it. It is ordered that the injunction be dissolved as to so much of lot 5, block 2, in the city of Waco, as is covered by the one-story brick building, and the same is adjudged subject to sale under the executions levied upon it, and that as to the remainder of said lot 5, and half of lots 4 and lots 10, 11, and 12, in said block 2, the said injunction be, and the same is, made perpetual, and that the plaintiffs in error, S. J. Forsgard and F. G. Forsgard, recover of defendants in error, and their sureties on their appeal bond, all costs, and that this judgment be certified to the district court for observance.

### MASSACHUSETTS SUPREME JUDICIAL COURT.

James DOYLE, Admr., etc., of Cornelius J. Doyle, Deceased,

v.

FITCHBURG R. CO.

(.....Mass.....)

1. A railroad employe having a monthly ticket given him, which is good for more rides than are necessary in attending to his work, with the express privilege of using them for his own private interest or pleasure, is not, when passing over the road entirely for his own business, or pleasure, an employe, but is a passenger, within Pub. Stat., chap. 112, § 212, creating a liability for injury to a passenger.

2. Conditions on the back of a ticket cannot release the railroad from liability for the penalty given by Pub. Stat., chap. 112, § 212, to the widow and children and next of kin of a passenger injured by the gross negligence or carelessness of the servants of the company.

(June 20, 1894.)

**EXCEPTIONS** by defendant to rulings of the Superior Court for Middlesex County made during the trial of an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate, which resulted in a verdict in plaintiff's favor. *Overruled*.

The facts sufficiently appear in the opinion.

Mr. George A. Torrey, for defendant:

It by no means follows that because the plaintiff's intestate was riding upon a train and not actually engaged in service that he was a passenger.

*Robinson v. Old Colony R. Co.* 156 Mass. 435.

The defendant was under no common-law or statutory obligation to transport the plaintiff's intestate in the manner in which he was riding at the time of the accident, and it did not stand towards him in the relation of a common car-

**NOTE.**—As to the rights of a person injured while riding on a contract for free passage, see note to *Muldoon v. Seattle City R. Co.* (Wash.) 23 L. R. A. 794.

26 L. R. A.

rier. He was upon the train, not as a passenger who has a right to be there, but as an employe of the defendant, who was there through the license of the defendant, as a sheer gratuity or accommodation.

*Pennsylvania R. Co. v. Price*, 90 Pa. 256.

A servant is still in the employment of his master while being carried to and from his work by the master.

*Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228; *Russell v. Hudson River R. Co.* 17 N. Y. 184; *Vick v. New York Cent. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 86; *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 88; *Seaver v. Boston & M. Railroad*, 14 Gray, 466; *Gilman v. Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635; *O'Brien v. Boston & A. R. Co.* 138 Mass. 387, 53 Am. Rep. 279.

A servant who is permitted, but not required, to ride in an elevator is not a passenger but an employe while so riding, and the degree of care required of his employer was that of a master towards his servant, and not that of a common carrier of passengers.

*McDonough v. Lampher* (Minn.) Dec. 18, 1893. See also *Vick v. New York Cent. & H. R. Co.* *supra*; *Abend v. Terre Haute & L. R. Co.* 111 Ill. 208, 53 Am. Rep. 616; *International & G. N. R. Co. v. Ryan*, 82 Tex. 565; *Kansas City, M. & B. R. Co. v. Phillips* (Ala.) April 26, 1898; *Parkinson Sugar Co. v. Riley*, 50 Kan. 401; *Evansville & R. R. Co. v. Mad-dux*, 134 Ind. 571.

The fact that the conductor of the train received and treated him as a passenger was of no consequence.

*Texas & P. R. Co. v. Scott*, 94 Tex. 549.

The defendant was relieved from liability by reason of a contract entered into between the plaintiff's intestate and the defendant, by virtue of the reception and use of the ticket upon which the plaintiff's intestate was riding at the time of the accident.

If this were an action to recover damages for personal injuries to the plaintiff's intestate, even assuming that he were a passenger, the conditions on the back of this ticket would preclude his recovery in this commonwealth.

*Bates v. Old Colony R. Co.* 147 Mass. 255;

*Quimby v. Boston & M. R. Co.* 5 L. R. A. 846, 160 Mass. 865; *Hosmer v. Old Colony R. Co.* 156 Mass. 506; *Muldoon v. Seattle City R. Co.* 22 L. R. A. 794, 7 Wash. 538.

The basis of the plaintiff's action is the injury done to his intestate; and when his intestate released us from all liability for such injury, he released us from liability to compensate his administrator for his death.

In *Goodsell v. Hartford & N. H. R. Co.* 83 Conn. 51, it is held that the basis of an action for damages for death is not the loss to the relatives for the death, but the injury to the deceased.

In *Yelton v. Evansville & I. R. Co.*, 21 L. R. A. 158, 184 Ind. 414, it was held that in an action by the administrator to recover damages for death for the benefit of the widow, a settlement with the widow is invalid, and is not a bar to the maintenance of the action.

Clearly, therefore, this is an action brought by the administrator, and he has no ground of action if his intestate had relinquished all claim for injuries received at the collision that caused his death.

*Griswold v. New York & N. E. R. Co.* 53 Conn. 871, 55 Am. Rep. 115; *Kenney v. New York Cent. & H. R. R. Co.* 125 N. Y. 422; *Price v. Richmond & D. R. Co.* 33 S. C. 556; *Bissell v. New York Cent. R. Co.* 25 N. Y. 442, 82 Am. Dec. 369; *Griffiths v. Dudley, L. R.* 9 Q. B. Div. 357.

A settlement with the deceased in his lifetime bars an action for damages for his death.

*Dibble v. New York & E. R. Co.* 25 Barb. 183; *Price v. Richmond & D. R. Co.* supra; *Alexander v. Toronto & N. R. Co.* 33 U. C. Q. B. 474.

*Messrs. Allin & Mayberry* for plaintiff.

**Morton, J.**, delivered the opinion of the court:

It is conceded that the death of the plaintiff's intestate was due to the gross negligence of an engineer in the employ of the defendant. The defense rests on two propositions: First, that the plaintiff's intestate was not a passenger, but an employé; secondly, if that is not so, that the defendant is not liable, by reason of the conditions on the back of the ticket. The statute is as follows: "If by reason of the negligence . . . of a corporation operating a railroad . . . or of the unfitness, or gross negligence or carelessness of its servants . . . while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger, or in the employment of such corporation is lost, the corporation shall be punished." Pub. Stat. chap. 112, § 212. We do not think that, at the time of the injury, the plaintiff's intestate was in the employment of the defendant, within the meaning of the statute. The defendant was not transporting him to or from the place of his daily labor pursuant to the arrangement which existed between them. It had no control or authority over him. He was not traveling on any service for it. His time was his own, and the defendant was not paying him for it. He could use it as he saw fit, and was passing over the defendant's road entirely for his own business or pleasure. So long as he was working from day to day for the defendant, it might be 35 L. R. A.

said, in a popular sense, that he was in its employment; but we do not think that is the sense in which the words are used in the statute. Otherwise, if, at any time, under any circumstances, passing over the railroad on a highway crossing, on Sunday, for instance, on an errand to get a doctor for his father or a friend, he was injured by the gross negligence of the defendant's servants while engaged in its business, he would have no right of recovery. Nothing but the plainest language would warrant such a result.

Was he a passenger? The question is a more difficult one, and there is force in the argument which is urged that to hold that he was a passenger would subject the defendant to a higher degree of care towards him when traveling on its road on his own pleasure than when traveling pursuant to some purpose connected with his service as an employé. Nevertheless, we think that he must be regarded as having been a passenger. It is clear that a person may at one time be an employé when passing over a railroad, and at another time, in passing over the same road, be a passenger, though continuing all the while, in a popular sense, in the employment of the railroad company. The ticket on which the plaintiff's intestate was riding was not a mere gratuity. It furnished part of the consideration by which he was induced to enter the employment of the defendant. A ticket was given to him each month, and it contained more rides than were necessary in traveling to and from his work. It is expressly conceded that persons holding these tickets could use them for their own private interest or pleasure; and we think the result must be that the plaintiff's intestate held towards the defendant the relation of a passenger at the time when he was injured. The cases to which the defendant has referred us are distinguishable from this. Those in this state were where the plaintiff was being transported in immediate connection with his employment. *Gill-shannon v. Stony Brook R. Co.* 10 Cush. 228; *Seaver v. Boston & M. Railroad*, 14 Gray, 466; *Gilman v. Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635; *O'Brien v. Boston & A. R. Co.* 188 Mass. 387, 53 Am. Rep. 279. In the cases in other states the circumstances under which the injuries occurred were such that the plaintiff could at the time fairly be said to be in the employ of the defendant. *Russell v. Hudson River R. Co.* 17 N. Y. 184; *Vick v. New York Cent. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 203, 53 Am. Rep. 616; *International & G. N. R. Co. v. Ryan*, 82 Tex. 565; *Kansas City, M. & B. R. Co. v. Phillips* (Ala.) 13 So. Rep. 65; *Parkinson Sugar Co. v. Riley*, 50 Kan. 404; *Evansville & R. Co. v. Maddux*, 134 Ind. 571; *Manville v. Cleveland & T. R. Co.* 11 Ohio St. 417; *O'Connell v. Baltimore & O. R. Co.* 20 Md. 212, 83 Am. Dec. 549; *Hutchinson v. York, N. C. & B. R. Co.* 5 Exch. 343; *Tunney v. Midland R. Co.* L. R. 1 C. P. 291.

Considering the effect of the contract on the back of the ticket, the fact that the statute is a penal one must be borne in mind. The word "damages" is not used in a strictly legal sense. *Sackett v. Ruder*, 153 Mass. 403, 9 L. R. A. 391. Damages are to be assessed not less and not more than a certain amount, and with refer-

ence to the degree of culpability of the corporation, its servants or agents. Originally, the remedy was by indictment. Afterwards it was extended to an action of tort. Stat. 1871, chap. 381, § 49; Stat. 1874, chap. 872, § 163; Stat. 1881, chap. 199, §§ 1, 6. But only one of the remedies can be pursued by the executor or administrator; and, whether the amount is received by the indictment or in an action of tort, it goes, in either case, to the widow and children or the next of kin, and the executor or administrator has no interest in it. It is, in substance, a penalty given to the widow and children and next of kin, instead of the estate, and, as such, the intestate could not release the defendant from liability for it. *Com. v. Vermont & M. R. Co.* 108 Mass. 7, 12. 11 Am. Rep. 301; *Com. v. Boston & L. R. Co.* 184 Mass. 211;

*Littlejohn v. Fitchburg R. Co.* 148 Mass. 478, 482, 2 L. R. A. 502. Save as a matter of convenience, the proceedings, properly enough, might be instituted by the widow and children or next of kin, if the statute permitted it, as is done in certain instances under the employer's liability act. Stat. 1887, chap. 270, § 2. We have not found it necessary to consider whether a release of damages for causing the death of a human being is or is not justified by public policy, though a recent statute has been enacted which seems to authorize such a release by express messengers. Stat. 1894, chap. 469, § 2. Upon that, however, we express no opinion.

The result is that we think that the exception must be overruled, and it is so ordered.

### RHODE ISLAND SUPREME COURT.

George W. FISH

Edward C. CAPWELL *et al.*

(..... R. L. ....)

**The sale of standing timber by a written instrument not acknowledged or recorded as a deed amounts only to an executory contract or revocable license which is revoked by a subsequent conveyance of the land to another person.**

(July 24, 1894.)

**EXCEPTIONS** by plaintiff to rulings made during the trial of an action of trespass *quare clausum fregit* for the cutting and removal of certain trees from plaintiff's property which resulted in a verdict in favor of defendants. *Sustained.*

The facts are stated in the opinion.

**Mr. C. J. Arms** for plaintiff.

**Mr George T. Brown** for defendants.

**Stiness, J.**, delivered the opinion of the court:

This action of trespass *quare clausum fregit* was brought by the plaintiff, grantee of Nicholas Brown, to recover damages for the cutting and removal of trees from his close by the defendants, who justified under a writing, signed and sealed by said Brown, as follows, viz.: "Know all men by these present, that I, Nicholas Brown, of Coventry, R. I., have sold to Oliver H. Greene, of said Coventry, and Edward C. Capwell, of West Greenwich, R. I., all of the standing wood on a certain lot of land situated in said West Greenwich, bounded as follows: Northerly by the Greene land, so called; easterly by a wall; southerly by land of James Rathbun; and westerly by land of Edward C. Capwell,—estimated to contain ten acres; to have and to hold the same to said Greene and Capwell, their heirs, executors, and administrators, within two years from the date hereof to cut and remove said wood in, they having paid me the sum of fifty dollars, being in full for said standing wood, the receipt of which is hereby acknowledged. In witness

whereof, I hereunto set my hand and seal, at Coventry, R. I., Dec. 13, 1892. Nicholas Brown. (L. S.) In presence of S. W. Griffin." This instrument was not acknowledged and recorded, as required for deeds of real estate by Pub. Stat., chap. 178, §§ 3, 4. The plaintiff asked the judge to rule that this was a mere license from Brown, revocable at his will, and that his deed to Fish revoked it. The judge denied these requests, and ruled that, if the plaintiff knew of this instrument at the time he bought the land, he was bound by it, and could not maintain the action. To these rulings the plaintiff excepted, the verdict being for the defendants.

The first question is, What was the nature of the instrument? Did it convey an interest in land or not? In Greenleaf's *Cruise on Real Property* (page 55, § 45, *note*) the learned editor says: "The cases on this much-vexed question are extremely contradictory, but the principle now most generally recognized seems to be this: that in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have a right to the soil for a time, for the purpose of further growth and profit of that which is the subject of sale, it is an interest in the land, within the meaning of the fourth section of the statute of frauds, and must be proved by writing; but where the thing is sold in prospect of separation from the soil immediately, or within reasonable and convenient time, without any stipulation for the beneficial use of the soil, but with a mere license to enter and take it away, it is to be regarded as substantially a sale of goods only, and so not within that section of the statute; although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land." The same distinction, between permanency of the soil and products bought with a view to their separation from it, is also stated in 1 Greenleaf on Evidence, 14th ed. § 271. In Browne on Statute of Frauds, 4th ed. §§ 235-258, this subject is very thoroughly discussed, and the general rule deduced that where the

**NOTE.**—While as the court states in the above case it refuses to follow the weight of authority upon the question how far a sale of standing timber is within the statute of frauds (see *note* to *Hirth v. Graham*, (Ohio) 19 L. R. A. 781) it seems to have at the same time applied the rule in force in 3 L. R. A.

states holding such sales to be within the statute as to attempted sales being regarded as a license. The only way to reconcile the two positions would seem to be to hold that no sale was effected until the timber was delivered. In other words that a sale could not be made of standing timber.

intention is to convey a mere chattel, though it may in the interim be a part of the realty, it is not affected by the statute of frauds; but if it is to confer an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it is within the statute, and must be in writing, even though the purchaser's real profit may come from the sale of the produce of the land as a chattel. On the other hand, *Judge Washburn* gives, as an attempt to harmonize decisions, the result that a sale of growing trees or other *fructus naturales*, when they are not to be severed at once, but are to remain in the soil some definite or indefinite time, is generally regarded as a grant of an interest in the land. 8 Washb. Real Prop. 5th ed. 868. Mr. Benjamin states the rule in this way: that, where a sale is made which vests the property at once in the buyer before severance, a distinction is made between *fructus naturales* and *fructus industriales*, the former being an interest in the land, which is within the statute of frauds. 1 Benjamin, Sales, Kerr's ed. § 136.

We think the better reason is with the view which holds the sale to carry a chattel interest, and not an interest in the land. Evidently, the parties to a sale of standing trees, as in this case, have in mind the trees as timber, and not the land. They are not bargaining for occupation, and would not often think to clinch the trade by deed. They have contracted for wood, which happens not to have been cut; but why should a mere contract of that sort be different, in legal effect, from a contract for wood which has been cut? If, by its peculiar terms, it necessarily involves an occupation of land, there is reason for it, but not otherwise. If a man sells cut wood, he may refuse to deliver it, and become liable for a breach of contract. We see no reason why the same rule should not apply where the thing sold is standing wood, simply. What the buyer pays for and expects to get is not an interest in land, but trees severed from the land. The whole thing rests in contract. This view is supported by respectable authority. It is very clearly stated by Bigelow, *Ch. J.*, in *Drake v. Wells*, 11 Allen, 141, where it is held that a sale, such as the one before us, does not pass an interest in land, but only in the trees when they are severed from the land; that it is an executory contract for the sale of chattels when they shall be cut, with a license to enter on the land for the purpose of removal. Before they are cut, the license may be revoked; otherwise it would amount to an interest in the land. In some of the cases the contract has been oral, and in others written, but we do not see that this is important; for if the sale be an executory contract, either form is sufficient. To the same effect are *Sibley v. Trotter*, 29 N. J. Eq. 228; *Herrick v. Newell*, 49 Minn. 198; *Poor v. Oakman*, 104 Mass. 315; *Cain v. McGuire*, 13 B. Mon. 340; *Byassee v. Reese*, 4 Met. (Ky.) 373, 63 Am. Dec. 481; *McClintock's App.* 71 Pa. 365; *Sterling v. Baldwin*, 42 Vt. 306. In *Owens v. Lewis*, 46 Ind. 489, 15 Am. Rep. 295, there is as thorough an examination of this subject as can be found anywhere, with the conclusion that the contract for the sale of growing trees is a contract for the sale of an interest in land. See also *Williams v. Flood*, 68 Mich. 487.

While we must concede that this view is  
35 L. R. A.

taken by the greater number of authorities, yet we are constrained to think that the other view—that such a sale is an executory contract for trees to be severed from the land, and so not within the statute of frauds—is much more sensible. From the nature of the transaction, it is plain that what the buyer is after is wood, not land. If so, we do not see why we should say that, by legal construction, he buys an interest in land, and not wood. The buyer has just the same rights and remedies under the contract, as we construe it, that he would have for a sale of any chattel; whereas, under a contract by parol or in writing, not conformable to the statute, if it be held to be an interest in land, he would have none at all. In this case there was a written instrument, which was substantially a deed of the trees; but, if we give effect to it as a deed of an interest in land, we must say that it is more than a deed of trees, and that it practically amounts to a lease of the land for two years, because under it the purchasers might fell the trees at once, and obstruct the use of the land for any other purpose for nearly all that time. Now, the parties have made no such express agreement. It is more reasonable to imply that the owner meant to retain the possession and use of the land, subject to the license to remove the trees, than that he virtually surrendered it under such a license. If the deed carries an interest in land, suppose the purchaser refuses to take the trees, what then? The owner of the land cannot get back the interest he has conveyed, so as to be able to deal with another, unless he also can get a deed from the purchaser. Yet who would think of a purchaser of trees making a deed back in order to clear the title. The fact is the parties have simply made a contract, and it ought to be treated as such; and putting it into the form of a deed does not make anything more than a simple contract. One party has agreed to turn a part of his realty into personality, and sell it to the other. If he had agreed to turn cattle into beef, he would not be held to convey a present interest in the cattle, and there is no greater reason to hold that in the former case he conveys a present interest in the land. Courts have frequently tried to avoid the full effect of their construction of these contracts by making a distinction between the natural growth of the land (*fructus naturales*) and crops produced by tillage (*fructus industriales*), calling the former a contract for realty, and the latter for chattels. But we see no logical ground for this distinction. They are both a part of the realty until they are severed. The fact that the policy of the law allows the later to go to the executor or administrator as a reward for the labor of the husbandman does not change its character in the meantime. The better reason, as it seems to us, is to put both classes on the same footing, and treat them as contracts for things to be severed. Construing this contract, then, as amounting only to an executory contract or parol license, it follows that it was revocable (*Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505; *Owens v. Lewis*, 46 Ind. 489, 15 Am. Rep. 295); and the conveyance to the plaintiff operated as a revocation, because as to him the license was void. *Thurber v. Dwyer*, 10 R. I. 355.

The refusal to charge as requested must therefore be held to be erroneous, and a new trial granted.

## MISSOURI SUPREME COURT (In Banc).

Leonard MATTHEWS, *Resp't.*,

v.

ST. LOUIS & SAN FRANCISCO R. CO.,  
*Appt.*

(.....Mo.....)

1. A statute making a railroad company liable for damages caused by fire from a locomotive does not impair the obligation of a contract in its charter which merely authorizes the use of steam or of animal power or by mechanical power in operating the road.
2. The equal protection of laws is not denied to railroad companies by a statute making them liable for fires set by engines without regard to negligence.
3. No natural right is contravened by making a railroad company liable without regard to negligence for fires set by locomotive engines where experience has demonstrated the danger of fires from such sources.
4. A railroad company is not deprived of its property without due process of law or contrary to the law of the land by a statute making such company liable for all fires caused and communicated from locomotives.

*NOTE.*—Constitutionality of statutes making railroad companies absolutely liable for damage by fires set out by them or for stock killed by them, irrespective of negligence.

The courts have uniformly held statutes imposing absolute liability for fires set out by railroad locomotives to be valid or have assumed their validity as a basis for decision, and they have almost as uniformly held statutes invalid which attempted to impose absolute liability for stock killed on the track.

*Fires.*

A statute imposing liability for fires set out is not unconstitutional either, (1) as denying equal protection of the laws, (2) as taking property without due process of law, or (3) as impairing the contract contained in the charter. *Grisell v. Housatonic R. Co.* 54 Conn. 447.

In *Union Pac. R. Co. v. DeBusk*, 3 L. R. A. 350, 12 Colo. 294, the question of the constitutionality of a law imposing absolute liability for destruction of property by fire was fully discussed and the law was upheld with the remark that the statute was but a re-enactment of the common law on the subject.

That case was followed in *Denver. T. & G. R. Co. v. De Graff*, 2 Colo. App. 42; *Union Pac. R. Co. v. Arthur*, 2 Colo. App. 109; *Union Pac. R. Co. v. Tracy*, (Colo.) Jan. 15, 1894.

The South Carolina statute makes the railroad company liable for the burning of all property to which the fire is set by its locomotives, unless it was put on its right of way without its consent, and it has been held constitutional in *McCandless v. Richmond & D. R. Co.* 18 L. R. A. 440, 38 S. C. 103; *Hunter v. Columbia. N. & L. R. Co.* (S. C.) March 14, 1894; *Lipfeld v. Charlotte. C. & A. R. Co.* (S. C.) April 19, 1894.

And the validity of the law had been assumed in the prior case of *Thompson v. Richmond & D. R. Co.* 24 S. C. 304.

A statute imposing absolute liability for fire does 35 L. R. A.

5. Absolute liability and not merely a *prima facie* liability is created for fires set by locomotives under Mo. Rev. Stat. 1890, § 261A, declaring that each railroad corporation "shall be responsible" in such cases.

6. The known judicial construction of a statute by courts of another state is deemed to be adopted by the legislature when it adopts such statute.

7. The opinion of a witness that trees, shrubs, plants, and vines are by their inherent nature not susceptible to insurance is not admissible since the judge and jury are as competent in respect to that question as any witness.

8. Allowing weeds to grow on one's premises cannot be held to be contributory negligence which will defeat the liability of a railroad company for a fire communicated from a locomotive, especially under the statute which makes the railroad company an insurer against fires thus caused.

9. A railroad company is not entitled to any part of the insurance contracted for and collected by the owner of property destroyed by a fire communicated from a railroad locomotive, although the railroad company is given by a statute an insurable interest in such

not interfere with the right of congress to regulate interstate commerce. *Smith v. Boston & M. Railroad*, 68 N. H. 25.

In *Martin v. New York & N. E. R. Co.*, 62 Conn. 340, the court upheld a statute making the railroad company liable irrespective of the question of negligence, on the ground that it rested on broad grounds of justice and equity. But the Connecticut statute fixes the liability of the railroad only in case of absence of contributory negligence of the property owner.

In *Simmonds v. New York & N. E. R. Co.*, 52 Conn. 264, the court held the railroad company liable, where its men, at the request of the owner of the property first ignited, ceased their attempts to put out the fire, which they could easily have done, and the fire then spread to the property of a third person, who brought suit for the injury done him.

The validity of a statute imposing absolute liability for the destruction of property by fire has been assumed in Massachusetts. *Trask v. Hartford & N. H. R. Co.* 16 Gray, 71; *Ingersoll v. Stockbridge & P. R. Co.* 8 Allen, 438; *Safford v. Boston & M. Railroad*, 103 Mass. 583; *Pierce v. Worcester & N. R. Co.* 105 Mass. 199; *Basett v. Connecticut River R. Co.* 145 Mass. 129.

And the same is true in New Hampshire. *Hooksett v. Concord Railroad*, 58 N. H. 242; *Adden v. White Mountains N. H. R. Co.* 55 N. H. 413, 20 Am. Rep. 220; *Rowell v. Railroad Co.* 57 N. H. 132.

And in Maine. *Chapman v. Atlantic & St. L. R. Co.* 37 Me. 92; *Pratt v. Atlantic & St. L. R. Co.* 42 Me. 579; *Bean v. Atlantic & St. L. R. Co.* 63 Me. 294; *Lowney v. New Brunswick R. Co.* 78 Me. 479.

And in Connecticut. *Regan v. New York & N. E. R. Co.* 60 Conn. 124.

In Iowa it has been held that a statute making railroad companies absolutely liable for fires set out by their locomotives may be upheld under the police power. *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 562.

This ground of decision is not concurred in by all the courts.

In *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 340,

property with the right to insure it for its own protection.

**10. Including in damages for condemnation an allowance for the danger of fires by operation of the railroad will not prevent the owner of the property from recovering for its loss by subsequent fire communicated from the railroad locomotives, as the original damages were compensation for the depreciation to the value of the property.**

(March 24, 1894.)

**A** PPEAL by defendant from a judgment of the St. Louis Circuit Court in favor of plaintiff in an action brought to recover damages for losses sustained by fire set out by defendant's locomotive. *Affirmed.*

**Statement by Gantt, J.:**

This is an action for damages caused by the destruction and injury to plaintiff's property, a suburban residence and grounds near the city of St. Louis, in St. Louis county, by fire alleged to have been set out by an engine operated by the defendant on its railroad. The petition contains two counts; the first being an action at common law, charging "that on the 9th day of August, 1887, and for a long time prior thereto, defendant negligently suffered a large amount of dry grass, weeds, and rub-

bish to accumulate and remain upon and along its railway and right of way adjoining the land of the plaintiff, and used and employed, in operating said railway, locomotive engines and other machinery that were improperly and negligently constructed, so that sparks of fire could and did needlessly escape said engine," and that by reason of such negligence fire was communicated to said dry grass, weeds, and rubbish, and extended to plaintiff's land, and destroyed a dwelling house, barn, outbuildings, personal property therein, trees, and shrubbery, of the value of \$80,000, for which judgment is prayed. The second count is based upon the statute (Rev. Stat. 1889, §2815), and charges that the defendant owned and operated a railroad adjoining plaintiff's land, "having locomotive engines in use on the same, and on said 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon said railroad, owned and operated by defendant as aforesaid, to plaintiff's property on his said land," and then avers the destruction of the same property, of the same value as charged in the first count, and avers damages in, and prays judgment for, the same amount.

The answer admits the incorporation of defendant, and the operation of the line of railway described in the petition, and the use of

however, the Iowa statute was held to establish only a prima facie liability.

In *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95, the validity of the law was attacked, but it was upheld without much discussion as to its validity on the part of the court.

And the Maine statute was held valid in *Thatcher v. Maine Cent. R. Co.* 85 Me. 502.

In *Hart v. Western R. Co.*, 13 Met. 99, 46 Am. Dec. 119, the Massachusetts statute was enforced without its validity being questioned.

And in *Lyman v. Boston & W. R. Corp.*, 4 Cush. 288, it was held to apply to roads created before its enactment.

In *Ross v. Boston & W. R. Co.*, 6 Allen, 87, however, it seems to be assumed that under the Massachusetts statute the owner of the property must have been in the exercise of due care in order to entitle him to recovery.

And in *Perley v. Eastern R. Co.*, 98 Mass. 414, 98 Am. Dec. 645, the question was discussed as to whether or not back fires contributed to the loss for which the suit was brought.

Contributory negligence is not a defense. *Denver, T. & G. R. Co. v. De Graff*, 2 Colo. App. 42; *Union Pac. R. Co. v. Arthur*, 2 Colo. App. 159.

Unless it is intentional. *Union, Pac. D. & G. R. Co. v. Williams* (Colo.) Oct. 24, 1893.

But the Colorado court has refused to base a recovery entirely upon presumption and has held that the facts as to the origin of the fire must be proved and not left to inference. *Denver, T. & G. R. Co. v. DeGraff*, 2 Colo. App. 42.

As to the general rule of liability for setting fires which spread to the property of others, see *note to Brown v. Brooks* (Wis.) 21 L. R. A. 255.]

#### *Killing stock.*

In analogy to the statutes imposing absolute liability for setting out fires some of the states enacted statutes which attempted to impose an absolute liability for the value of livestock killed on the track. There is ground for making a distinction between the two classes of cases in that the livestock cannot be killed unless it is trespassing on the 25 L. R. A.

track, while in the case of the fire the owner of the property may be entirely without fault beyond his misfortune in owning property in proximity to the railroad. In some of the earlier cases under stock killing laws the validity of the laws was assumed or at least not denied.

Thus, in *Nashville & C. R. Co. v. Peacock*, 25 Ala. 229, a liability was enforced under a stock killing law, but the question of its constitutionality was not considered.

And a similar result was reached in *Atchison, T. & S. F. R. Co. v. Lujan*, 6 Colo. 338.

So the cases of *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 1; *Denver & R. G. R. Co. v. Zastrow*, 10 Colo. 4; *Union Pac. R. Co. v. Sternberg*, 13 Colo. 141,—were each based on the stock-killing law, but failed because plaintiff had not on his part complied with the provisions of the statute.

*Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 431, was an action based on the Colorado stock-killing act, and while the validity of the act does not seem to have been attacked, the judgment against the company was reversed on other grounds.

In *Denver & R. G. R. Co. v. Stewart*, 1 Colo. App. 227, the court refused to apply the stock-killing law on the ground that at the time of the killing the stock was running at large contrary to the provisions of a statute.

But when the validity of the laws was questioned they speedily fell upon various constitutional grounds.

A statute which makes a railroad company absolutely liable for killing animals is unconstitutional as depriving the company of property without due process of law. *Zeigler v. South & North Ala. R. Co.* 55 Ala. 594.

The authority of that case was recognized in *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71.

A law imposing absolute liability for the value of stock killed on the track is unconstitutional. *Jensen v. Union Pac. R. Co.* 4 L. R. A. 724, 6 Utah, 238; *Bielenburg v. Montana Union R. Co.* 2 L. R. A. 813, 8 Mont. 271; *Thompson v. Northern Pac. R. Co.* 8 Mont. 279.

A statute making the killing of stock a misde-



locomotive engines thereon, and denies generally every other allegation in the petition, and then, as special defenses to each count of the petition, avers: "(1) That plaintiff has assigned to persons to this defendant unknown his right of action against this defendant, if any he ever had, and is neither a necessary nor proper party plaintiff herein, and is not the real party in interest, and is not, therefore, entitled to maintain or prosecute this action. (2) That there is a defect of plaintiff, in this, to wit, that the Detroit Fire & Marine Insurance Company, the Commercial Union Insurance Company, and the Imperial Fire Insurance Company, and each and every one of them, are parties in interest in this case, and are necessary parties plaintiff herein. (3) That, on the date and at the time in the petition mentioned, there were growing and standing upon the property in said petition described, adjacent to and continuous from the right of way of defendant to the house, shrubbery, and trees of plaintiff in his petition described, large quantities of dry grass, leaves, weeds, and other combustible and highly inflammable matter, which were carelessly and negligently allowed to grow and accumulate upon said premises by and with the knowledge and consent of plaintiff; that the accumulation of dry, combustible, and highly inflammable matter as aforesaid had been carelessly and negligently allowed to remain upon said premises for a long time pre-

vious to the 9th day of August, 1887, to wit, for many years; that it was gross negligence for plaintiff to allow said dry and combustible matter to accumulate and remain upon the said premises without taking precautions to prevent the spread of fire which might accidentally be set upon the right of way of defendant railway company, or which might accidentally escape from passing engines, which said negligence of plaintiff did proximately and directly contribute to the injuries of which he complains. (4) That the said dwelling house, barn, and outbuildings in the petition described were on the 9th day of August, 1887, insured in certain insurance companies named in the answer for the aggregate sum of \$10,000, which, as defendant avers, was greatly in excess of the real value of said dwelling house, barn, and outbuildings; that said insurance companies, after the fire in plaintiff's petition alleged, paid to said plaintiff the sum of \$10,000 on account of the loss sustained by reason of the burning of said dwelling house, barn, and outbuildings as aforesaid. Wherefore, defendant says that the sum so paid by the said insurance companies as aforesaid should be applied *pro tanto* to the satisfaction of plaintiff's claim, if any he has, which defendant denies."

And the answer, in addition to the above counts, which are common to both counts of the petition, contains the following counts,

meanor and subjecting the officials of the road to indictment unless they pay the damages to the owner within a certain time is unconstitutional. *State v. Divine*, 96 N. C. 772.

A statute imposing absolute liability for cattle killed on a railroad without any negligence or default on the part of the owner of the road is unconstitutional. *Cateril v. Union Pac. R. Co.* 2 Idaho, 540.

The statute making the railroad company absolutely liable in double damages for killing stock is unconstitutional. *Denver & R. G. R. Co. v. Outcalt*, 3 Colo. App. 395.

A law making railroad companies liable for cattle killed by them at a value to be fixed by appraisal is unconstitutional as depriving them of the right of trial by jury. *Graves v. Northern Pac. R. Co.* 5 Mont. 554, 51 Am. Rep. 51; *Dacres v. Oregon R. & Nav. Co.* 1 Wash. 525.

In *Wadsworth v. Union Pac. R. Co.*, 23 L. R. A. 512, 18 Colo. 600, the court had before it the question of the validity of the stock-killing law, and held it unconstitutional; but it states: "We do not decide that the legislature has not the power to enact a valid statute making railroad companies liable for domestic animals killed or damaged by the operation of their trains irrespective of the question of negligence." They then stated that as there was no duty to fence, the statute could not be enforced as a penalty, and that the mode of ascertaining the value of the property destroyed was unconstitutional.

It has generally been held that the companies could lawfully be compelled to fence their tracks (see authorities collected in note to *State v. Chicago, M. & N. R. Co. (Wia.)* 12 L. R. A. 180) and that for refusal to comply with the statute they might be subjected to the penalty of paying for stock killed by reason of the failure. In some instances an attempt has been made to impose an absolute liability upon the companies for the killing of stock from which they might relieve themselves by fencing.

And in *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573, 25 L. R. A.

a statute was held valid which imposed an absolute liability on the company for killing stock, but provided that such liability might be escaped by erecting a lawful fence.

The same rule was followed in *Hopkins v. Kansas Pac. R. Co.*, 18 Kan. 462, and *Atchison & N. R. Co. v. Harper*, 19 Kan. 520.

But in Washington a statute imposing absolute liability for stock killed in case the road was not fenced was held unconstitutional in *Oregon R. & Nav. Co. v. Smalley*, 1 Wash. 204, there being no law in terms requiring the fencing of the road.

There are several other instances in which an absolute liability is imposed as a penalty for failure to comply with some statutory requirement. An illustration is where a lookout is required to be kept on the track ahead of the train, failure to do which subjects the company to liability for injuries caused thereby. The authorities on that subject are collected in the note to *Smith v. Norfolk & Southern R. Co. (N. C.) post*, 267. There is, however, a clear distinction between these cases on the imposition of absolute liability with no violation of duty, and that class of authorities are therefore not valuable upon the latter question. There are, however, two analogous cases which may be stated here as throwing light on the subject.

In Nebraska it has been held that a statute imposing absolute liability on a railroad company for injuries received by a passenger, unless he is guilty of criminal negligence or has violated some express rule or regulation of the road, is valid. *Union Pac. R. Co. v. Porter*, (Neb.) Nov. 8, 1893.

That statute was enforced in *Missouri Pac. R. Co. v. Baker*, 37 Neb. 236, and *Omaha & E. V. R. Co. v. Chollette*, 38 Neb. 143.

But in Illinois it was held that a law making railroad companies liable for the expenses necessary in connection with the disposal of the bodies of persons who die or are killed on its cars is unconstitutional. *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55.

H. P. F.

which are addressed to the second count of the petition only: "(5) Defendant avers that the alleged cause of action set forth in the second count of the petition is founded on an act of the legislature of the state of Missouri entitled 'An act to establish the responsibilities of railroad companies and persons owning or operating railroads for damages by fire communicated by locomotive engines,' approved March 31, 1887, which act defendant avers is illegal, unconstitutional, and void, in that it seeks to deprive the defendant of its property without due process of law, and is contrary to the provisions of section 80, article 2, of the Constitution of the state of Missouri. (6) That the said act of the legislature is illegal, unconstitutional, and void, in that it denies the defendant the equal protection of the law, contrary to the provisions of section 1, article 14, of the Amendments to the Constitution of the United States; and in this: that it deprives defendant of its property without due process of law, contrary to the provisions of article 5 of the Amendments to the Constitution of the United States; and in this: that it impairs the obligations of a contract made between the state of Missouri and defendant, by the terms of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel locomotive engines, and cars attached thereto, and be responsible only for the negligent and careless use thereof; and is contrary to the provisions of article 1, section 10, of the Constitution of the United States. (7) That heretofore, to wit, on the 1st day of June, A. D. 1882, the plaintiff was the owner of the land described in his petition and also of a certain strip of land along and adjacent to the west side of said tract, 100 feet wide, being the same strip of land now occupied by defendant's roadbed and right of way, that defendant was desirous of building its road upon said strip. That plaintiff and defendant could not agree as to the amount of compensation to be paid to plaintiff for said strip, and defendant commenced proceedings in the circuit court of St. Louis county against plaintiff, the object and nature of which was to condemn a right of way upon said strip, and through and along plaintiff's said land. That commissioners were duly appointed by said circuit court of St. Louis county, before whom the matter of compensation of plaintiff was to be heard, and before whom was then and there pending, among other things, the question of how much compensation plaintiff should receive from defendant—First, for actual amount of ground taken; second, for the injury to the property as a place of residence, caused by running the road where it now runs; third, for cutting up or dividing the property then owned by plaintiff into detached portions; fourth, for danger of fire for all time to come. That thereafter, to wit, on the 1st day of July, A. D. 1882, the said matters so pending before said commissioners were all compromised and settled between plaintiff and defendant upon the agreement that in consideration of all of said matters the defendant should pay plaintiff the sum of nine thousand dollars, in full payment, settlement, accord, and satisfaction of said right of way and said strip of land, and all the mat-

ters and things so pending before said commissioners as aforesaid. That thereafter, to wit, on the 15th day of July, A. D. 1882, defendant, for the consideration aforesaid, paid to said Leonard Mathews, and said Leonard Mathews received from the defendant, the said sum of nine thousand dollars, pursuant to and in compliance with said contract and agreement. Wherefore, defendant says the plaintiff ought not to prosecute or maintain said cause of action in said second count set out."

The replication was a general denial of all new matter set up in the answer.

Upon the trial, and when the plaintiff first offered testimony in his behalf, the defendant objected to the introduction of any testimony for the reasons "(1) that the petition does not state a cause of action; (2) that, in the first count, plaintiff has not specifically pleaded; (3) that he has combined two causes of action in one count, involving different rules of evidence, and different measures of damage; (4) that the law on which the second count is based is unconstitutional." These objections were overruled, and exceptions duly saved by defendant, and thereupon defendant moved the court to require plaintiff to elect between the two counts in his petition, "because the measure of damages in the alleged causes of action set forth in said petition are totally different, and because a different, and not the same, proof is required to support each of the said alleged causes of action." This motion was by the court overruled, and exception duly saved by defendant.

The testimony on the part of plaintiff tended to show that the plaintiff was the owner of a piece of real estate lying between the Pacific Railroad on the north, and the St. Louis & San Francisco Railway on the south, Holmes avenue on the west, and the property of Anderson on the east; the northern part of this tract, containing about eleven and one half acres, and lying between the Pacific Railroad and Elliott avenue, was called the "Home Place," and was bounded by osage orange hedges on the south, east, and west. This home place had been improved and planted on plans prepared by a landscape gardener, and contained a large assortment of all kinds of ornamental trees, shrubbery, and plants, as well as fruit trees and vines. There was on it a large dwelling, of nineteen rooms,—the front or main building made of concrete, and the rear building of frame, in imitation of stone; also, a large barn of 75 feet in length by 30 feet in width, with a bowling alley therein, and a cow-shed attachment. There were also one or more outbuildings of no very considerable value, and in the house, barn, and bowling alley, some personal property, to the amount of probably two or three hundred dollars in value. As is generally the case, the testimony as to the value of this house and barn, and of the property as a whole, with its improvements by planting, etc., was conflicting; plaintiff's witnesses putting the value of the house and barn alone as high as \$18,000, and the value of the shrubbery, etc., destroyed, as high as \$6,000. On the afternoon of August 9, 1887, at a time when everything was very dry, a fire started along the railroad track and on the railroad right of way adjoining plaintiff's prop-

erty, and at a point southeast of the barn, and was carried by a south or southeast wind, with great rapidity, into plaintiff's property, set fire to the barn, and then to the house and out-buildings, and ran pretty much over the whole place, destroying the buildings, and much the larger part of the trees, plants, shrubbery, vines, etc. Albert B. Chandler testified: He was at home, south of the railroad, opposite Mr. Mathews' place, on the day of the fire. It started near where Elliott avenue crosses the railroad, and swept up the railroad bank there, and caught the Mathews barn, and burned it down, and the shingles flew from the barn, and burned the house. After the fire, he went down, and saw ashes on the track, and saw where the fire had burned up the bank. He stirred the ashes, and there were a few coals. When he first observed the fire, it was going up the railroad bank. Samuel K. Harding testified that on the 9th day of August, 1887, he was a brakeman in the employ of the defendant, and on that day was braking on a train which was called the "Hoodlum," and which passed plaintiff's place about 2 o'clock in the afternoon, and when it passed there he was on the rear part of the train, and saw some grass on fire on the defendant's right of way, opposite the Mathews place, about six or eight feet from the ends of the ties, on the bank in the cut. This fire was about three feet across. The engine gave out a great many sparks. He had noticed before that it gave out sparks. He had been running on that train since the 1st of August. The place was occupied by plaintiff as a residence up to 1880, when he removed to St. Louis, leaving a man named Cleary in charge of the place. Cleary lived in the back part of the house, and took care of the place, till 1885, when it was rented to a Mr. Wright, who lived there until September, 1884, from which time until the fire the place was vacant, except that some member of plaintiff's family would go out once in a while, and sometimes stay all night, and sometimes a week or two. After the fire, plaintiff sold the place for \$9,000. There was verdict and judgment for plaintiff for \$11,000. In due time, motions for a new trial and an arrest of judgment were filed, heard, and overruled, and defendant appealed to this court.

**Mr. E. D. Kenna**, for appellant:

Section 2615 of the Revised Statutes of 1889 is unconstitutional, because:

(a) It impairs the obligation of the contract contained in defendant's charter.

Rev. Stat. 1889, § 2543; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *United States v. Quincy*, 71 U. S. 4 Wall. 535, 18 L. ed. 403; *Green v. Biddle*, 21 U. S. 8 Wheat. 92, 5 L. ed. 570; *Planters Bank of Mississippi v. Sharp*, 47 U. S. 6 How. 327, 12 L. ed. 458; *Com. v. Erie & W. Transp. Co.* 107 Pa. 112; *Pennsylvania R. Co. v. Baltimore & O. R. Co.* 60 Md. 263; *Bank of The Republic v. Hamilton County*, 21 Ill. 53; *Payne v. Baldwin*, 8 Smedes & M. 661; *Edwards v. Kearzey*, 96 U. S. 607, 24 L. ed. 798; *Howard v. Bugbee*, 65 U. S. 24 How. 461, 16 L. ed. 753; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Bronson v. Kinsie*, 42 U. S. 1 R. A.

S. 1 How. 311, 11 L. ed. 143; *McCracken v. Hayward*, 43 U. S. 2 How. 603, 11 L. ed. 397; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 182; *New Orleans Gas Light Co. v. Louisiana Light & Heat Co.* 115 U. S. 608, 29 L. ed. 523; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *People v. Jackson Road Co.* 9 Mich. 285; *Sloan v. Pacific Railroad*, 61 Mo. 24, 21 Am. Rep. 397; *Smith v. Hannibal & St. J. R. Co.* 87 Mo. 295; *Whart. Neg.* § 668; *Burroughs v. Housatonic R. Co.* 15 Conn. 128, 38 Am. Dec. 64; *Moshier v. Utica & S. R. Co.* 8 Barb. 427; *Rood v. New York & E. R. Co.* 18 Barb. 80; *Piqua Branch of Bank of Ohio v. Knoop*, 57 U. S. 16 How. 369, 14 L. ed. 979; *Dodge v. Woolsey*, 59 U. S. 18 How. 331, 15 L. ed. 401; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Ashbury Railway, Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 196, 23 Am. Rep. 71; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 57, 20 Am. Rep. 259; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 143, 62 Am. Dec. 625; *Benson v. New York*, 10 Barb. 223; *Small v. Chicago, R. I. & P. R. Co.* 50 Iowa, 346; *Cooley, Const. Lim.* 5th ed. 837; *Vincennes University Trustees v. Indiana*, 55 U. S. 14 How. 263, 14 L. ed. 416; *Scottland County v. Missouri*, 1. & N. R. Co. 65 Mo. 185; *State v. Greer*, 78 Mo. 188.

(b) It denies defendant the equal protection of the laws.

*Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276; *State v. Hayes*, 81 Mo. 586; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641; *Slaughter-House Cases*, 88 U. S. 16 Wall. 36, 21 L. ed. 394; *San Mateo County v. Southern Pac. R. Co.* 13 Fed. Rep. 723; *Santa Clara County v. Southern Pac. R. Co.* 118 U. S. 394, 30 L. ed. 118.

(c) It takes defendant's property without due process of law.

*Ohio & M. R. Co. v. Lackey*, *supra*; *Small v. Chicago, R. I. & P. R. Co.* 50 Iowa, 340; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 594; *Miller v. Martin*, 16 Mo. 508, 57 Am. Dec. 242; *Kahle v. Hoblin*, 80 Mo. App. 476; *Catron v. Nichols*, 81 Mo. 82; *Wally v. Kennedy*, 3 Yerg. 554, 24 Am. Dec. 511.

Said section, if valid, only makes the fact of the injury *prima facie* evidence of negligence.

*Small v. Chicago, R. I. & P. R. Co.* *supra*; *Tilley v. St. Louis & S. F. R. Co.* 49 Ark. 535; *Kahle v. Hoblin*, and *Catron v. Nichols*, *supra*.

Said section does not authorize damages for property upon which plaintiff could not have obtained insurance.

*Chapman v. Atlantic & St. L. R. Co.* 87 Me. 92.

Plaintiff was not entitled to damages for personal property.

*Ibid.*

The question of plaintiff's contributory negligence should have been submitted to the jury.

*Ross v. Boston & W. R. Co.* 6 Allen, 92.

Plaintiff was compensated for his loss in the condemnation proceedings instituted by the defendant.

*Small v. Chicago, R. I. & P. R. Co.* *supra*.

**Mr. John G. Chandler**, for respondent:  
Rev. Stat. 1889, § 2615, is constitutional.  
*Grissell v. Housatonic R. Co.* 54 Conn. 447;

*Union Pac. R. Co. v. De Busk*, 8 L. R. A. 350, 12 Colo. 294; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Jones v. Festein* R. Co. L. R. 8 Q. B. 738; *Hooksett v. Concord Railroad*, 88 N. H. 242; *Lyman v. Boston & W. R. Corp.* 4 Cush. 288; *Hart v. Western R. Corp.* 13 Met. 105, 46 Am. Dec. 719; *Ross v. Boston & W. R. Co.* 6 Allen, 90; *Chapman v. Atlantic & St. L. R. Co.* 87 Me. 92; *Pratt v. Atlantic & St. L. R. Co.* 42 Me. 579; *Pierce v. Worcester & N. R. Co.* 105 Mass. 199.

Appellant's charter, while authorizing the use of steam as a motive power, in no way exonerates it from liability to others for damages occasioned by its use. If it did it would be unconstitutional and void.

Rev. Stat. 1889, § 2543; Const. art. 12, §§ 5, 14.

The owner of land adjoining a railroad is not chargeable with contributory negligence for allowing dry grass and other combustible material to be on his premises.

*Palmer v. Missouri Pac. R. Co.* 76 Mo. 217; *Patton v. St. Louis & S. F. R. Co.* 87 Mo. 117, 56 Am. Rep. 446; 2 Wood, Railway Law, § 326, note 1, § 830; *Philadelphia & R. R. Co. v. Schulte*, 93 Pa. 341; *Richmond & D. R. Co. v. Medley*, 75 Va. 499, 40 Am. Rep. 734; *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 79 Ind. 111; *Pittsburgh, C. & St. L. R. Co. v. Jones*, 86 Ind. 496, 40 Am. Rep. 334.

Wrongdoers can have no benefit from payment by the insurer.

May, Ins. § 455; *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304; *The Monticello v. Mollison*, 58 U. S. 17 How. 153, 155, 15 L. ed. 68, 70; *Carroll v. Missouri Pac. R. Co.* 88 Mo. 239, 57 Am. Rep. 882; *Hammond v. Schiff*, 100 N. C. 161; *Hart v. Western R. Corp.* and *Ross v. Boston & W. R. Co.* supra.

The police power extends to the protection of property as was done by the statute in this case.

*Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Slaughter-House Cases*, 83 U. S. 16 Wall. 86, 21 L. ed. 394; *Bradwell v. Illinois*, 83 U. S. 16 Wall. 130, 21 L. ed. 442; *New Orleans Gas Light Co. v. Louisiana Light & Heat Co.* 115 U. S. 650, 29 L. ed. 516; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *Louisville Gas Co. v. Citizens Gas Light Co.* 115 U. S. 683, 29 L. ed. 510; *Stein v. Bienville Water Supply Co.* 141 U. S. 67, 85 L. ed. 622; *New York v. Squire*, 145 U. S. 175, 86 L. ed. 686; *People v. Squire*, 107 N. Y. 593; *Tiedeman*, Pol. Powers, § 1; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Martin v. New York & N. E. R. Co.* 62 Conn. 331.

Statutes substantially the same as that of Missouri, imposing liability for damages caused by railroad locomotives irrespective of negligence, have in no case been held unconstitutional, though passing under judicial review for a period of more than fifty years. They have been held valid in the following cases:

*Lyman v. Boston & W. R. Corp.* 4 Cush. 288; *Hart v. Western R. Corp.* 13 Met. 105, 46 Am. Dec. 719; *Ross v. Boston & W. R. Co.* 6 Allen, 90; *Pierce v. Worcester & N. R. Co.* 105 Mass. 199; *Trask v. Hartford & N. H. R. Co.* 16 Gray, 71; *Chapman v. Atlantic & St. L. R. Co.* 87 25 L. R. A.

Me. 92; *Pratt v. Atlantic & St. L. R. Co.* 42 Me. 579; *Hooksett v. Concord Railroad*, 88 N. H. 242; *Roswell v. Railroad*, 57 N. H. 132, 24 Am. Rep. 59; *Smith v. Boston & M. Railroad*, 63 N. H. 25; *Griswell v. Housatonic R. Co.* 54 Conn. 447; *Martin v. New York & N. E. R. Co.*, and *Rodemacher v. Milwaukee & St. P. R. Co.* supra; *Small v. Chicago, R. I. & P. R. Co.* 50 Iowa, 840; *Union Pac. R. Co. v. De Busk*, 8 L. R. A. 350, 12 Colo. 294; *Denver, T. & G. R. Co. v. DeGraff*, 2 Colo. App. 42; *McCandless v. Richmond & D. R. Co.* 18 L. R. A. 440, 38 S. C. 103.

Grant, J., delivered the opinion of the court:

1. Among the grounds assigned for the reversal of the judgment of the circuit court, is the unconstitutionality of section 2615 of the Revised Statutes of 1889 (Laws 1887, p. 101), which is as follows: "Each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages." It is argued by counsel that this act is unconstitutional for three reasons: "It impairs the obligation of a contract; it deprives defendant of its property without due process of law; it denies to defendant the equal protection of the laws." The defendant is a railroad corporation organized under the general laws of this state on the 10th of September, 1875, and prior to the passage of section 2615. The contention of defendant raises a question of prime importance, and has received our most careful consideration.

Does section 2615 impair the obligation of the contract made by the state in the grant of defendant's charter? The claim is that it interferes with the right of defendant, granting in the sixth paragraph of section 2543, Rev. Stat. 1889, to propel its cars by steam, in subjecting it to an increased burden or liability for fires set out by its locomotives. Said paragraph is as follows: "Sixth. To take and convey persons and property on their railroad by the power or force of steam or of animals, or by any mechanical power, and to receive compensation therefor." Defendant insists that because there was no statute in force at the time it was organized, which would render it liable for damages by fire in the absence of proof or presumption that it had been guilty of negligence in the operation of its trains, the construction of its engines, or the care of its right of way, and because the decisions of this court prior to the adoption of this section had never held it liable in such cases save for negligence, the law on this subject, as then understood, became part of its charter, and hence inviolable, under the Constitution of the United States.

It is wholly unnecessary to review the decisions which sustain the view adopted in the

*Dartmouth College Case*,—that defendant's charter is a contract between it and the state. It has been uniformly followed by this court. This ground has been gone over so often, and this limitation so thoroughly discussed, that nothing new can be said on the subject. Says Judge Cooley, in his great work on Constitutional Limitations (8th ed. chap. 16, pp. 707, 708): "The occasions to consider this subject in its bearings upon the clause of the constitution of the United States which forbids the states passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held, without dissent, that this clause does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important." "All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity." "Perhaps the most striking illustration of the principle here stated will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the state with a view to the public protection, health, and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of state regulations, and that the charter implies an undertaking on the part of the state that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues." "The obligation of the contract by no means extends so far; but on the contrary the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection, and enjoyment." To this clear, lucid statement of the rule deduced from the decisions, little can be added, save to point out the various statutes that have been held to be legitimate exercise of the police power inherent in the several states, which cannot be taken from them, in whole or in part, and cannot be exercised by congress.

This identical question was before this court in *Gorman v. Pacific Railroad Co.*, 26 Mo. 441, 72 Am. Dec. 220. That was an action to recover the value of three head of cattle killed by the railroad company. It was alleged they were killed at a point on the road where it ran through inclosed fields: that defendant had failed to erect and maintain fences as required by law; that the cattle were killed by reason

of this failure. The company denied that it was subject to the Law of 1853, requiring railroad companies to fence their roads where they passed over inclosed fields. It was conceded that the company's charter antedated the Act of 1853, and, moreover, that the legislature, by the Act of March 1, 1851, had yielded the right to suspend or repeal its charter. *See*, Acts 1851, p. 270, § 4. Judge Scott wrote the opinion of the court, and conceded that the charter was a contract between the state and the company, but held, notwithstanding, that the corporation, like natural persons, was subject to those regulations which the state may prescribe for the good government of the community. He says: "Where such dangerous and powerful agents as steam engines are brought into use, there should be a power in the legislature to prescribe such reasonable regulations as will prevent injuries resulting from their employment." "The foresight of man is not competent to the task of prescribing in a charter all the regulations which time may show to be necessary for the security of the interests of the people of the state against injuries caused by the introduction of new, powerful, and dangerous agents for carrying on her intercourse and commerce." The charter must be taken subject to the understanding that in its operation, affecting the interests of society, it will be, like individuals, liable to be controlled by such reasonable enactments as may be dictated by a sense of what is required for the preservation of the persons, lives, and property of the people, such enactments not contravening the expressed or plainly implied provisions of the charter." He cited with approval the case of *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 63 Am. Dec. 625, in which Judge Redfield firmly and ably sustained the power of the state legislature to impose upon existing railroad companies the duty of maintaining fences, and to construct and maintain cattleguards, as clearly within the police power of the state. The court also cited with approval the decision of the supreme judicial court of Massachusetts in *Lyman v. Boston & W. R. Corp.*, 4 Cush. 288, in which it was held that a statute "making the proprietors of railroads responsible for injuries by fire communicated from their locomotive engines applied to railroads established before as well as since its passage, and extends as well to estates, a part of which is conveyed by the owner, as to those of which a part is taken by authority of law for the purposes of a railroad." This statute of Massachusetts enacted in 1840 was the first to render the railroad companies liable for fires put out by their locomotives. It is important to note that the point was made in this first case that the act did not apply to charters granted before its passage, but the claim was denied, the court saying in its opinion that the act was "one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the steam engine." "The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations and impose such liabilities for injuries suffered from the mode of using the road as the occasion and circumstances may reasonably justify." This

Act of 1840 has again and again been held valid, and enforced, by the supreme court of Massachusetts, and its constitutionality never seriously questioned since the first case. *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Rep. 719; *Ross v. Boston & W. R. Co.* 6 Allen, 87; *Pierce v. Worcester & N. R. Co.* 105 Mass. 199. The Massachusetts act was adopted by the legislature of Maine in 1842, and sustained by the supreme court of Maine in *Chapman v. Atlantic & St. L. R. Co.* 87 Me. 92, and in *Pratt v. Atlantic & St. L. R. Co.* 43 Me. 579, as binding equally upon corporations whose charters were granted prior to its enactment as to those subsequently organized. The act was adopted by New Hampshire as early as 1850, and enforced by its highest court, in *Hooksett v. Concord Railroad*, 88 N. H. 242. It became the law of Iowa in 1878 (Code 1878, § 1289), and received a most careful consideration by the supreme court of that state in *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592, and its constitutionality unanimously affirmed, as a valid exercise of the police power of the state, and applied as well to a company incorporated prior to the enactment as to one subsequently chartered. *Drady v. Des Moines & Ft. D. R. Co.* 57 Iowa, 893. The state of Connecticut also adopted the Massachusetts statute, in effect, in 1881. The constitutionality of the statute was challenged in *Grissell v. Housatonic R. Co.*, 54 Conn. 447, and fully sustained by the supreme court of that state. A statute similar in principle was upheld by the supreme court of Colorado in *Union Pac. R. Co. v. De Buak*, 12 Colo. 294, 8 L. R. A. 350. In *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140, an act requiring all railroads that were open for use to be fenced, and imposing a penalty for non-compliance, was considered; and it was held constitutional, the court saying, "To hold otherwise would be to say that the legislature might create an *imperium in imperio*."

These decisions all agree that subsequent acts imposing the duty to fence, and affixing penalties for a failure, are clearly within the police power of the state, subject to which all laws are enacted in this state; and yet those acts imposed a burden and cost upon the roads, not named in their charters. These laws require the companies, at their own expense, to erect and maintain these fences along their roads. They are sustained on the ground that experience demonstrated that the operation of the roads with steam engines resulted in great loss to the adjoining owners, in the destruction of their stock lawfully running in their fields, and was liable to cause loss of life, by wrecking trains. The damage by fires set out by trains comes within the same reasoning. It had not been anticipated to what extent engines would destroy the crops and property along the road, but when it was demonstrated that it was a common occurrence; that the company had the right to run its trains at all times of day and night; and that the injured party was powerless, often, to show negligence, on account of his inability to show what particular train had set out the fire, or the particular cause of the fire; and because the owner was entirely innocent, in the premises, of any negligence,—it was determined by the legislature that, when one of two innocent parties must suffer, the one

who operated the dangerous agency should suffer the loss. Notwithstanding the great weight of authority that such an act is within the police power of the state, the defendant challenges it here. We are, however, not impressed with its reasons to the contrary. If the state is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials of a good government. Certainly, it fails in the protection of property. The argument of the defendant, reduced to its last analysis, is this: The state authorized the railroad companies to propel cars by steam. To generate steam, they are compelled to use fire. Therefore, they can lawfully use fire, and, as they are pursuing a lawful business, they are only liable for negligence in its operation, and when, in a given case, they can demonstrate they are guilty of no negligence, then they cannot be made liable. To this the citizen answers: "I also own my land lawfully. I have the right to grow my crops, and erect buildings on it, at any place I choose. I did not set in motion any dangerous machinery. You say you are guiltless of negligence. It results, then, that the state, which owes me protection to my property from others, has chartered an agency which, be it ever so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The state has no right to take or damage my property without just compensation." But, what the state cannot do directly, it attempts to do indirectly, through the charters granted to railroads, if defendant's contention be true. When it was demonstrated that although the railroads exercised every precaution in the construction of their engines, the choice of their operatives, and clearing their rights of way of all combustibles, still fire was emitted from their engines, and the citizen's property burned notwithstanding his efforts to extinguish it, and notwithstanding he had in no way contributed to setting it out, it is perfectly competent for the state to require the company who set out the fire to pay his damages. He is as much entitled to the protection from fire set out by engines as he is against the killing of his stock by those engines. Neither of these remedies was foreseen as necessary when the charters were granted, but experience has shown both are now necessary for the protection of the citizen; and the organic law of the state prescribed, before defendant obtained its charter, that "the exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state." Mo. Const. art. 12, § 5. Let it be conceded, for it is true, that, prior to the enactment of section 2615, by the decisions of this and other courts, defendant was only liable for negligence in setting out fire. Is it to be concluded that the legislature is powerless to enact laws which will give ample protection to citizens against fires? Most certainly not. Fire, as one of the most dangerous elements, has ever been the subject of legislative control. It ought not to excite surprise among a people, the great body of whose laws had their origin

in England, that those who set out fires which destroy the property of others should be held absolutely responsible for them. Such was the ancient common law, before any statutes were enacted. "If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant or a guest, or any person who entered the house with my consent; but otherwise if it is caused by a stranger, who entered the house against my will." Rolle, Abr. Action on the Case, B, title, *Fire*. Under ordinary circumstances, this was thought to be a harsh rule, and it was not generally adopted by the courts of the several states; but the question we are discussing is not what the courts have generally regarded as the reasonable rule, but what is the power of the lawmaking power to adopt as a correct one? In considering it, the dangerous character of fire must be kept in mind. Many laws have been sustained which were enacted to prevent destruction of property by fire, which at first blush seemed arbitrary, and infringing on natural right. Thus, the owner of a lot in a city may desire to build a frame or wooden building upon it, but the municipal corporation may establish fire limits, and prevent the building of wooden buildings. *Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *King v. Davenport*, 96 Ill. 805, 88 Am. Rep. 89; *Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 826.

Counsel, in his brief, with great earnestness, insists that "no law can be sustained as a police regulation which imposes a penalty or confers an action for doing that which has never been declared unlawful, and which, on the contrary, is made legal." But has not counsel gone too far in his assumption? Is there anything in defendant's charter that exonerates it from damage by fire it may set out, or permits it to destroy with impunity? If there is, would not the charter itself be liable to the charge of unconstitutionality? *Evansville & C. R. Co. v. Dick*, 9 Ind. 433. The right to use steam is granted, but it is granted subject to the right of the state to render the company liable for damages it may do in the use. The position of the defendant is that the law of the state permitting it to use steam in the operation of its trains is a protection from liability for fire set out by its engines, provided it is guilty of no negligence; and he invokes the principle that what the law authorizes cannot be a nuisance, although it may result in damages to individual rights or property. That there are cases where corporations acting in the performance of a public duty imposed upon them by the legislature, or in the exercise of a right conferred by law, and where persons appointed or authorized by law to perform a public duty or to do acts of a public character, are not responsible for consequential damages, if they act within their jurisdiction, and are guilty of no negligence or want of care, is certainly true. The cases sustaining this rule will generally be found to be those where municipal corporations were engaged in grading and improving public streets or highways, or

where the act causing the injury was done by a corporation in the construction of its works upon property acquired under the power of eminent domain. *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 636, 25 L. ed. 836; *Uline v. New York Cent. & H. R. R. Co.* 101 N. Y. 98, 58 Am. Rep. 123, 54 Am. Rep. 661; *Conklin v. New York, O. & W. R. Co.* 102 N. Y. 107; *Cooley*, Const. Lim. 5th ed. 671.

But there is another rule of law, that has passed into a canon of construction, and of great utility in these days, when nearly all the business affairs of the country are carried on under corporate authority, and it is this: That "in the construction of grants by the legislature, whether public or private, only such rights and powers can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant." *Carroll v. Campbell*, 108 Mo. 550; *Fanning v. Gregoire*, 57 U. S. 16 How. 584, 14 L. ed. 1047; *Minturn v. Larue*, 64 U. S. 98 How. 485, 16 L. ed. 574. "And the rule is now established that the statutory authority which will justify an injury to private property and afford immunity for acts which would otherwise be a nuisance, must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury." *Bohan v. Port Jervis Gas Light Co.* 122 N. Y. 18, 9 L. R. A. 711; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817, 27 L. ed. 789; *Hill v. Metropolitan Asylum Dist. Managers*, L. R. 4 Q. B. Div. 483, 6 App. Cas. 218.

In the case last cited, Lord Watson said: "When the terms of the statute are not imperative, but permissive; when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put to execution or not,—I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected."

It may be remarked that in the grant to defendant it is nowhere imperatively required and compelled, as argued by its counsel, to use steam. Its charter permits it "to convey persons by the force of steam or animals, or by any mechanical power." To charge that the legislature ever intended, by this grant, to authorize defendant to destroy the property of the adjoining landowners by the use of fire, and deny them redress therefor according to well-settled principles of the common-law, as evidenced by numerous decisions both in England and in the highest courts of this country, would be an imputation upon their sense of justice, and contrary to the ordinary rules of construction of such grants. No good reason can be shown, in my opinion, why the companies organized under this act should not be liable for the damage occasioned by their use of highly dangerous machinery; but most certainly the hands of all subsequent legislatures have not been so securely tied that they may not adopt a just and equitable rule in such

cases, and not be charged with impairing the obligation of the state's contract with the railroad companies organized under the general law. Although the decisions of this court only held landowners liable for fire set out by negligence, when this charter was granted, still there is nothing in the state or federal constitutions that can restrict the state to those regulations, and those only, existing at the time; but it has the right, in order to guard the property of its citizens along these roads, to adopt new regulations from time to time, as the necessity may require. The state has, and can have, no higher function than the duty to provide for the safety of its citizens and their property. All laws and all charters are passed subject to this duty, wherever it may arise.

Having come to the conclusion that this section in no wise impairs the obligation of the contract made in defendant's charter, we are brought to the next contention,—that defendant is deprived of the equal protection of the law.

That the statute is not open to this serious charge, we think is clear. Defendant is brought into the same courts that are provided for other corporations and natural persons; upon the same process, and the plaintiff is required to make out his case according to the law of the land. If it could be shown that this statute imposes a burden upon railroads from which it exempts others under the same or similar circumstances, then it would be open to the criticism that it deprived the railroads of the equal protection of the law. But if the circumstances are different; if no other person, natural or artificial, is authorized to condemn or purchase a narrow strip of land through the lands of others on its route, and to run trains propelled by steam over its road at all times of day or night, and at all seasons, wet or dry, and using engines that scatter fire and burn property, although operated with a degree of care that amounts to "faultlessness," all for its own profit,—then we assert that the statute is not obnoxious to the charge of denying the railroads the protection it accords to others. So long as the state imposes this duty upon the only agency that has like powers, and creating similar hazards, it cannot be charged with inequality or unjust discrimination. This is a familiar rule in taxation, where uniformity and equality are required by the constitution. The statute applies to all railroads in this state,—a class of carriers operating 133 railroads, with a mileage of 6125 miles, in 1890. If it essayed to render only one road liable, it would be open to the objection; but, as it is, it might as well be said that a statute regulating the practice of medicine, or peddlers, is unconstitutional. This objection was overruled in *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S. 364, 87 L. ed. 769. The example cited by counsel as a similar case is that of a steamboat operated by steam. Nothing could well be more dissimilar in their surroundings than a railroad and a steamboat. The one is propelled upon the water, upon which the sparks from its smokestacks fall, and are instantly extinguished. The other runs along and beside fields full of grain, dry straw, and other highly combustible material, upon which the sparks light, and cinders are blown, at places

and at times when it is almost impossible for the owner to be present, and guard against the damages. It seems to us the example emphasizes the dangerous exception which railroads constitute to all other person using steam as a means of transportation.

Finally, is it unconstitutional because it deprives defendant of its property "without due process of law," or in defiance of "the law of the land?" We accept Mr. Webster's definition of the "law of the land:" "By 'law of the land' is most clearly intended the general law,—a law which bears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another,—legislative judgments, decrees, and forfeitures, in all possible forms,—would be the law of the land." "Such a strange construction would render the constitutional provisions of the highest importance completely inoperative and void. Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country." We cheerfully concede that, if this act comes within this definition, it is our sworn duty to declare it void and inoperative, notwithstanding the high respect we have and owe to the legislative and executive branches of our government, which enacted and approved this act. Let us subject this statute to the test.

At common law, if a person use a highly dangerous machine, he must do so at the peril of the consequences, if it cause injury to others. *Fletcher v. Rylands*, L. R. 1 Exch. 265; *Rylands v. Fletcher*, L. R. 3 H. L. 330, and the authorities referred to in Comyns' Dig. title "Action on the Case for Negligence," A 6. But when the legislature expressly authorized railroads, in this state, to operate and propel their cars by locomotive engines, it was ruled by our courts that the roads were only liable for negligence in setting out fire upon the premises of adjoining owners in the absence of specific legislation to the contrary. And here lies the real contention of defendant in this case: It is that it is not competent for the legislature or lawmaking power to attach an absolute liability. We have seen that at common law the liability for fire was absolute. In *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 738, Blackburn, J., said: "The general rule of the common law is correctly given in *Fletcher v. Rylands*, L. R. 1 Exch. 265-279, affirmed in house of lords, *Rylands v. Fletcher*, L. R. 3 H. L. 330,—that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his peril, and is liable for the consequences if it escapes, and does injury to his neighbor." "Here the defendants were using a locomotive engine, with no express parliamentary powers making lawful that use, and they are therefore, at common law, bound to keep the



engines from doing injury; and if the sparks escape, and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part." It took acts of parliament (8 Anne, chap. 31, and 14 Geo. III. chap. 78) in England to repeal this absolute liability for fire accidentally set out on one's own premises, and extending upon his adjoining proprietor. But, if parliament might repeal, it might also re-enact. By Conn. Gen. Stat. 1875, p. 489, § 6, one who kindles a fire on his own land is made liable for all damages it may do if it runs upon the land of another, and proof of negligence is not required. A similar statute was passed in Iowa, and sustained in *Conn v. May*, 36 Iowa, 241. When the legislature passed the general railroad act giving them the right to use steam, had it also annexed as a condition that the railroads should be absolutely liable for all damages they might cause by fire set out by them, would any one have questioned its power to do so? Had it been done then, would it not have been a valid exercise of its police power? No violation of the obligation of the contract could be charged in that case, and, if it be a valid exercise of police power, all the authorities, and defendant's counsel, agree that the state is not restricted from asserting it by reason of the prior grant of the charter, for all charters are subject to it.

Does it, then, contravene natural right? Is it open to the indictment preferred by defendant,—that it arbitrarily takes its property, and confers it upon another, without a hearing or consideration? We have seen that it was the ancient common law that the owner was liable for fire escaping from his own premises, whether negligent or not, and that different states in the Union have re-enacted the old common law, by which the owner is now absolutely liable for damage by fire put out on his own premises. Looking for the reason underlying the ancient rule of law, we find that it had its origin in the dangerous character of fire, and that whosoever put this dangerous agency in motion was rightfully required to see that it did no harm; that while it was an elementary principle that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property, the mode of enjoyment was necessarily limited by the rights of others, otherwise it might result in the destruction of their rights altogether. Hence the maxim, "*Sic utere tuo ut alienum non laedas*." So that while it has been generally held that one is only liable for negligence in the prosecution of a lawful business, nothing is more firmly settled than that a man cannot erect a nuisance or employ dangerous agencies, to the annoyance of an adjoining proprietor, even for the purposes of a lawful trade; and it was an old common-law maxim that, where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who occasioned the injury, rather than upon the one who had no agency in producing the damage. Counsel for defendant, in his earnest denunciation of the act as violative of every principle of justice, and indefensible as a police regulation, says: "But we are not aware that this prin-

ciple of '*Sic utere*,' etc., has ever been extended so far as to make a man liable for the lawful and careful use of his own property." In *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, the court of appeals of New York had this case before it: The defendant was a corporation chartered by the legislature, and authorized to construct a canal. In the construction of the canal, they resorted to blasting, and threw stone, gravel, and slate upon the house and premises of plaintiff. He brought his action without alleging negligence. The defendant moved for a nonsuit, insisting that it was necessary both to aver and prove negligence and wantonness, and plaintiff had failed to do either. The trial court nonsuited plaintiff. The court of appeals reversed the case, saying: "The defendant had a right to dig the canal. Plaintiff had a right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the use of his altogether, which might be the consequence of the privilege of the former should he be wholly unrestricted." In *Tremain v. Cohoes Co.*, 2 N. Y. at page 163, 51 Am. Dec. 284, the defendants offered to prove "that the work was done in the best and most careful manner." The common pleas court rejected it as irrelevant, as the declaration neither averred willfulness nor negligence. The court of appeals sustained the common pleas court, and held it was not necessary to charge or prove negligence, to recover. In *McAndrews v. Collierd*, 42 N. J. L. 189, 36 Am. Rep. 508, these two cases in New York were reviewed and approved. In the New Jersey case, the Delaware, Lackawanna & Western Railroad Company was authorized by its charter to construct a tunnel through Berger hill. It contracted with McAndrews to do the work. The tunnel was driven through rock; was begun in 1873, and finished in 1877. McAndrews constructed near the eastern end of the tunnel, and within the limits of Jersey City, a magazine for explosive materials which he used for blasting. In 1875, at night, the materials exploded, doing damage to property, and, among others, injured Collierd's houses. In a suit by Collierd for damages it was held: "(1) That the legislative authority to a private corporation or an individual to do work for its or his own profit does not include authority to use, at whatever hazard to the persons or property of others, dangerous materials, even though they are necessary to the convenient prosecution of the work. (2) They will be liable for injury, although no negligence or want of skill in executing the work is proved, and liable for actual damages, even though they show that they have done the work in the most careful manner." In *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, the action was sustained upon the ground that the manufacturing and storing of fireworks, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance, for which the defendant was liable to respond in damages, without regard to the

question whether he was chargeable with negligence or carelessness. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder, which, without apparent cause, exploded and caused the injury. The court says: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a personal nuisance." "In such case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application." It is significant that the argument employed by the court in that case to show the dangerous character of the magazine, and for that reason to take it out of the rule that exonerates one in a lawful business from liability, save for negligence, is identically the same used by defendant in this case to escape liability. It admits that it uses fire in its engines, and that the utmost care cannot and does not prevent its destroying the property of adjoining proprietors, and yet insists, because it is engaged in a lawful business, it can only be made liable save for negligence. See also *Bohan v. Port Jervis Gaslight Co.* 123 N. Y. 18, 9 L. R. A. 711; *Lafan & R. Powder Co. v. Tearney*, 181 Ill. 322, 7 L. R. A. 262. We think it is clear that, upon the plainest principles of justice, it ought to be liable, and that when experience demonstrated the dangerous character of the locomotive engine, in setting out fire, it was not only the right, but the manifest duty, of the legislature, to hold the railroads liable for fires set out by them, without reference to whether they were guilty of negligence or not. Nor do we think there is any force in the argument that by so doing their property is arbitrarily taken without right. The right to compel them to respond is based upon their use of a dangerous element, and by their destruction of adjoining proprietors' property. Moreover, it is not done in an arbitrary manner. The plaintiff is required to show to a jury or court organized as in any other case that the road did set out the fire; that it did destroy his property; and the jury must, from the evidence, determine the amount of the damage. In no sense is it a finding without a hearing, nor are the essentials to a recovery based upon unreasonable or untenable grounds. In a word, he is simply called upon to respond to a legal duty established by proofs. The wrong done by the dangerous agency set in motion by the company, and under its control, is ample consideration for the compensation it is required by the statute to make the owner whose property it destroys.

But, were it without compensation, it would not follow that the statute would be void. Many instances to the contrary were enumerated in *Boston & M. R. Co. v. York County Comrs.*, 79 Me. 386, in which it was held that the legislature might lawfully require railroads to fence their tracks, although the act was subsequent to the charter, and although it imposed a burden and expense on the company not existing when it was incorporated." Emery, J., says, "The wide extent of the police power can be illustrated by instances of

its actual exercise without direct compensation." Many of these instances are too familiar to need citations of authorities. He enumerates those cases in which licenses to manufacture liquor have been recalled, and the manufacture prohibited, after much expenditure by the licensees. *Beer Co's Case*, 97 U. S. 33, 24 L. ed. 992. Lotteries chartered for a consideration paid have been suppressed. *Stone's Case*, 101 U. S. 814, 26 L. ed. 1079. The various inspection laws, by which dealers are required to pay the inspection fees. Dealers using weights and measures must have them approved, and pay the approving officer. The blameless sufferer from a contagious disease is often compelled to leave home and friends, and bear his pain in some quarantine hospital, and his clothing destroyed, all at his own expense. The right of municipalities to destroy buildings, to prevent spread of fire, in an emergency. The owners of theaters, hotels, and other public buildings are required, at their own expense, to provide fire escapes, and more ample means of exit. Steamboats are subject to inspection, and must pay the fees therefor. Railroads are constantly having imposed upon them additional duties with reference to safety of persons and property. New inventions in brakes, switches; blocking their switches, etc. *Pierce, Railroads*, 462, 463. In this state, the action for damages in case of death was given after many of the old charters were granted, which must have greatly increased the cost of running the road, and yet *Judge Scott* says no one questioned that the act was constitutional.

2. But it is contended by the appellant that the legislature never intended to make the fact of the injury anything more than prima facie evidence of negligence; that the circuit court erred in holding that proof of care and diligence on part of the defendant railroad would not relieve it of liability under the statute. If this is all that was in the contemplation of the legislature, it was a work of supererogation, because it has been the settled law of decision in this court since the determination in *Fitch v. Pacific R. Co.* 45 Mo. 322, (in 1870,) "that, where it is proved that the property was destroyed by fire escaping from the defendant's engine, a prima facie case of negligence is made out; that the burden is then thrown on defendant, by its evidence, to rebut the presumption of negligence by showing the absence of negligence." *Conle v. Hannibal & St. J. R. Co.* 60 Mo. 227; *Clemens v. Hannibal & St. J. R. Co.* 53 Mo. 386, 14 Am. Rep. 460; *Randle v. Pacific Railroad*, 65 Mo. 325; *Miller v. St. Louis, I. M. & S. R. Co.* 90 Mo. 389.

In the light of this judicial history, and of the history of the act itself, we think the legislature meant more than this mere prima facie liability. Section 2815 is a rescript of the Massachusetts act. That act had been adopted in other New England states and in Iowa, and a construction given it that rendered the railroad companies liable, independent of the question of negligence, for damages occasioned by fires set out by them. It is a familiar rule of construction in this state that when the legislature enacts a statute which is a transcript of a statute of another state, that has received a known judicial construction by the courts of

that state, it is deemed that our legislature adopted that construction as an integral part of its act. *State v. Macon County Ct.* 41 Mo. 453; *Skouten v. Wood*, 57 Mo. 380; *West v. McMullan*, 112 Mo. 405; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Grissell v. Housatonic R. Co.* 54 Conn. 447; *Union Pac. R. Co. v. DeBuck*, 12 Colo. 294, 3 L. R. A. 350; *Hooksett v. Concord Railroad*, 38 N. H. 242; *Rowell v. Railroad*, 57 N. H. 132; *Jayman v. Boston & W. R. Corp.* 4 Cush. 238. We are confirmed in our views by the reasoning of the learned judge in *Small v. Chicago, R. I. & P. R. Co.* 50 Iowa, 538. He shows that in Iowa the court had not, previous to the statute, held the fact of the fire prima facie evidence of negligence, and the language of the statute is made the turning point. Nothing, however, said in that case, in our opinion, destroys the force of *Judge Day's* decision in *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592.

3. Appellant complains of a ruling of the court in excluding certain evidence. It offered to prove by Howard Blossom, an insurance agent, that trees, shrubs, plants, and vines were, by their inherent nature, not susceptible of insurance, and it was impracticable, from a business standpoint, to insure such classes of property, and why it is so impracticable. Upon objection that this evidence was immaterial and irrelevant, the court excluded it, and defendant excepted. It is not contended by defendant that "trees, shrubs, plants and vines" are not property, often of great value, and that, as such, they would not be included in the general term "property," used in the statute, but it urges that such property is not insurable. Its offer was to show that the inherent nature of such property is uninsurable. The act under consideration is not limited to any specific property. It is broad enough to include both real and personal property. The statute is an enabling act. By its terms the property becomes a subject of insurance. The mere fact that no person has as yet applied for insurance upon growing timber and ornamental shrubs would not meet the case. This character of property is of inherent value, adds greatly to the value of realty, and certainly is not more subject to change than ordinary personal property, which is clearly insurable. That this class of property is subject to destruction by fire, all must admit, and no valid reason appears why it may not be insured. We take it that it is not an open question, under this statute, and no error was committed in declining to hear the evidence offered. The judge and jury would be as competent to respond to that question as any witness. Such property was held clearly within a similar statute in Maine, and insurable, in *Pratt v. Atlantic & St. L. R. Co.* 42 Me. 579,—a case much later than that cited by defendant from 87 Me. 92 [*Chapman v. Atlantic & St. L. R. Co.*] and following *Hart v. Western R. Corp.* 13 Met. 99. *Chief Justice* Bigelow, in *Ross v. Boston & W. R. Co.* 4 Allen, 87, pointed out the difficulties in which the supreme court of Maine had become involved by attempting to confine the right of recovery to permanent property, and repudiated any such limited construction. He maintained that the statute was broad enough to cov-

er every species of property, and the claim for indemnity was as strong in one as in the other. The evidence, if permitted, would have led to a distinction unauthorized by anything in the statute, which is remedial in its nature, and not to be strictly construed against those for whose benefit it was enacted. It becomes unnecessary to say more in regard to the point that the personal property in the house was not insurable. The personal property that was burned was stored in the residence and barn, and no reason is given why it was not insurable. The defendant's point as to this is not sustained.

4. On the trial, defendant introduced witnesses who testified that they lived in the neighborhood of the Mathews home place; that it had been neglected for years prior to August 9, 1887, and no care taken of it, except to mow the meadow and lawn around the house; that the garden, nursery, and orchard had been permitted to grow up in weeds, some of which were two or three years old, and on the day of the fire were very dry; that the place was a resort for boys, who frequented it to swim in the pond, and, in the fall, to hunt; that the weeds and inflammable material at the southeast corner, near the nursery, ran right down to the defendant's right of way. At the conclusion of the evidence, defendant asked two instructions to the effect that the conduct of plaintiff in permitting these weeds to grow on his place, as above testified, constituted such contributory negligence as would prevent plaintiff's recovery, or, if such weeds augmented the loss, he could only recover for so much of the injury as would have followed, had he not been negligent in that regard. The circuit court declined to give either of said instructions, and defendant complains of that ruling. The instructions are predicated on the fact that the jury should first find that the fire was communicated by defendant's engine to this grass or weeds, but assumes that it was contributory negligence in plaintiff to permit these weeds to grow upon his land in this manner. This question has often been before this court, beginning with *Fitch v. Pacific R. Co.*, 45 Mo. 322; and it has uniformly been ruled that it was not contributory negligence in a farmer to permit dead and dry grass to remain in his fields adjoining the right of way, "especially," as was said in *Patton v. St. Louis & S. F. R. Co.*, 87 Mo. 117, 56 Am. Rep. 446, "when there is no evidence that this is out of the usual course of husbandry." These decisions of this court are amply supported by both reason and authority in other states. In *Richmond & D. R. Co. v. Medley*, 75 Va. 499, 40 Am. Rep. 784, *Judge* Waller R. Staples delivered the opinion of the court. It appeared in that case that the plaintiff's land was covered with dry grass and broom sedge; that this grass was of a highly combustible nature, and easily ignited. The point was made that plaintiff was guilty of contributory negligence, but the court held otherwise, saying: "The legislature, in legalizing the use of engines running through the country, scattering fire and cinders on all sides over lands in the vicinity of the road, certainly did not intend to impose any additional burdens or duties upon the owners of such lands." "They are subject only to such risks as are

necessarily incidental to the proper and legitimate operation of the road by those having charge of it." "Any other rule would impose upon property holders near the line of a railroad the necessity of removing their grain, hay, and whatever is of a combustible nature, to some distant point,—not infrequently, of changing the whole course of husbandry, of incurring enormous expenses, and of exercising ceaseless vigilance,—in order that the company may negligently permit the accumulation of dangerously inflammable matter upon its own lands, liable at any moment to be ignited from its own locomotives." "It has been well said that fire is an extremely dangerous element, even when employed for a lawful purpose. The exercise of due care is imposed on him who uses it, and sets it in motion for his own advantage, and not upon him who is merely passive, confining himself to lawful employment and business in the conduct of his own affairs." "There are some few cases holding a contrary doctrine, but the great weight of authority is in conformity with the views here expressed. I refer particularly to an exhaustive discussion of the whole subject by Chief Justice Dixon in *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69; also, to a very able opinion of Judge Raymond in *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 14; *Salmon v. Delaware, L. & W. R. Co.* 38 N. J. L. 5, and *Delaware, L. & W. R. Co. v. Salmon*, 29 N. J. L. 299, 23 Am. Rep. 214. In *Philadelphia & C. R. Co. v. Schultz*, 93 Pa. 341, the supreme court of Pennsylvania characterized the claim of defendant that plaintiff was guilty of contributory negligence because he permitted dry leaves, brushwood, and other rubbish on his property, which could be readily fired by sparks from its locomotive, as "an extraordinary proposition," assigning, among other reasons, that "it was an attempt to impose upon property owners along the line of a railroad duties unknown and unnecessary before the building of the road," and, "if this proposition means anything, it means that upon such property owners devolves the duty of guarding against the negligence of railroad companies and their servants, which is absurd;" and citing Judge Agnew's opinion in *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. 182, 21 Am. Rep. 97. See also, *Pittsburgh, C. & St. L. R. Co. v. Jones*, 86 Ind. 496, 44 Am. Rep. 334; *Vaughan v. Taff Vale R. Co.* 8 Hurlst. & N. 750; *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 79 Ind. 111. It will be observed that defendant's own witnesses testified to the mowing of the grass and meadow, and the only accumulation was in the nursery, garden, vineyard, and orchard. As remarked in *Patton's Case*, *supra*, there was no evidence whatever that it was not customary, or even proper, at times, to let weeds grow. Certainly, it cannot be affirmed that weeds, even, are not often put to a most useful purpose, in mulching and manuring. In any aspect of the case, we think there was nothing showing contributory negligence by the plaintiff. But there is another ground upon which this plea should have been denied, and that is, by virtue of section 2615, the defendant is made an insurer against fire set out by its engines; and it is a familiar rule that contributory negligence, short of fraud,

does not furnish any defense to an action by the insured on his policy of insurance, and this was the view taken and enforced in *Bowell v. Railroad*, 57 N. H. 182.

5. In this connection, we are called upon to consider the position taken by defendant in the fourth paragraph of its answer, which is, in brief, that, at the time of the fire, plaintiff was insured in certain insurance companies to the amount of \$10,000; that, after said fire, said companies paid said loss of \$10,000. Wherefore, defendant prays that the insurance money so paid to plaintiff by said insurance companies shall be applied *pro tanto* to the damages sued for in this case. The defendant is most clearly not entitled to any benefit of the insurance money which accrued to plaintiff by reason of defendant's own act in destroying the insured property. In *Dillon v. Hunt*, 105 Mo. 154, this division held the rule as stated in 1 Sutherland on Damages, 242 (ed. 1882), to be correct, viz.: "That there can be no abatement of damages on the principle of partial compensation received for the injury, when it comes from a collateral source, wholly independent of the defendant, and is, as to him, *res inter alios acta*. The payment of such moneys not being procured by the defendant, and they not having been paid or received to satisfy in whole or in part his liability, he can derive no benefit therefrom, in mitigation of damages for which he is liable. To permit a reduction on such a ground would be to allow a wrongdoer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." A similar conclusion had previously been reached in *Carroll v. Missouri Pac. R. Co.*, 98 Mo. 289, 57 Am. Rep. 382, to which our attention was not called at the time. Although an insurer, defendant, having itself destroyed the property, has no right to share the immunity afforded other insurers. Their relation as to this loss is entirely antagonistic to it. The defendant's liability is first and principal; that of the insurance companies, secondary. Plaintiff and the insurance companies who paid his loss stand opposed to defendant, who was the cause of loss to both. There is no contractual relation or principle of subrogation that will enable defendant to require of them that they shall share their losses pro tanto with it. The statute points out the way by which it may protect itself against the loss. It confers on it an insurable interest in the property, and only by availing itself of this right can it guard against those losses which occur by fires put out by it on the lands of adjoining owners. May, Ins. § 455; *Harding v. Townshend*, 43 Vt. 586, 5 Am. Rep. 304; *The Monticello v. Mollison*, 58 U. S. 17 How. 153, 15 L. ed. 68; *Hammond v. Schiff*, 100 N. C. 161; *Hart v. Western R. Corp.* 18 Met. 105, 46 Am. Dec. 719; *Ross v. Boston & W. R. Co.* 6 Allen, 90.

6. At the trial, defendant offered to prove that its right of way was a portion of the property described in plaintiff's petition; that when its railroad was built through plaintiff's premises, in 1882, condemnation proceedings were instituted against plaintiff, to which he was made a party; that before the commissioners appointed to assess plaintiff's among other items of damage caused by defendant's road,

plaintiff claimed, as one, "damage of fire for all time to come." Defendant then offered to show by H. W. Hough and W. T. Essex, two of said commissioners, that they awarded plaintiff, for his damages to all his property, \$9,000, and for this home place they assessed the damage at \$3,000; that in estimating the damage they took into consideration the danger to said property from accidental fire set out by engines on the railroad; that plaintiff and defendant finally agreed to abide the award, and the damages were accordingly paid. The court was requested to charge the jury, in the second instruction prayed by defendant and refused by the court, that if the commissioners did assess the damages, and in so doing took into consideration the danger to plaintiff's property by accidental fire, and said danger was also considered by plaintiff and defendant, then plaintiff cannot recover, provided such proceedings and compromise were had prior to March 31, 1887. When a part of a tract of land is taken for railroad purposes under condemnation proceedings, the jury or commissioners may properly take into consideration the risk from fire to the buildings, fences, timber, or crops upon the remainder, in so far and to the extent, only, that it depreciates the value of the property; but compensation for a probable or future loss by fire is entirely too speculative and remote to be made the basis of damages. As said in *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, *loc. cit.* 294, "It would not be proper to estimate the possible damage from fires or injuries to persons." "Neither may ever occur, and to take them into the estimate would be mere speculation." "We think they may properly be considered, however, in so far as they tend to depreciate the value of the whole property, and to affect the proposed changes, but no further." *Lewis, Em. Dom. § 497; Mills, Em. Dom. §§ 163-166; Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Adden v. White Mountains N. H. Railroad*, 55 N. H. 418, 20 Am. Rep. 220; *Pittsburgh, B. & B. R. Co. v. McCloskey*, 110 Pa. 436.

The plaintiff's claim before the commissioners was damage from the risk of fire. In so far as that risk affected the value of his property not taken, by depreciating it, it was a proper claim. There was nothing to show that it was unjustly extended to an estimate of damages that might accrue at some future time, or might never occur. The damages assessed were \$3,000, and paid. After the assessment, then, plaintiff held his property in its depreciated condition. How defendant can arrive at the conclusion that if this property, in its depreciated condition, is subsequently destroyed, plaintiff is not entitled to recover whatever damages shall accrue from such subsequent destruction, we cannot understand. The prior condemnation assessment has been made and settled. After that, plaintiff owns what is left, absolutely, as he owned the whole before a portion was appropriated by the road. The subsequent damages constitute no part of the first. It is not double damages, in any sense, as we view it. If the property is destroyed by negligence, there can be no question of the liability of the company for burning it, nor is it material, under section 2615, whether it was the result of negligence or pure accident.

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The statute operates upon the estate as it is when the fire occurs, and, as we hold the statute valid, the company is liable. *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Adden v. White Mountains N. H. Railroad*, 55 N. H. 418; *Griswell v. Housatonic R. Co.* 54 Conn. 447; *Pierce v. Worcester & N. R. Co.* 105 Mass. 199; *Lyman v. Boston & W. R. Corp.* 4 Cush. 288.

We find no error in the judgment of the Circuit Court, and accordingly affirm it.

**Black, Ch. J.**, concurs in holding § 2615 constitutional, but not as a police regulation and in all respects as to other points.

**Brace, Burgess, and Macfarlane, JJ.**, concur. **Barclay, J.**, concurs in the result.

**Sherwood, J.**, dissents.

Affirmed, 165 U. S. 1, 41 L. ed. 611.

Allen A. CAMPBELL, *Respt.*,

v.

MISSOURI PACIFIC R. CO., *Appt.*

(.....Mo.....)

1. **There is no constitutional objection against making a railroad company absolutely liable** for the injury caused by fire set out by its locomotives along the line of its road.
2. **A recovery for injury by fire set out by a locomotive without proof of negligence** will not be prevented where the statute authorizes such recovery by the mere fact that negligence is alleged in the petition.
3. **Evidence that both before and after the occurrence of a fire** which caused the injuries forming the basis of the suit other fires had been started by sparks from defendant's engines at different places along the road is admissible as tending to show that the fire in question was so caused.
4. **A statute making railroad companies responsible** "to every person or corporation whose property may be injured or destroyed" by fire set out by their locomotives will not be limited by construction to embrace only insurable property, although the companies are given by the statute an insurable interest in the property for the destruction of which they may be liable.

(March 24, 1894.)

**A PPEAL** by defendant from a judgment of the Circuit Court for Moniteau County in favor of plaintiff in an action brought to recover damages for injuries caused by fire set out by defendant's locomotive. *Affirmed.*

The facts are stated in the opinion.

**Messrs. H. S. Priest and William S. Shirk** for appellant.

**Messrs. Edwards & Davison and Drafen & Williams** for respondent.

**Macfarlane, J.**, delivered the opinion of the court:

This is an action to recover damages, as al-

**NOTE.**—As to constitutionality of statutes imposing upon railroad companies an absolute liability for losses caused by fires set out by their locomotives, see *note* to the case immediately preceding this one.

leged, by the burning of plaintiff's building, fences, shrubbery, etc., by fire communicated from one of defendant's locomotives. The petition charged negligence on the part of defendant in permitting fire to escape. The answer was a general denial. It is agreed by counsel that the evidence, though circumstantial, tended to prove that the fire which consumed plaintiff's property was communicated from one of defendant's engines while being operated on its road. The court permitted a recovery under section 2615 of the Revised Statutes, without proof of negligence on the part of defendant.

1. The first proposition insisted upon as ground for reversal of the judgment is that said section 2615, which makes every person and corporation responsible in damages for property injured or damaged by fire communicated, directly or indirectly, by locomotive engines in the use upon their railroads, without proof of negligence, is unconstitutional. This objection has received the careful consideration of this court in *banc* at this term in the case of *Matthews v. St. Louis & S. F. R. Co.* (Mo.) *ante*, 161, in which the statute in question was held valid. The objection under the authority of that case must therefore be overruled. It may not be out of place here to take the occasion of stating that, in my opinion, the statute can be sustained on the broad ground that it is merely remedial in its character, and is authorized under the general powers of the legislature to provide appropriate remedies for the redress of such wrongs as are contemplated. "The remedy does not alter the contract or the tort. It takes away no vested right for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective, remedy." *Endlich, Interpretation of Statutes*, § 285. It is unquestioned that the utmost diligence and care cannot prevent the escape of fire from locomotive engines. We have, then, this condition of things: The corporation is given the right, by the statute, to run its engines by steam power, necessitating the use of fire. Fire necessarily escapes, and is scattered along the route. The citizen owns property on the line of the road, which is exposed to fire from those engines, regardless of the care and vigilance he may exercise. Both parties are faultless, but nevertheless the property of the owner is consumed by fire from an engine. The property owner has the right to own the property, and to claim protection under the law, equal, at least, to the right of the corporation to use fire on its engines. The loss must necessarily fall upon one or the other of these parties. Which one of them shall suffer the loss,—the one through whose agency the damage was caused, though in the lawful use of its own property, or the one equally innocent of wrong, and who had no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to the inquiry. This answer is formulated into the maxim that "every one should so use his own property as not to injure that of his neighbor." Prior to the statute under consideration, the loss was made to fall upon the owner who was innocent of fault in the use and care of his own property,

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and had no part in setting at liberty the destructive agency. The rule was manifestly unjust. To change this rule, and place the liability where it should rest, is the purpose of the statute. In the language of Dewey, J., in *Lyman v. Boston & W. R. Corp.*, 4 Cush. 290, we consider the statute "as one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the locomotive engine. The right to use the parcel of land appropriated to the railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may justify." The statute considered in that case imposes on the railroad company absolute liability for damages caused by fires escaping from engines. So, in a recent case in Connecticut, the court, in discussing a similar statute, says: "In this view of the case the statute rests upon broad grounds of justice and equity. It is designed to do justice where before there was a partial failure of justice. It is therefore a 'remedial statute,' in the best sense, and we must so construe it as to suppress the mischief and advance the remedy." *Martin v. New York & N. E. R. Co.* 62 Conn. 840. The contract between the state and the corporation is that the latter may propel its trains by the use of steam generated by fire. There was no agreement that it should be exempt from liability for the consequence relating to others from its use of fire. In respect to such consequences it is subject to control by remedial laws to the same extent as natural persons. Fire, when uncontrolled, is necessarily destructive of property. As shown in the opinion of Gantt, J., in the *Matthews Case, supra*, damage caused by fire was recoverable at common law without proof of negligence. There is no reason why the common law could not, or indeed should not, be restored in cases in which the lawful use of property by one necessarily exposes the property of others to damage by fire. A statute of this state declared that "if any person shall willfully set on fire any woods, marshes, or prairies, so as thereby to occasion any damage to any other person shall make satisfaction for such damage to the party injured, to be recovered in an action on the case." Rev. Stat. 1845, p. 1091, § 3. This act came before this court in 1848, and its validity was not questioned, though that distinguished jurist, Leonard, afterwards judge of this court, represented the party charged with the damage, and a recovery without proof of negligence was affirmed. In that case the court held that the fact that the fire was set on defendant's land constituted no defence under the statute. *Finley v. Langston*, 12 Mo. 123. A similar statute was held valid by the supreme court of Iowa. *Conn v. May*, 36 Iowa, 241. We think there can be no doubt that the state has the power to impose absolute liability upon one causing loss of property to another by the use of agencies necessarily destructive, and in the use of which absolute control is impossible, whether the one using the agency be a private person or a corporation.

2. The petition charged that the fire causing the injury was permitted to escape through

the negligence of defendant, and the court permitted a recovery under the statute without proof of negligence. Defendant assigns this action of the court as error, in that it permitted a recovery upon a cause of action different from that charged in the petition. The petition states all the facts necessary to authorize a judgment under the provisions of the statute, and, in addition thereto, the allegation of negligence. By the statement of more than was required, plaintiff did not forfeit his right to recover upon proof of the facts he was required to state, and did state, in his petition. *Radcliffe v. St. Louis, I. M. & S. R. Co.* 90 Mo. 181; *Morrow v. Surber*, 97 Mo. 155.

3. During the trial, witnesses were permitted to testify, over the objection of defendant, that other fires, both before and subsequent to the one in question, at different places on the line of defendant's road, had been started by sparks from some of defendant's engines. The admission of this evidence is assigned as error. In *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 237, this court held that, in order to prove that one engine was insufficient, or that the employees of the company in charge of such engine were careless or incompetent, evidence was not admissible to prove that other engines were defective, and other employees were incompetent or negligent. The ruling in that case is not controlling on the question of the admissibility of the evidence complained of here, for the reason that the statute creates an absolute liability, without respect to the character of the machinery or the competency of the employees. The admission of the evidence was clearly harmless if it only tended to prove want of care on the part of defendant. The only issue involving the liability of defendant was whether the fire was communicated to plaintiff's property, directly or indirectly, by a locomotive engine in use upon its road. Was this evidence admissible as tending to prove that issue? The question was sharply contested on the trial whether the fire causing the damage did, in fact, originate from one of defendant's engines. The evidence was all circumstantial. It was important, then, to show that there was a possibility that sparks may have been thrown a distance sufficient to reach the building in which the fire originated, and that they contained heat enough to set it on fire. The facts that live sparks were thrown from engines, and did ignite grass and other combustible materials, would tend to prove the probability that the fire was communicated from an engine. It was not shown that the engine from which alone the fire could have been communicated was constructed or manned with more care than all others in use on the road. The admissibility of such evidence was affirmed in *Sheldon v. Hudson River R. Co.*, 14 N. Y. 223, 67 Am. Dec. 155, by a divided court. The court in that case says: "The competency of this evidence has been directly decided in the English court of common pleas. *Piggot v. Eastern Counties R. Co.* 10 Jur. 571; *Aldridge v. Great Western R. Co.* 3 Mann. & G. 515. These cases upon this point are well decided. The principle is essential in the administration of justice, inasmuch as circumstantial proof must, in the nature of things, be restored to,

and inasmuch as the jury cannot take judicial cognizance of the fact that locomotive engines do emit sparks and cinders, which may be borne a given distance by the wind. The evidence was competent to establish certain facts which were necessary to be established in order to show a possible cause of the accident, and to prevent vague and unsatisfactory surmises on the part of the jury." This ruling was followed without division in *Field v. New York Central Railroad*, 32 N. Y. 339, and *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 421, 10 Am. Rep. 389. A similar ruling was made by the Supreme Court of the United States in *Grand Trunk R. Co. of Canada v. Richardson*, 91 U. S. 470, 23 L. ed. 362. *Mr. Justice Strong*, who wrote the opinion of the court, says: "The question has often been considered by the courts of this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and consequent probability, that some locomotive caused the fire." He follows this statement of the law by a number of citations, both English and American, including the case of *Sheldon v. Hudson River R. Co.*, *supra*. Further on in the same opinion the judge says: "The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire along their passage." To the same effect are the following cases: *Smith v. Boston & M. Railroad*, 63 N. H. 26; *Chicago, St. P. M. & O. R. Co. v. Gilbert*, 3 C. C. A. 264, 52 Fed. Rep. 711, 10 U. S. App. 375; *Thatcher v. Maine Central R. Co.* 85 Me. 509. We think the evidence tended to prove the possibility, and consequent probability, that the fire was communicated to plaintiff's property from one of defendant's engines, and that the evidence was admissible, and its probative force was for the determination of the jury. If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court. *Coale v. Hannibal & St. J. R. Co.* *supra*; *Patton v. St. Louis & S. F. R. Co.* 87 Mo. 117, 56 Am. Rep. 446. But, in case the fact whether the fire originated from the engine was alone in issue, and there was no direct proof of the fact, it seems very clear that such evidence would have some tendency to prove that issue. The evidence was all circumstantial, and the facts testified to were circumstances, though slight they may have been, bearing upon the issue.

4. Defendant insists, further, that plaintiff was not entitled to recover under the statute for personal property burned, nor for shrubs, trees, and flowers, upon which defendant could not obtain insurance. For support of this contention, counsel cite *Chapman v. Atlantic & St. L. R. Co.* 37 Me. 92. The loss considered in that case was of a lot of cedar posts temporarily deposited near the road. The statute

made the railroad responsible "when a building or other property is injured by the fire communicated by a locomotive engine," and gave to the corporation "an insurable interest in the property along the route for which it is responsible." After discussing the statute, the court says: "The conclusion to which we have arrived is that the liability of railroad corporations under this statute extends only to property permanently existing along their route, and capable of being insured, and that as to movable property, having no permanent location, the liability of such corporation is to be determined by principles of the common law." In *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579, the same court held that the liability of the company under this statute was not confined to real estate, but extended to personal property as well. Exemption from responsibility under the statute of that state has never extended beyond injury to movable property temporarily placed near the track. In the recent case of *Thatcher v. Maine Central R. Co.*, *supra*, the supreme court of that state very evidently disapproves the decision in the *Chapman Case*, though it expressly states that it had no intention of overruling it. The court agreed that a different construction of the statute had been given by the courts of Massachusetts, Vermont, and New Hampshire for the

one declared in the *Chapman Case*. We do not think so narrow a construction should be given our statute. It is remedial, and such construction should be given it as will advance the remedy. Indeed, the language of the statute is so plain and unambiguous as to admit of but one construction. The corporation shall be responsible "to every person or corporation whose property may be injured or destroyed." This language leaves no room for discussion as to the character of the property contemplated; it includes all property that may be injured or destroyed. We do not think it necessary to the validity of the statute that the railroad corporations should have been given an insurable interest in the property upon the route of their roads; nor does the fact that such interest was given limit their responsibility to insurable property that may be injured or destroyed. The purpose of the law was to give the corporation the same right and opportunity of protection and indemnity from fires as the owner of the property had. What property is the subject of insurance must be determined by the insurance companies, whether the indemnity is sought by the owner or by the corporation.

*Judgment affirmed.*

**Sherwood, J.**, dissents; **Barclay, J.**, absent; the other Judges concur.

### MISSOURI SUPREME COURT (Div. 2).

Edward W. RUHE, *Appt.*,  
v.

Oliver W. BUCK *et al.*, *Respts.*

(.....Mo.....)

**1. An attachment of the property of a married woman which is not allowed by state law in the case of its own citizens will not be allowed to a nonresident creditor, al-**

though the debt was created in another state where the married woman resided and where the contract creating it was valid.

**2. The spirit of comity does not require that a nonresident shall be allowed a remedy which is by the policy of the state law denied to its own citizens.**

(*Sherwood, J., dissents.*)

(July 9, 1894.)

**NOTE.—Enforceability of contracts of married women outside of state in which they are legally made.**

The general rule is to apply the same rule to contracts by married women which is applied to other classes of contracts.

If the contract is valid in the state where it is made it is valid everywhere. *Holmes v. Reynolds*, 55 Vt. 39; *Nixon v. Halley*, 78 Ill. 611; *Kelly v. Davis*, 28 La. Ann. 773; *Bond v. Cummings*, 70 Me. 125; *Hill v. Pine River Bank*, 45 N. H. 300.

If a married woman is competent by the law of the domicile to make contracts, her contracts so made will be valid in every other country. *Union Nat. Bank v. Hartwell*, 84 Ala. 379.

The validity of the transfer by a married woman of a note is governed by the law of her domicile if the transfer is made there. *Clanton v. Barnes*, 50 Ala. 260.

Where a deed of gift in trust for the separate use of a married woman was made in Alabama by parties living there at the time of its execution, the laws of that state as to the rights of the parties under it will govern, in a litigation in regard to it brought in Florida. *Maiben v. Bobe*, 6 Fla. 381.

A note executed by a married woman as surety for a firm of which her husband is a member in a state where the makers resided and where the note is payable, if valid in that state may be enforced 25 L. R. A.

against her in the courts of another state, although if made in the latter state it would have been void. *Robinson v. Queen*, 3 L. R. A. 214, 87 Tenn. 445.

Where a married woman living in Pennsylvania bought a farm in Delaware, for which she gave her bond valid in Delaware, it was held that a personal judgment could be rendered against her in Pennsylvania, although such course was not authorized in case of a Pennsylvania contract. *Baum v. Birchall*, 150 Pa. 164, reversing 11 Pa. Co. Ct. Rep. 222.

To what extent states in which the disabilities of married women have not been removed will regard contracts made by such persons in other states as so opposed to the policy of their law as to be unenforceable has not been directly considered in many cases, although by sustaining such contracts there is an implied adjudication that such policy is not contravened.

However in *Hayden v. Stone*, 13 R. I. 103, the court takes the broad ground that a contract valid by the laws of one state cannot be enforced in another, unless such a contract between its own citizens would be enforced there.

On the other side in *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180, the court held that a statute empowering a married woman to contract in the same manner as if she were unmarried was not so in conflict with the public policy of New Jersey-



**APPEAL** by plaintiff from a judgment of the Circuit Court for Atkinson County in favor of defendants in an action brought to perfect the plaintiff's title to certain property which he had bought at a sheriff's sale. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Lewis & Ramsay*, for appellant: The equitable title of defendants Julia E. and O. W. Buck in the property in controversy was subject to attachment, execution, and sale.

Rev. Stat. 1889, § 4915; *Eddy v. Baldwin*, 23 Mo. 588; *Eneberg v. Carter*, 98 Mo. 647.

The assignment of the Perkins contract to Mrs. Julia E. Buck was a fraud upon her husband's creditors, and the land was therefore liable to sale upon attachment and execution at the instance of such creditors.

*Jordan v. Buschmeyer*, 97 Mo. 94; *Ryland v. Callison*, 54 Mo. 513; *Bobb v. Woodward*, 50 Mo. 95.

Upon showing the insolvency of the husband and his purchase of the lot in the wife's name the burden devolved upon her to show that it was purchased in good faith with her own moneys.

*Seitz v. Mitchell*, 94 U. S. 580, 24 L. ed. 179; *Sloan v. Torrey*, 73 Mo. 623; *Crook v. Tull*, 111 Mo. 283.

The attachment proceedings against Oliver W. Buck and his wife, Julia E. Buck, being for a personal legal liability against both of them, there was no reason why it could not be enforced in a legal proceeding against both of

them—even under the strict old common-law rules such judgments might be so rendered in the cases where she was so personally liable—as in case of her antenuptial contracts, or torts during coverture.

*Bruen v. Bamberger*, 11 Mo. App. 261; *Walker v. Deaver*, 79 Mo. 664; *Merrill v. St. Louis*, 12 Mo. App. 473, 83 Mo. 244, 53 Am. Rep. 576; *Conrad v. Howard*, 89 Mo. 219; *Smith v. Beard*, 73 Ind. 159. See also 14 Am. & Eng. Encyclop. Law, p. 637, and note 7, p. 638, and note 9, pp. 661, 762; *Kingman v. Paulson*, 126 Ind. 507.

The Dakota judgments, which were general personal liabilities of Mrs. Buck, were entitled to "full faith and credit in every other state."

U. S. Const. art. 4, § 1; *Chew v. Brumager*, 80 U. S. 13 Wall. 497, 20 L. ed. 663; *Cheerer v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604; *Mutual L. Ins. Co. of New York v. Harris*, 97 U. S. 331, 24 L. ed. 959; *Kingman v. Paulson*, *supra*.

An attachment or execution could issue against a married woman.

*Reidworth v. Bowman*, 104 Mo. 44; *Walker v. Deaver*, and *Merrill v. St. Louis*, *supra*.

The court had jurisdiction of the subject-matter, that is of the question of her personal liability upon the Dakota judgments, conceded to be personal liabilities against her where she lived, and having jurisdiction of the subject matter and of the person, the judgment could not be void on account of the form of the proceedings.

*Babb v. Bruere*, 23 Mo. App. 604; *Gates v.*

as to afford a reason for the nonenforcement of the contract against her in that state.

And it has also been held that the settled public policy of North Carolina will not be contravened by enforcing contracts made in another state by married women domiciled there. *Taylor v. Sharp*, 108 N. C. 377.

As tending to throw some light on the question—In *Cosio v. De Bernales*, 1 Car. & P. 296, Ryan & M. 102, an action was brought by husband and wife trading as partners in Spain, and the court said before the action could be maintained it must be shown that a married woman was authorized in that country to have separate property and to trade on her own account. The plaintiffs must show that they had put a proper plaintiff on the record, according to the law of Spain, before the question could be raised whether or not a husband and wife being partners in trade in Spain could sue as such in English courts.

In *Arnold v. Bernard*, 8 Abb. Pr. N. S. 120, a contract was made abroad between two married women in reference to the rendition of services in an opera company and suit was brought for breach of it by one of them in New York. The court held the complaint bad because it did not show that the business was to be carried on in a state where married women were permitted to make such contracts, so that the benefits arising from it would be their own.

In *Woodcock v. Reed*, 5 Allen, 207, the court tested the right of a married woman to property claimed by her by the law of her domicile, without in terms stating that it must be so tried.

But in *Whitridge v. Barry*, 42 Md. 140, it was held that the validity of an assignment of a policy of insurance must be determined by the law of the forum. It is, however, remarked in the opinion that such seems to have been conceded by the parties interested.

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If there is no statute governing the matter in the state of domicile, the rights of the parties must be determined by the general principles of common law and equity applicable to such cases. *Hendricks v. Isaacs*, 46 Hun. 239.

The presumption is that the common law is in force in the other state, in the absence of proof to the contrary. *Tinkler v. Cox*, 68 Ill. 119.

*Contracts in relation to real estate situated where the suit is brought.*

An exception to the general rule exists when the contract relates to real estate situated in the state where the suit is brought. In such cases the rule is to apply the *lex rei sitæ* in determining the validity of the contract.

The effect of the contract on real estate is determined by the laws of the place where the estate is located. *Kelly v. Davis*, 28 La. Ann. 773.

Statutes giving power to contract have no extra-territorial effect, where the particular contract involved relates to the conveyance or incumbrancing of real estate situated in a foreign jurisdiction. *Cochran v. Benton*, 120 Ind. 58.

The courts where the land is situated will not give effect to a mortgage executed in another state, if it is void by the *lex rei sitæ*. *Swank v. Hufnagle*, 111 Ind. 453.

A mortgage will not be enforced against a married woman, if it is not permitted by the law of the place where the land lies. *Wood v. Wheeler*, 111 N. C. 231.

A mortgage executed in Michigan by a married woman, without her husband joining, upon her separate estate in Indiana, will not be enforced by the Indiana courts. *Otis v. Gregory*, 111 Ind. 504.

The validity of a contract intended to bind separate real estate is to be determined by the law of the place where the estate is situated. *Johnston v. Gawtry*, 11 Mo. App. 322.

*Tusten*, 89 Mo. 13; *Scott v. Caruth*, 50 Mo. 120; *Clark v. Clark*, 86 Mo. 114; *Rosenheim v. Hartsock*, 90 Mo. 357.

The real reason why under our practice equity was necessary to charge the separate property of a married woman, was because her contracts as such were void, and it was only her separate property that could be reached and in the very nature of things an equitable proceeding to appropriate same was necessary.

*Davis v. Smith*, 75 Mo. 219.

The presumption is in favor of the jurisdiction of the court.

*McClanahan v. West*, 100 Mo. 309.

*Meers, Hunt & Bailey*, for respondents: Under the Revised Statutes of 1879, sections 3295 and 3296, which have been the same since 1865, the property of the wife could not be attached for her own or her husband's debts.

The attachment suit was brought March 8,

1887, and judgment rendered February 8, 1890, and this suit was brought April 21, 1891, so that the Laws of 1879, governing married women's rights to control their property and sue and be sued, govern this case.

Under the law as it then stood she could not be sued at law, and certainly not by attachment, but the only remedy against her was by bill in equity.

*Gage v. Gates*, 63 Mo. 412; *Williams v. St. Louis, I. M. & S. R. Co.* 8 Mo. App. 135; *Drake*, Attachm. 2d ed. §§ 247, 249; *Bachman v. Lewis*, 27 Mo. App. 81; *Gabriel v. Mullen*, 30 Mo. App. 465; *Frank v. Siegel*, 9 Mo. App. 467; *Brumback v. Weinstein*, 37 Mo. App. 520; *Boekhoff v. Gruner*, 47 Mo. App. 22; *State v. Beltsmeier*, 56 Mo. 226; *Chicago Coffin Co. v. Fritz*, 41 Mo. App. 389; *Baer v. Pfaff*, 44 Mo. App. 35; *Decker v. Lidwell*, 3 Mo. App. 586.

Prior to the Revision of 1889 a judgment at law against a married woman is a nullity.

And that principle was applied in *Frierson v. Williams*, 37 Miss. 451, to a case where the contract was invalid where made, but valid where the real estate was situated and the remedy sought.

But in Louisiana it was held that the law of the *status* of real property will not be applied in favor of married women residing in other states, for the purpose of upholding a contract between her and her husband conveying the property to her as against creditors of the husband residing in the state where the land is situated. *Hyman v. Schlenker*, 44 La. Ann. 108.

#### *Contract outside of state of domicile.*

The question how far the law of domicile follows a person and affects her contracts made in other jurisdictions has been the subject of considerable discussion. It would probably not be a practical question where the attempt was to enforce a contract made outside the state of domicile, in a third state. The *lex loci contractus* would in all probability alone be looked to in such cases. But when the remedy is sought at the domicile, there is a strong tendency on the part of the courts to determine the validity of the contract by the law of the domicile.

This is illustrated by the case of *ARMSTRONG v. Buer* which is reported in connection with the case to which this note is appended. In that case enforcement of the contract was refused although it was valid where made.

So in *Goldsmith v. Ladson*, 19 Wash. L. Rep. 733, a woman residing in the District of Columbia purchased goods on credit in New York, and the courts of the District of Columbia held that her title to the property depended on the law of the District.

But in a Massachusetts case it was held that a contract made in another state by a married woman domiciled in Massachusetts, which she was at the time not capable of making under the law of Massachusetts, but which was valid by the law of the state where made, will sustain an action against her in the courts of Massachusetts. *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241. In that case, however, the contract would have been valid if made at the time the suit was brought. During the discussion of the case the court said: "In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to

have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all."

But it was further said: "It is possible also that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract."

In discussing the validity of the transfer of shares of stock the California court said: "The capacity of a married woman is regulated by the law of her actual domicile. *Dow v. Gould & Curry* Silver Min. Co. 31 Cal. 633.

#### *The remedy applicable.*

As is apparent from the opinions in *BUEH v. BUCK* the greatest difficulty arises in determining the appropriate remedy by which the contract is to be enforced. The remedy is to be governed by the *lex fori*. But what is the law of the forum. If the particular contract is recognized by the law of the forum and a particular remedy provided for it, no question can arise. That remedy must be followed. But if as in *BUEH v. BUCK* the statute has provided no remedy because the validity of such contracts is not recognized in the state what course shall be pursued. There is no right without a remedy. Therefore if the court recognizes the contract as valid some remedy must be given. Will the court compel a resort to the limited and often inadequate remedies provided against married women who are by the law of the state under disability. Or will it permit a resort to the remedies afforded in case of similar rights arising upon contracts between parties not under disabilities. The statute specifies neither. Therefore the matter is entirely within the control of the court and it should give the one which is most adequate; that is the one applicable in cases of similar contracts between persons not under disabilities. Such is the rule which has generally been followed.

In *Merrielles v. State Bank of Keokuk*, 5 Tex. Civ. App. 453, the liability of a married woman doing business in Iowa was sought to be enforced by attachment of her land in Texas, and it was con-

*Wernecke v. Wood*, 58 Mo. 352; *Gage v. Gates*, 62 Mo. 412; *Lincoln v. Rowe*, 64 Mo. 138.

The law has never authorized an attachment against a married woman's property.

*Meyers v. Van Wagoner*, 56 Mo. 115; *Boal v. Morgner*, 46 Mo. 48; *Schuster v. Schuster*, 93 Mo. 438; *Turner v. Shaw*, 96 Mo. 22; *Gilliland v. Gilliland*, Id. 522; *Kimball v. Silvers*, 22 Mo. App. 520; *Kimm v. Weippert*, 46 Mo. 582, 3 Am. Rep. 541; *Whitesides v. Cannon*, 23 Mo. 457; *Martin v. Colburn*, 88 Mo. 229; *Bruns v. Capstick*, 46 Mo. App. 897; *Higgins v. Pelzer*, 49 Mo. 152; *Napton v. Leaton*, 71 Mo. 358; *Musick v. Dodson*, 76 Mo. 625; *Hoskinson v. Adkins*, 77 Mo. 537; *Coe v. Ritter*, 86 Mo. 277.

The wife is given the same ownership, possession, and enjoyment of her property as she would have were she sole and unmarried.

*Emerson v. Clayton*, 32 Ill. 493; *Vankirk v. Skillman*, 84 N. J. L. 114; *Blair v. Chicago*

& A. R. Co. 89 Mo. 391; *Bedsworth v. Bowman*, 104 Mo. 44.

The indebtedness being for cigars were not necessities, and they nowhere allege that Julia E. Buck attempted to bind her own estate, hence it created no charge upon the separate estate of the defendant, Julia E. Buck, in the attachment suit, and the judgment was void, so also sheriff's deed passed no title to J. P. Lewis.

*Hooton v. Ransom*, 6 Mo. App. 22; *Kimm v. Weippert, supra*; *Maguire v. Maguire*, 3 Mo. App. 463; *Bedsworth v. Bowman, supra*.

A judgment is merely a record contract, and an action on a judgment of a sister state is at common law an action of debt, hence a sister judgment brought here for collection; the remedy is by the *lex fori* and not *lex loci*, and can have no greater privileges or rights accorded to it than judgments rendered here.

Story, Conf. L. § 830; Story, Bills, § 160; *Bank of United States v. Donnelly*, 83 U. S. 8 Pet. 361, 872, 8 L. ed. 974, 978; *Warren v.*

tended that the trial court erred in submitting to the jury the laws of Iowa to create a liability against the separate real estate of a married woman situated in Texas, contrary to the constitution, laws, and public policy of Texas. But the court of civil appeals held that the trial court correctly applied the law of Iowa, the *lex loci contractus*, in the enforcement of the obligation in suit.

If the contract is to be held valid and binding it would seem to reasonably follow that her property in the state where the contract is sought to be enforced should be subject, for to hold that a valid and binding contract is not enforceable at any time nor in any manner is absurd. Whenever it is ascertained and determined by judgment of court that a contract made by a married woman in another state is valid and binding according to the rule founded upon comity between the states, the remedy provided for satisfaction of judgments should be applied as though the judgment was against a *feme sole*, or a married woman invested with the rights and subject to the responsibilities of a *feme sole*. *Gibson v. Sublett*, 82 Ky. 596.

In attempting to enforce a judgment obtained upon a contract made in another state where it was valid, the husband need not be joined as a defendant, although he would be a necessary defendant if the suit was on a Pennsylvania contract. *Brans v. Cleary*, 125 Pa. 204.

Judgment may be rendered against a married woman upon a valid note executed at the place of her domicile in another state. *Wood v. Wheeler*, 111 N. C. 231.

In *Spearman v. Ward*, 114 Pa. 634, an action was brought in Pennsylvania to enforce the contract liability of a married woman living in Ohio, against land situated in Pennsylvania, and it was conceded upon the argument that if under the law of Ohio the common-law disabilities of married women had been removed and the defendant clothed with a general power to contract the same as a *feme sole*, the plaintiffs would be entitled to obtain a judgment against her in Pennsylvania which could be enforced by execution, as in other cases.

The New York court has held that a married woman domiciled and owning separate property in one state in seeking a remedy for an injury to it in another state is governed by the laws thereof, and may bring the action in her own name, if such laws permit it, regardless of the laws of the state of domicile. *Stoneman v. Erie R. Co.* 53 N. Y. 429.

In the cases in which such rule has not been applied there has been some peculiar circumstance to take it out of the rule.

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Thus, where the contract is an equitable charge on the separate estate of the woman, it must be enforced by an equitable suit in a state preserving the distinction between legal and equitable remedies, although in the state where made it might be enforced in a suit at law. *Burchard v. Dunbar*, 82 Ill. 450, 25 Am. Rep. 394.

So if, although in the state where the contract was made all contracts of married women are valid and may be sued at law, a suit is brought in a state where only contracts relating to her separate estate will sustain suits at law, the suit must be in equity, unless the contract is one concerning her separate estate. *Halley v. Ball*, 66 Ill. 250.

The case of *Louisiana Bank v. Williams*, 46 Miss. 618, which apparently is the strongest one in support of *RUHE v. BUCK*, does not go nearly so far as the latter case goes. In fact from its peculiar circumstances it can have little application as a precedent in other cases.

In it a married woman living in Mississippi executed in Louisiana a note secured by mortgage on land in Louisiana, and the court said that if the creditor came to Mississippi to seek his remedy against her, he must be governed by the Mississippi law, which had not provided for a judgment against her but only subjected her personal estate to liability for the debt. But in the course of the opinion, the court says, if, by the Louisiana law, a married woman was competent to incur debts generally, and coverture imposed no disabilities, it would be a different question from that we are dealing with. And they held that the law which permitted the contract in Louisiana was a local one, not intended to apply to married women generally.

In New Jersey it has been held that, to make the liability enforceable under the remedy given by the *lex fori*, which is a departure from the common law, it must be shown that the *lex loci contractus* was the same. It will not be presumed to be the same, and if the law is not shown the common-law rule will be presumed. So, if a contract by a married woman seeks to charge her separate estate, it must be enforced in equity in the absence of anything to show the law of the place where made, although by the law of the forum a suit against her on such a contract could be maintained at law. *Bradley v. Johnson*, 45 N. J. L. 371.

That decision seems to ignore the rule that the remedy is governed by the *lex fori*. It is in doctrine opposed to *Stoneman v. Erie R. Co. supra*.

H. F. F.

*Copelin*, 4 Met. 594; *McMorty v. Morrison*, 62 Mo. 140; *Lyman v. Campbell*, 84 Mo. App. 214; *Smith v. Moore*, 58 Mo. App. 525; 12 Am. & Eng. Encyclop. Law, pp. 148 o, 148 t.

The wife has power to convey her property by power of attorney.

Rev. Stat. 1879, § 670; Rev. Stat. 1889, § 2897; *Melton v. Smith*, 65 Mo. 315; *Bedsworth v. Bowman*, *supra*; *Richardson v. DeGiverville*, 107 Mo. 422; *Lect v. State Bank of St. Louis*, 115 Mo. 184; *McClure v. Herring*, 70 Mo. 18, 35 Am. Rep. 404.

The court has no jurisdiction over the property in the attachment suit.

*Hardin v. Lee*, 51 Mo. 244; *Freeman v. Thompson*, 58 Mo. 194; *Bailey v. McGinnies*, 57 Mo. 362.

The assignment of the contract of sale from Coulter to Julia E. Buck and from Julia E. Buck, by her attorney, to Thompson and Trout, was good.

*Webb v. Webb*, 87 Mo. 541; *McClure v. Herring*, 70 Mo. 18, 35 Am. Rep. 404; *Kinner v. Walsh*, 44 Mo. 65.

There was no fraud on the creditors of O. W. Buck in the sale of this property. Thompson and Trout had no notice.

*Sibly v. Hood*, 3 Mo. 206; *McLaran v. Mead*, 48 Mo. 115; *Hartt v. Rector*, 18 Mo. 497, 53 Am. Dec. 157; *Dougherty v. Cooper*, 77 Mo. 528.

*Grantt, P. J.*, delivered the opinion of the court:

This record presents this case: At the time of the transactions involved, a married woman in Missouri was incompetent to make a valid contract at law. At that time, however, she was authorized by the laws of Dakota to contract as a *feme sole*, and sue and be sued as such. Mrs. Buck, the wife of O. W. Buck, became the purchaser of a city lot in Tarkio, Mo., and held a bond for title from Perkins, the owner, until a balance of the purchase money should be paid. Under the firm name of O. W. Buck & Co., Mrs. Buck and her husband became indebted in Dakota, and the interest of herself and her husband in said lot was attached for said debt, in an action commenced in the circuit court of Atchison county, Mo. After this attachment was levied on the lot, Mrs. Buck sold the lot to Thompson and Trout, who afterwards paid the balance of the purchase money to Perkins, and received a warranty deed from Perkins, which was recorded. That a married woman was not subject to a suit by attachment in Missouri prior to 1889 was decided by this court in *Gage v. Gates*, 62 Mo. 413; and that a judgment obtained against her in such a proceeding was a nullity was repeated in *Lincoln v. Rowe*, 64 Mo. 188; and that she could not be sued as a member of a mercantile firm at law was also settled in *Weil v. Simmons*, 66 Mo. 617. From these and many other decisions, it would appear that no resident creditor could proceed by an attachment at law against a married woman in this state for a debt contracted in this state, and this record presents the question whether our laws will give non-resident creditors remedies to collect their claims against a married woman in this state, which we uniformly deny to our own citizens.

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The Supreme Court of the United States in *Scudder v. Union Nat. Bank of Chicago*, 91 U. S. 406, 23 L. ed. 245, sums up the general principle in a few words: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suits, admissibility of evidence, and statutes of limitation, depend upon the law of the place where the suit is brought." So that while we concede that, by the laws of Dakota, Mrs. Buck could enter into a contract of partnership with her husband, and become bound for the debts of that partnership, the question remains, when the creditors sue her in this state, are they bound to take such remedies, and such only, as our laws offer against a married woman (for such she remains, notwithstanding her capacity to contract and sue and be sued), or are we bound to treat her as a single person? Judge Story, in his treatise on the Conflict of Laws (8th ed. § 556), says: "Having stated these general principles in relation to jurisdiction (the result of which is that no nation can rightfully claim to exercise it except as to persons and property within its own domains), we are next led to the consideration of the question in what manner suits arising from foreign causes are to be instituted and proceedings to be had until final judgment." "Are they to be according to the laws of the place where the parties, or either of them, live, or are they to be according to the modes of proceeding and forms of suit prescribed by the laws of the place where the suits are brought? Fortunately, here there is scarcely any ground left open for controversy, either at the common law or in the opinions of foreign jurists or in the actual practice of nations. It is universally admitted and established that the forms of remedies and modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted, or according to the *lex fori*." This principle has been illustrated in many ways. Thus in *Williams v. Haines*, 27 Iowa, 251, the supreme court of Iowa, in an opinion by Chief Justice Dillon, held, in an action on a sealed instrument, executed in Maryland, that although, by the laws of Maryland, the consideration could not be inquired into, yet as the Iowa statutes provided that "the want or failure in whole or in part of the consideration of a written contract might be shown as a defense," and "the addition of a seal should not affect the character of the instrument in any way," the consideration could be impeached in an action in Iowa. Said the court: "The plaintiff must take such remedy as our laws afford him. He has not a vested right in the courts of other states to all the common-law incidents of contracts, provided the obligation of the contract be not impaired." The courts of Iowa "must administer its own laws, and not those of other states." In *Mathuson v. Crawford*, 4 McLean, 540, Fed. Cas. No. 9,279, judgment was rendered in Indiana on a note executed in Ohio. The laws of Indiana required an ap-

praisement of lands before a sale on execution, and that no lands should be sold for less than one half of their appraised value, but the sheriff sold without regard to the valuation laws. The question was whether the sale was void for failure to comply with the Indiana law. The contention was that, as the contract was made in Ohio, its laws should control, and not those of Indiana. Discussing the proposition that the remedy existing in the state where the contract was made constituted an essential part of it, *Mr. Justice McLean* said: "It is impracticable, and cannot be enforced." "In the present case the laws of Ohio cannot be recognized in Indiana, in giving a different remedy from the existing laws here. No difficulties arise in giving effect in any state to what is properly called the 'law of the contract,' in contradistinction to the 'law of the remedy.'" "In the case before us, the note was given to a firm in Cincinnati, and payment was to be made there. We look to Ohio for the rate of interest, demand, and protest, and notice required by the laws of Ohio." "But, as the remedy has been sought in Indiana, the laws of Indiana must govern," as to the execution and sale. So in *Mineral Point R. Co. v. Barron*, 38 Ill. 365, a garnishee proceeding was commenced against the company in Illinois to recover wages due Barron. The company answered that it owed Barron \$40, but set up that Barron was a resident of Wisconsin, and the head of a family, and that, by the laws of Wisconsin, such wages were exempt. It was urged that as Barron was a resident of Wisconsin, and the debt was contracted in that state, the exemption laws of Wisconsin should control; but the supreme court of Illinois held that this law merely affected the remedy when an action should be brought in Wisconsin, and could not be invoked in Illinois, saying: "The remedy must be governed by the laws of the state where the action is instituted." And in *Burchard v. Dunbar*, 82 Ill. 450, 25 Am. Rep. 384, a married woman signed the note of her husband in New York, and bound her separate estate by an express agreement to that effect. It had previously been ruled that, upon this equitable charge, the laws of New York permitted a judgment at law, without indicating any property out of which it was to be satisfied. *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 618, 1 Am. Rep. 601. An action was brought on this note in Illinois, and the circuit court held, on the authority of the New York decision last cited, that the note was valid and binding at law in New York, and that it could be enforced as such in Illinois; but the supreme court of Illinois held that it did not follow that, because the remedy was an action at law in New York, it would be the same in Illinois, *Judge Scholfeld* saying: "But the law of the remedy is no part of the contract. *Wood v. Child*, 20 Ill. 209. 'When the question is settled that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in forming it, the *lex loci* ceases its functions, and the *lex fori* steps in, and determines the time, the mode, and the extent of the remedy.' *Sherman v. Gassett*, 9 Ill. 531; *Chenot v. Lefevre*, 8 Ill. 648." "That appellant charged her separate estate with the payment of the amount of the note, by the law

of New York, is beyond question, . . . but this is in equity only, and although, by our present statutes, married women may sue and be sued either with or without joining their husbands, and defend without regard to whether the husband shall defend or not, and judgments may be recovered against them, we still preserve the distinction between actions at law and suits in equity, and there is no authority [in Illinois] for suing and obtaining judgment against them in actions at law on purely equitable liabilities.' It will be observed that though the wife's contract was a binding obligation, and could be sued at law by the *lex loci*, and although, by the laws of the forum, she could be sued with or without joining her husband, still the plaintiff was given such remedy only—to wit, a suit in equity—as the law of the forum afforded in such a case, irrespective of the *lex loci*.

In the case at bar it is argued that, had her undertaking in New York been good at law, she could have been sued at law in Illinois. So she could, but it would have been so because the law of the forum gave that right; but, as we have seen, the law of Missouri denied the right to attach a married woman prior to the Revision of 1889. In *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, the question was "whether a contract made in Maine by a married woman domiciled in Massachusetts, which a married woman was not at the time capable of making under the laws of Massachusetts, but was then allowed by the law of Maine, and which she could lawfully make in Massachusetts, at the time of the suit, could be enforced in the courts of Massachusetts;" and the supreme court of Massachusetts answered in the affirmative, placing the decision, however, on the comity of states, and that the contract, in view of the subsequent enabling act of Massachusetts, was not contrary to the policy of that state. As the contract was valid by the *lex loci*, and as the *lex fori* afforded a remedy at the commencement of the suit, there would seem to be no doubt of the soundness of that decision; but if the law of Massachusetts had up to that time regarded the contracts of married women as utterly void at law, and had not permitted them to sue or to be sued, it would seem a different conclusion would have been attained, judging from the intimation of the distinguished jurist, *Mr. Justice Gray*, "that it was possible that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state for the protection of its own citizens that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." The case supposed by *Judge Gray* is this case in fact. By the law of this state, Mrs. Buck's contract would have been absolutely void at law, and no action could have been maintained thereon in our courts, and such was the long-established policy of this state, and, unlike Massachusetts, she had not relaxed this rule prior to and at the time this attachment was levied. Is this state required,

out of a spirit of comity, to award a nonresident a remedy at war with her own policy, and one which she constantly denied to her own citizens? The supreme court of Rhode Island in *Hayden v. Store*, 18 R. I. 106, answered in the negative. That the law of the forum governs as to remedies in the enforcement of contracts, see also, *Pickering v. Fisk*, 6 Vt. 102; *Commercial Nat. Bank of Chicago v. Chicago, M. & St. P. R. Co.* 45 Wis. 172; *Leiber v. Union Pac. R. Co.* 49 Iowa, 688; *Denny v. Faulkner*, 22 Kan. 89; *Green v. Van Buskirk*, 72 U. S. 5 Wall. 807, 18 L. ed. 599; *Whart. Conf. L. § 121*; *Bank of United States v. Donnelly*, 83 U. S. 8 Pet. 362, 8 L. ed. 974; *Laird v. Hodges*, 26 Ark. 356.

A case very similar to this arose in Illinois. An action at law was brought against a married woman. She pleaded coverture at the time of making the contract and the commencement of the action. Reply: "Contract good by the laws of Iowa, where it was made, and a liability to suit as a *feme sole* in that state." Discussing the sufficiency of this reply, the supreme court of Illinois said: "A party seeking to enforce a contract valid by the laws of another state must avail of the remedy provided by our laws." "That part of the replication which alleges that, by the laws of the state of Iowa, a married woman could be sued alone on contracts concerning her separate property, did present an immaterial issue." But because, by the laws of Illinois, she could be sued alone, it was held that enough remained to make a good replication. *Halley v. Ball*, 66 Ill. 250. A different conclusion was reached in *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, although the court recognized the rule already stated, in these words: "Under this rule, we act in requiring the husband to be made a party defendant with the wife, as was done in the case at bar. While under the law of Kentucky, this married woman has had her disabilities removed, and can contract, sue, and be sued as a *feme sole*, we recognize and enforce in this state [Tennessee] so much of the foreign law as determines and fixes her liability,—in other words, the law of the contract; but in enforcing such liability in the courts of this state, if she is plaintiff, she must sue by next friend or with her husband, and, as defendant, her husband must be joined with her as a party." In other words, her status as a married woman, by the laws of Tennessee, still remained, and the remedies there given against a married woman controlled. That was a proceeding in a chancery court, and we are not sufficiently advised of the practice in that state to draw any conclusion as to its persuasiveness as an authority for the practice here invoked. The general principle announced is in harmony with the rule heretofore deduced. In *Gibson v. Sublett*, 82 Ky. 596, the supreme court of Kentucky held a married woman personally liable in Kentucky on a note executed in Louisiana, although, if she had made the note in Kentucky, her promise would have been void. The reasons for this decision are tersely stated by the court. They say: "And if, by the law of the place of the domicile of the husband, a married woman has a capacity to sue or to make a contract or to ratify an act, her acts so done will be held valid everywhere." *Story*, 25 L. R. A.

*Conf. L. § 66a*. "If, then, the contract is to be held valid and binding here because it is so in the state where it was made, it would seem to reasonably follow that her property here should be subject;" "for to hold that a valid and binding contract is not enforceable at any time nor in any manner is absurd." And the court consequently held "that the remedy provided for the satisfaction of judgments in Kentucky should be applied as though the judgment was against a *feme sole*." Entertaining, as we do, the highest respect for the court that decided this case, we do not think its reasoning convincing in that case. In our opinion, it has mingled the "*lex loci contractus*" with the "*lex fori*," which are distinct in their nature and obligation, and treats them as one. We do not think that many other courts have gone so far. The rule which recognizes the binding force of the contract where made has never gone to the extent of attaching to it the local remedies, and carrying them into another jurisdiction, but it is left to each nation and state to enforce such a contract according to its own laws.

As already said, when this action was brought, this court had, by uniform decisions, held that a married woman could not be sued by attachment in actions at law in Missouri. No such remedy was available in our courts in favor of resident creditors. Had any citizen of Missouri proceeded by attachment at law against this real estate on a contract made or to be performed in this state, no lien would have been created, and no valid judgment could have been rendered against Mrs. Buck, and no purchaser for value would have been affected; but, if plaintiff's contention is true, the fact that this claim originated in Dakota has changed all this, and his attachment is as valid as if Mrs. Buck was a single woman. But Mrs. Buck is still a married woman, and there was no such exception in our code of procedure in favor of contracts executed beyond our borders when this suit was brought, and an attempt to enforce such a distinction out of a spirit of comity would create endless confusion. A purchaser's rights ought not to depend upon the accidental circumstance of the place of the execution of the contract upon which the judgment is based. Our courts administer justice without distinction, according to the modes prescribed by the state, and those who seek them must take such remedies as are prescribed. An infant's contract may be good in Illinois, but, if he is sued in Missouri, he is proceeded against as an infant, by next friend or guardian. His status, for the purposes of the action, is determined by our laws in force when the suit is brought. It follows that the circuit court properly held that the proceedings by attachment against Mrs. Buck were void, and hence presented no obstacle to the purchase by Trout and Thompson, and its judgment is affirmed.

**Burgess, J.,** concurs.

**Sherwood, J.,** dissenting:

Lot No. 18, in block No. 9, in the town of Tarkio, furnishes the subject-matter for this litigation, which takes the form of an equitable proceeding to divest the title out of certain of the defendants, who had bought the equitable

interest in the lot of O. W. Buck and wife after the levy of the writ of attachment on the lot, plaintiff being the purchaser under such attachment proceedings, which were instituted in March, 1887, amended in June, 1889, so as to include two personal judgments rendered against Buck and wife, then residents of Dakota, and judgment duly rendered thereon after publication against the Bucks, as nonresidents, who were husband and wife, and sued as copartners in the original suit by attachment. Thompson and Trout, two of the defendants herein, purchased the interest of Buck on the 27th of July, 1889; abstracts of the attachment suit then being on file in the proper office. In June, 1890, Perkins, the holder of the legal title to the lot, made a deed to Trout and Thompson, the previous purchasers of the equitable title of Julia E. Buck, the wife, and her husband, O. W. Buck. Buck and wife and Trout and Thompson, defendants in the present proceeding, averred that Mrs. Buck being a married woman, the court in which the attachment proceeding was brought acquired no jurisdiction over her or her husband or the subject-matter in that suit. The answer also contained general allegations of denial of the averments of the petition, and plaintiff replied. The lower court found in favor of defendants, and plaintiff appeals. Other facts as necessary will be hereafter adverted to.

1. This record discloses the fact that the predominant question herein presented is whether a married woman, resident in Dakota, capable by the laws of that state of contracting as a *feme sole* in every particular, and of suing and being sued like any other person, can be sued in this state as a nonresident, and her lands attached to satisfy a debt. Having elaborately considered the authorities, *Mr. Justice Story* reaches the conclusion that: "Generally speaking, the validity of a contract is to be decided by the law of the place where it is made. . . . If valid there, it is by the general law of nations—*jure gentium*—held valid everywhere, by the tacit or implied consent of the parties. The rule is founded, not merely in the convenience, but in the necessities, of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse and commerce with each other. The whole system of agencies, of purchases and sales, of mutual credits, and of transfers of negotiable instruments, rests on this foundation." *Story*, Conf. L. § 242. Elsewhere the same eminent author says: "In regard to questions of minority and majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*—the law of the place where the contract is made or the act done." "Although foreign jurists generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract, yet the common law holds a different doctrine, namely, that the *lex loci contractus* is to govern." "If, by the law of the place of the domicile of the husband, a married woman has a capacity to sue or to make a contract or to ratify an act,

her acts so done will be held valid everywhere." *Id.* §§ 108, 241, 66a. From these premises, supported, as is needless to say, by abundant authority, let us deduce and apply the principles they enunciate to the facts heretofore set forth. This case must, then, be dominated by the law of Dakota. That law made Mrs. Buck, as to the contracts which resulted in the judgments obtained, a *feme sole* to all intents and purposes. By that law, the *feme* defendant made contracts which, being valid where made, became, *eo instanti*, valid everywhere, and capable of being enforced in like manner as in the state of their origin. Those contracts, thus made, and judgments obtained in Dakota, bore with them, wherever taken, the stamp of the status, capacity, and condition of the *feme* defendant conferred by the laws of that state; hence she is to be regarded, in reference to such contracts and judgments, as a *feme sole* in this state, with full capabilities and liabilities as such, and with none of the disabilities incident to coverture in this state. This must be so, or else the acknowledgment of the validity of the contracts would be but a barren and idle ceremony, conferring no benefits and affording no remedy; because if, in this state, Mrs. Buck be permitted to assert her coverture as a defense to such contracts, she thereby overthrows the force and effect of the law under which those contracts were made and those judgments recovered. We hold, then, that Mrs. Buck, as to such contracts, etc., already mentioned, occupies the attitude before this court of a *feme sole*, suable as such in every point and particular, as if she were discover. For this reason, our laws, which do not admit a recovery of a personal judgment against a *feme covert* in an action at law, do not apply, and were not intended to apply, to such a case, as will be more fully seen later on.

A number of well-considered cases support the views here expressed. Thus, in Kentucky a married woman is incapable of binding herself by contract except in a limited way as to necessities; but yet, in that state, a married woman and her husband, being domiciled in the state of Louisiana, where such contracts were valid, having executed with her husband a promissory note, it was ruled that the payee of such instrument could maintain an action on such note in the state of Kentucky against the *feme covert*, recover a judgment against her as a *feme sole*, and subject her general property in that state to the payment of such judgment. *Gibson v. Sublett*, 82 Ky. 596. In that case the principles announced by *Story* were referred to and followed, and it was there aptly and forcibly said: "If, then, the contract is to be held valid and binding here, because it is so in the state where it was made, it would seem to reasonably follow that her property here should be subject; for to hold that a valid and binding contract is not enforceable at any time, nor in any manner, is absurd. . . . In our opinion, whenever it is ascertained and determined, by judgment of court, that a contract made by a married woman in another state is valid and binding, as, according to the rule founded upon comity between the states, the contract in this case must be adjudged, the remedy provided for

the satisfaction of judgments should be applied as though the judgment was against a *feme sole* or a married woman invested with the rights and subject to the responsibilities of a *feme sole*." The point that no personal judgment was rendered against the married woman was not passed upon in that case, because not assigned for error; but the evident drift and intimation of the opinion sanction the rendition of such a judgment, and the quotation there made from *Hurt v. Grigsby*, 14 Bush, 542, and the reference thereto, set this point forth in a very clear light. In that case it appears that, by a statute of Kentucky, a decree of chancery in certain circumstances might be obtained conferring on a married woman the power to make contracts, sue, and be sued as a *feme sole*; and it was there said in reference to an instance where such power had been conferred: "Power to make a contract necessarily subjects the person possessing the power to the obligations legally incident to the contract made in the exercise of the power; and a married woman, authorized by statute to contract as a *feme sole*, is bound as a *feme sole* upon any contract she may make under the power, and is subject to all the remedies to which she would have been subject if unmarried." In that case it is worthy of remark, no change had occurred in the general laws of Kentucky respecting the method of procedure against married women. In North Carolina a married woman (with one exception, not necessary to be here adverted to) is incapable of binding herself by contract, nor is there any method of procedure provided for recovering a personal judgment against her; but, nevertheless, it has been held in that state that a promissory note executed by a married woman in the state of New York, where, by the late acts (1884), she could contract as a *feme sole*, could be sued in North Carolina, and such married woman being served with process in that state, a personal judgment could be rendered against her. *Taylor v. Sharp*, 108 N. C. 377. In a later instance in that state, where the note was executed by the *feme covert* in South Carolina, and being there valid, it was ruled that a personal judgment could be rendered against her. *Wood v. Wheeler*, 111 N. C. 281. Both of these cases proceed upon the theory that, the contract being valid where made, that validity attends it and determines the status, condition, and capacity of the maker, in the forum of another state, whose laws do not recognize the validity of such contracts, when made within the jurisdiction of such forum. A married woman, resident in Kentucky, and emancipated from the disabilities of coverture by a decree to that effect in a court of that state, executed, as surety of a firm of which her husband was a member, a promissory note, and it was held, in a suit instituted in Tennessee, that a judgment could be recovered against her on such note, and her property in that state sold for the satisfaction of the judgment thus rendered, though, by the *lex fori* there, no suits could ordinarily be maintained against a married woman there resident. *Robinson v. Queen*, 87 Tenn. 445, 8 L. R. A. 214. In Illinois the same principle has been enforced. Thus, a *feme covert*, resident in that

state, executed a promissory note in the state of New York, whereby, by the statutes and adjudications of that state, she only charged her separate equitable estate. Subsequently, she and her husband, who had joined in the execution of the note, were sued in Illinois on the note, in an action at law, and judgment recovered; but it was held, in reversal of the judgment, that as her contract, by the law of the place of contract, was only of an equitable character, the only recovery which could be had against her was by a proceeding in equity, notwithstanding, by the statutes of Illinois then and theretofore in existence, a married woman could be sued at law, either with or without her husband, judgment recovered against her, and her property sold to satisfy the same. *Burchard v. Dunbar*, 82 Ill. 450, 25 Am. Rep. 334. The clear corollary from this case is that had the *feme*, by the statutes of New York, bound herself by the execution as a *feme sole*, a legal judgment might have been recovered against her in the state of her residence. In other words, her status towards the note and her capacity respecting the same, as well as the obligation of the contract, were determined by the *lex loci contractus*. In Massachusetts a married woman resided. By the statutes of that state, at that time, she was incapable of contracting. She made, however, a written guaranty of her husband's debt, and the instrument was forwarded and delivered in Maine, where such contracts were valid and binding, and where they could be enforced in the same manner "as if she were *sole*." Subsequently, the statutes of Massachusetts were so amended that a married woman could contract and could be sued. In the particular instance referred to, the *feme covert* who gave the guaranty was sued in Massachusetts, and it was held, after an elaborate and learned discussion, in which the principles heretofore quoted from Story as to the force and effect of the law of the place of contract were distinctly recognized, that the action could be maintained. *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241. Of the correctness of this ruling there would seem to be no doubt, as the statutes of Massachusetts, at the time of action brought were in substantial conformity with those of Maine. In *Spearman v. Ward*, 114 Pa. 634, a married woman, residing in Ohio, executed certain promissory notes there, and was afterwards sued upon them in Pennsylvania, where she was incapable of contracting. In that case the action failed, because it did not appear that the *feme* defendant was capable of making the notes under the laws of Ohio, the court in that case saying: "It was conceded upon the argument that if, by the law of the state of Ohio, the common-law disabilities of married women have been removed, and the defendant is clothed with a general power of contracting the same as a *feme sole*, the plaintiff would be entitled to obtain a judgment against her here, which could be enforced by execution as in other cases. It is very certain that if the defendant had carried on business in this state, and had given the notes here, there could be no recovery. The reason is that the note or other obligation of a married woman here is void, as at common law. . . . The statutes of the state of Ohio attached to the special ver-



dict do not confer upon a married woman a general power of contracting. They do not authorize married women to enter into general business, and bind themselves personally for notes given." This language bears with it the clear recognition of the doctrine that, had the *feme* defendant been able in Ohio to bind herself generally by the notes sued, this would have been a sufficient basis in Pennsylvania for a general judgment and general execution against her, though not allowable against women resident in that state. This view of that case is taken in the subsequent one of *Evans v. Cleary*, 125 Pa. 204. In that case a married woman, residing in Illinois, contracted a debt which she was authorized by the statutes of that state to contract as if she was unmarried, and which debt could be enforced against her separately. Action was afterwards brought on this debt in Illinois, and judgment recovered against the contracting *feme*. Subsequently, a suit was begun in Pennsylvania on the judgment thus obtained, against both the husband and the wife, dismissed as to the former, and judgment as to the latter. This judgment was affirmed, the supreme court holding that, being individually liable where the contract was made and the judgment recovered, her status remained unchanged in the state where the suit was brought, and that joinder of the husband was unnecessary. In a subsequent case, in the same state, an action was brought on a bond executed by a married woman in the state of Delaware, where she was liable personally on her contract, she being then resident in Pennsylvania. She resisted the action, one ground being that, owing to her disability, the contract could not be enforced against her personally; but thereupon it was held that judgment was properly recoverable against her in the state of Pennsylvania, the supreme court remarking: "The remedy and the effect to be given to any existing disability in the maker of the instrument are also to be determined by the law of the place of payment. *Hill v. Chase*, 148 Mass. 129. . . . The courts of this state will administer in such cases the *lex loci contractus* as against one under disability. *Evans v. Cleary*, *supra*. . . . We have therefore a contract made, and, in legal effect, delivered in Delaware, for the purchase of real property in that state, upon which, according to the laws of that state, the defendant is personally liable, notwithstanding her coverture. In passing upon it here our courts will secure to her the advantages, and enforce against her the obligations, of her contract in accordance with the laws of that state." *Baum v. Birchall*, 150 Pa. 164. In *Wright v. Remington*, 41 N. J. L. 48, it was held that an ordinary action might be maintained against a married woman alone on a contract made by her in Illinois, where she was capable of contracting as if unmarried, notwithstanding there was no such statute in New Jersey, and that the enforcement of such a contract in New Jersey was not repugnant to the general interests of the citizens or of the policy of that state.

From these authorities, the rule is readily deducible that, although the *lex fori* must apply as to the remedy, yet it belongs to the *lex loci contractus* to interpret the contract, ascer-

tain its validity, the nature of its obligations, the capacity and *status* of the contracting party; and, having done this, the *lex fori* applies the remedy in accordance with the legal status of the party sued, as previously determined by the law of the place of the contract. Thus, if a *feme covert* is sued in a jurisdiction where she is incapable of contracting, on a contract executed in a country where she is capable, by the form of the action brought against her, she will be treated and dealt with as a *feme sole*. In no other way, indeed, could validity, force, or effect be given to contracts made in another jurisdiction, unless the courts, when appealed to to enforce such contracts, aimed to do so in such a manner as to give effect to them according to the law which gave them validity. *Camfrangus v. Burnell*, 1 Wash. C. C. 840, Fed. Cas. No. 2,842. Bishop says: "A court, called upon to enforce a contract made in another state or country, tests its validity by the foreign law, except where domestic policy forbids. Not that in any proper sense the foreign law controls the tribunal; but, being duly proved, it is, by that portion of its own law which is termed 'international,' made domestic for the purpose." Bishop, *Cont. Enlarged ed.* § 1871. See also, *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 589, 10 L. ed. 808; *Story, Conf. L.* §§ 88, 89, 99.

2. If the foregoing observations be taken as correct, no difficulty is encountered in holding that the *feme* in this case was properly proceeded against by attachment. If her status by the law of Dakota was, respecting the contracts in question, that of a *feme sole*, attachment would necessarily run against her, as well as against any other nondisabled person. In two of the cases already cited (*Robinson v. Queen* and *Evans v. Cleary*, *supra*), the proceedings were instituted by attachment. A different conclusion as to the right to sue a married woman by attachment has been reached in *Rhode Island (Hayden v. Stone)*, 18 R. I. 106; but that case is entirely consistent with itself, for there it is declared that no suit at all could be there maintained against a married woman, even on a promissory note executed by her in Massachusetts, and conceded to be valid by the laws of that state.

3. Taking it, then, for granted that the *feme* defendant could be sued by attachment, and the writ of attachment being levied on the interest of herself and husband in the litigated lot, and due notice of the pendency of the attachment having been filed in the proper office prior to the purchase by Trout and Thompson, it follows that plaintiff's title to the lot purchased at the attachment judgment sale will prevail over that of defendants Trout and Thompson, who purchased the lot of Buck, as the representative of his wife, and subsequent to the levy of the attachment writ, and subsequent to notice given of the attachment lien, took subject thereto; and as an abstract of the attachment was duly filed, as required by section 543, Rev. Stat. 1889, they cannot successfully deny that they had notice of the levy of the writ notwithstanding they may have had no actual notice thereof; and that Mrs. Buck was a partner in the firm of Oliver W. Buck & Co., that such firm was indebted as stated, and that she was not a resident of this state when

the attachment suit was brought, was settled and determined by the judgment in that suit as effectually as if she had been personally served with ordinary process. In *Irvine v. Leyh*, 102 Mo. 200, the reporter makes the court say that notice by publication was less effectual than by personal service; but this was a mistake, as three of the members of the court, the writer of this opinion among the number, took the contrary view, to wit, that a person notified by publication is as much notified as those served within this state with personal process by an officer. The only difference, in legal effect, between the two methods of ser-

vice, so far as necessary to mention them here, would be, in the former a bill of statutory review would be allowable, and in the second no such bill would lie. It does not appear that the sheriff notified the actual tenants of the property, but this, under the ruling in *Durosett v. Hale*, 88 Mo. 846, would not invalidate the levy.

For these reasons, there was error in dismissing plaintiff's petition. The foregoing was tendered as the opinion of the court, but, as my associates entertain and express different views, I file this as my dissent.

## NORTH CAROLINA SUPREME COURT.

ARMSTRONG, CATOR & CO., *Appts.*,  
v.

N. W. BEST and Wife.

(112 N. C. 52.)

1. A contract for the sale of goods, made by an order given by a married woman in North Carolina to a firm in Maryland, and its shipment of the goods in Maryland, is a Maryland, and not an North Carolina, contract.
2. A contract for the purchase of goods, made in another state where it is valid, by a married woman resident in North Carolina, where the common-law disability of married women still obtains, and their promises under the policy of the state are void, and no power exists to proceed to judgment against them *in personam*, will not be enforced in the latter state.

(March 14, 1888.)

**A**PPEAL by plaintiffs from a judgment of the Superior Court for Wayne County in favor of defendants in an action brought to recover the price of goods sold and delivered to defendant L. C. Best, the wife of defendant N. W. Best. *Affirmed*.

"The case was submitted on the following agreed statement of facts: It is agreed that at the time the goods, for the purchase money of which this action is brought, were bought, the plaintiffs were merchants doing business in the city of Baltimore, in the state of Maryland, and the defendant L. C. Best was carrying on the trade of milliner and merchant in the city of Goldsborough, state of North Carolina, in her own name, as a licensed trader. That said goods were ordered by the defendant L. C. Best of the plaintiffs, and they were shipped by the plaintiffs to her, from their place of business, in the city of Baltimore, and were to be paid for by defendant L. C. Best at the end of sixty days. That at that time, and since, the defendant was, and is, a citizen and resident of the state of North Carolina, and a married woman, living with her husband, the defendant N. W. Best. The goods have not been paid for, except the credits set out in the accounts filed, and those not paid

for were worth the agreed price of \$212.48. That the defendant has never been a free trader under the statutes of North Carolina, and her husband has never consented in writing, to the order of said goods, and to the sale thereof."

*Mr. W. C. Munroe* for appellants.

*Mr. W. R. Allen* for appellees.

*Shepherd, Ch. J.*, delivered the opinion of the court:

If the contract which is the subject of this action was made in this state, it is well settled that it would be void, by reason of the common-law disability of the *feme* defendant to make any contract whatever, upon which a personal judgment can be rendered against her, except in the cases provided by statute. *Pippen v. Wesson*, 74 N. C. 437; *Dougherty v. Sprinkle*, 88 N. C. 300; *Baker v. Garria*, 108 N. C. 218; *Flaum v. Wallace*, 103 N. C. 296; *Parthing v. Shields*, 106 N. C. 289.

The plaintiffs, however, insist that the contract was made in the city of Baltimore, Md., their place of business, where they accepted the proposal of the defendant by shipping the goods according to her order. In this they are correct; for, if a contract is completed in another state, "it makes no difference, in principle, whether the citizen of this state goes in person, or sends an agent, or writes a letter, across the boundary line between the two states." *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241.

As was said by *Lord Lyndhurst*: "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison v. Mills*, 1 Dow & C. 342. So, if one in New York orders goods from Boston, "either by a carrier whom he points out, or in the usual course of trade, this would be a completion—a making—of the contract; and it would be a Boston contract, whether he gave no note, or a note payable in Boston, or one without express place of payment." 2 Parsons, Cont. 586.

The contract, then, being a Maryland contract, it is next insisted that it is one which a *feme covert* could have made in that state, and therefore enforceable in the courts of North Carolina. We are by no means certain that the present contract is a valid one,

**NOTE.**—As to the enforceability of the contracts of a married woman outside of the state in which they are lawfully made, see note appended to the case immediately preceding this one.

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according to the laws of Maryland, as the statute of that state seems to recognize the legal capacity of a married woman only through the extent of contracting with reference to property acquired by her "skill, industry, or personal labor." Assuming, however, that it is a valid contract in Maryland, we will proceed to the examination of the question whether it should be enforced by the courts of this state.

It is well settled that the law of one state has, *proprio vigore*, no force or authority beyond the jurisdiction of its own courts, and that whatever effect is given to it by the courts of foreign countries or other states is the result of that international comity (more properly called "private international law") which is the product of modern civilization. *Hornthal v. Burwell*, 109 N. C. 10, 18 L. R. A. 740. It is left to each state or nation to say how far it will recognize this comity, and to what extent it will be permitted to control its own laws. It has, however, been very generally settled that all matters bearing upon the execution, the interpretation, and the validity of a contract are to be determined by the law of the place where the contract is made, and, if valid there, it is valid everywhere. *Taylor v. Sharp*, 108 N. C. 377. An exception is maintained by some of the continental jurists as to the capacity of a contracting party, and they generally hold that the incapacity of the domicil attaches to and follows the person, wherever he may go. We remarked in *Taylor v. Sharp*, *supra*, that this was not considered by Mr. Justice Story (Conf. Laws, 103, 104) as the doctrine of the common law; and we also stated the conclusion of Gray, Ch. J., in *Milliken v. Pratt*, *supra*, that the general current of the English and American authorities is in favor of holding that a contract which, by the law of the place, is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of the domicil, be deemed capable of making it. The proposition, though denied by Dr. Wharton as to infants and *femes coverti* (Conf. L. 113, 118), seems to be generally accepted in this country, in so far as it relates to the enforcement of contracts in courts other than those of the domicil. If, for example, the plaintiffs were suing upon the present contract in the courts of Maryland, the defendant could not, it is thought, avail herself of the incapacity of her domicil, but the *lex loci contractus* would prevail. But quite a different question is presented when the action is brought in the forum of the domicil. In such a case a very important qualification of private international law is to be considered: and this is, that no state or nation will enforce a foreign law which is contrary to its fixed and settled policy. In *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274, Chief Justice Taney, speaking for the court, said: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests." To the same effect is the language of Story, — 35 L. R. A.

that no state will enforce a foreign law if it be "repugnant to its policy, or prejudicial to its interests." Conf. L. 87. That this qualifying principle is applicable to cases like the present is manifest, not only by reason and necessity, but also by the decisions of other courts. Even in *Milliken v. Pratt*, *supra*, in which the *lex loci contractus* is pushed to the extreme limit, it is suggested that where the incapacity of a married woman is the settled policy of the state, "for the protection of its own citizens, it could not be held by the courts of that state to yield to the law of another state, in which she might undertake to contract." In *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, the contract was made by the *feme* defendant in Kentucky, where she resided, and under whose laws she was capable of contracting. An action was brought in Tennessee, and the court held, as we did in the similar case of *Taylor v. Sharp*, *supra*, and *Wood v. Wheeler*, 111 N. C. 232, that the plaintiff was entitled to recover. The court, however, said: "If this were a suit against a married woman, a citizen of this state, on a contract made out of the state, there would be much force in the insistence of the defendant." In *Johnston v. Gentry*, 11 Mo. App. 323, it was held that where a married woman, having a separate estate in land in Missouri, makes a contract in another state, her capacity to make the contract, and its validity, are to be determined by the law of Missouri, in a suit in a Missouri court to enforce such contract. In *Louisiana Bank v. Williams*, 46 Miss. 618, 12 Am. Rep. 319, the contract was made in Louisiana, where it would have been valid against the *feme* defendant. The suit was brought in Mississippi, the place of her domicil, and under whose laws the contract was void by reason of her coverture. The opinion of the court is very elaborate, and, although the special character of the Louisiana law is referred to, it is believed that its reasoning is of general application. The court said: "It is the prerogative of the sovereignty of every country to define the conditions of its members—not merely its resident inhabitants, but others temporarily there—as to capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid or not, in the forum of his domicil, as they may infringe or not its interests, laws, and policies." After speaking of the separate estate of the wife, and the statutes prescribing how it may be charged, the court, referring to the foreign plaintiff, says: "But he must satisfy the court that his debt was such a charge upon her estate, or its income, as she had the power to make; otherwise, it would be a violation of the tenure, the conditions, of her title, to allow him to subject it. But the creditor may say: 'I cannot bring this debt within the terms defined by your law. Nevertheless it was such a contract as a married woman could make, by the law of Louisiana. Comity requires your courts to treat the contract precisely as Louisiana would, and I demand a judgment against the wife.' 'No,' says the court, 'you cannot get here

any fruit of a judgment. There is nothing subject to its payment, and our law affords no remedy against a married woman in any of its courts,—law or equity,—except through a property which she has, and which must be pointed out by the creditor. We know of no such thing as a personal obligation, aside from, and independent of, a property which may discharge it.”

In North Carolina it has been conclusively determined that the common-law disability of a *feme covert* still obtains, and that, except in the cases provided by statute, her promise, as was said by Ruffin, J., is “as void as it ever was, with no power in any court to proceed to judgment against her *in personam*.” *Dougherty v. Sprinkle, supra*. The constitution and laws made in pursuance thereof protect her separate estate, and prescribe the manner in which she may dispose of or charge it, and the assent of the husband is generally necessary. This brief reference to our laws in respect to married women is sufficient to show that the enforcement of the present contract is wholly repugnant to our domestic policy, as well as prejudicial to the interests of our citizens. It is not pretended that the defendant has attempted to charge her separate estate in any manner provided by our laws: and to hold that she may subject it to execution upon a personal judgment, by reason of a promise made during a short visit to another state, or, as in this case, by a simple order for goods, would afford an easy method of charging her property, in contravention of the public policy and laws of the domicile. It is further to be observed that in North Carolina, as a general rule, the written assent of the husband is necessary in order to give any effect whatever to her obligations, yet this wholesome

provision may easily be evaded, even in the very presence of the husband, and despite his protest, by a simple correspondence by the wife with parties in another state, which may technically amount to a foreign contract. In this way she could indirectly dispose of or charge all of her real or personal property, entirely freed from the restraint of her husband, or the methods prescribed by the *lex rei sitae*. We cannot assent to the proposition that a foreign law thus introduced, and so utterly subversive of the laws regulating a large amount of property within the limits of this state, will be recognized and enforced by our courts. The courts of our state have perfect jurisdiction over all personal and real property within its limits, belonging to the wife; and, if our laws in respect to the manner in which it may be charged conflict with those of another state, it cannot be made a question in our own courts as to which shall prevail. It is certainly competent for any state to adopt laws to protect its own property, as well as to regulate it; and “no nation,” says Story, “will suffer the laws of another to interfere with her own, to the injury of her citizens. That whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions. . . . That whenever a doubt does exist the court which decides will prefer the laws of its own country to that of the stranger.” Conf. L. 28.

For the reasons given, we cannot recognize the present contract as an enforceable one in our courts. We think his honor was correct in his ruling that the plaintiffs were not entitled to recover.

*Affirmed.*

## UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Amand LEVY *et al.*, *Appts.*,

*v.*

Henry WAITT *et al.*

(61 Fed. Rep. 1008.)

1. **Uninterrupted and innocent use without question for five years of the local geographical name “Blackstone”** as the name of cigars will not be judicially interfered with as an infringement in favor of one who may have first used the name for cigars, but whose use of it on cigars offered for sale has been intermittent, with long lapses.
2. **As against innocent parties who have through a period of years built up an extensive business in goods bearing a certain name, the fundamental basis of a right of action for violation of a trademark in the use of such name is a prior appropriation of the particular mark by occupying the**

market so that the public has been or will be defrauded by allowing another to use it, and the mere fact of a prior discovery or selection of the name is insufficient.

(May 15, 1894.)

**A**PPEAL by complainants from a decree of the Circuit Court of the United States for the District of Massachusetts in favor of defendants in an action brought to enjoin the alleged infringement of the trademark “Blackstone” as applied to cigars. *Affirmed.*

The facts are stated in the opinion.

Argued before Putnam, *Circuit Judge*, and Nelson and Webb, *District Judges*.

*Messrs. George L. Huntress and Morris S. Wise* for appellants.

*Messrs. Payson E. Tucker and George C. Abbott* for appellees.

*Putnam, Circuit Judge*, delivered the opinion of the court.

The Reverend Mr. Blaxton, or Blackston, suggested a name which has become a favorite one for local geographical uses. A well-known street in Boston, on which two of the parties named in the controversy in this case

**NOTE.**—In connection with the above case as to the use of geographical names as trademarks, see *Laughman v. Piper* (Pa.) 5 L. R. A. 599; *Gato v. El Modelo Cigar Mfg. Co.* (Fla.) 6 L. R. A. 823; *New York & R. Cement Co. v. Copley Cement Co.* (C. C. E. D. Pa.) 10 L. R. A. 833.

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conducted their business; a river, partly in Massachusetts and partly in Rhode Island (not of the first order, but so lined with manufactories and villages that it is well known throughout the United States); a canal following the line of that river (now almost a tradition, but formerly as well known as the river itself); a considerable town in the former state; and many local corporations,—bear the name of “Blackstone.” From the best view of the facts of this case which could be taken for all, A. P. Holley & Son, Waitt & Bond, the defendants below, and Levy Bros., the complainants below, each without the knowledge of the acts of the others, and contrary to the caution of the courts, usually disapproving of the use of widely known geographical names as trade-marks, of which the last example of importance is *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 87 L. ed. 1144, adopted for cigars the word “Blackstone.”—A. P. Holley & Son, for the local market at and about Woonsocket, in the state of Rhode Island; Waitt & Bond, originally for Boston and the New England states; and Levy Bros., originally for New York and the west. It is not necessary for the court to decide now whether, under the circumstances of this case, this use of a geographical name for the several limited markets described could be protected by the law, as was done in *Mousson v. Boehm*, L. R. 26 Ch. Div. 398. Nor, in the view we take, need we consider the origin of the alleged rights of A. P. Holley & Son.

Levy Bros. claim priority. In 1878 they manufactured, on a special order, 5,000 cigars, with some samples, applying to them the name in question. These were intended for one Thompson, who was then doing business on Blackstone street, in Boston, and who ordered the cigars either through A. R. Mitchell & Co., of Boston, or from them; A. R. Mitchell & Co. being then either the selling agents of Levy Bros., or the only parties at Boston to whom Levy Bros. made sales of their goods. It is claimed that on this occasion this use of the name was suggested by Thompson, and that it belonged to him, rather than to Levy Bros. Thompson did not accept the cigars, and they were soon after sold by A. R. Mitchell & Co., either on their own account, or on account of Levy Bros. In the view we take of the law of trade-marks, it is not necessary to determine either of the foregoing alternative propositions, some of which came under consideration in the important case of *Paine v. Danville & Sons' Breweries* [1893] 2 Ch. 567. No further sales of any cigars with this name were made by Levy Bros. until 1884. They claim that in the interval they kept samples on hand; but, as the cigars were not actually put on the market during the intervening period, the court considers this inconsequential, under the rules which we will hereafter state. It is undisputed that A. P. Holley & Son sold cigars under the trade-mark of “Blackstone” as early as 1881, in and about Woonsocket; and in 1884 Levy Bros. sold, either to or through A. R. Mitchell & Co., a lot of 5,000 cigars, ordered by one Cook, who also lived at Woonsocket, undoubtedly

for sale in competition with the cigars of A. P. Holley & Son and in their market. The rules which we will hereafter explain make it clear that the transaction of 1878 did not establish in Levy Bros. an exclusive right, against Waitt & Bond, to the trade-mark now in dispute, and that, as the sale of 1884 occurred after the long interval of six years, it had only the effect of an incipient transaction. Moreover, as it operated as a direct interference with the market of A. P. Holley & Son, which had certainly been established as early as 1881, it was ineffectual for that reason, if for no other. Another lot of 5,000 cigars was manufactured during the same year (1884) by Levy Bros., intended for the same Cook, but they were not taken by him; and they remained in the hands of A. R. Mitchell & Co., undisposed of, until some time between the beginning of May, 1885, and the latter part of July, 1885, when they were sold by them. At the time of this sale, Waitt & Bond had already put on the market their own cigars with the name “Blackstone.” Subsequent to the sale in 1884, Levy Bros. claim to have kept samples on hand, but as to that claim we make the same observations which we have made with reference to the claim touching samples between 1878 and 1884.

In April, 1885, Waitt & Bond, who were large manufacturers of cigars, doing business on Blackstone street, in Boston, put on the market cigars of their own manufacture, with the name “Blackstone,” in ignorance of what had been previously done by Levy Bros. touching the same name, and in good faith. This was not a mere experiment on the part of Waitt & Bond, but was continuously followed by extensive sales and extensive advertisements, the sales amounting in 1885 to 412,142 cigars; in 1886, to 1,151,252; in 1887, to 1,488,136; in 1888, to 2,731,560; in 1889, to 5,886,096; in 1890, to 8,291,366. As already stated, their market was in Boston and New England. In 1889, Levy Bros. commenced the continuous manufacture and sale of cigars under this name, and have manufactured and sold the same from that time to the present in very considerable amounts, mainly in New York and the west. Their bill in the present case was filed November 12, 1890, and contains the following allegations:

“And the complainants further say that, until they found a market for their said genuine Blackstone cigars in the city of Boston, the complainants had never known or heard of a cigar other than their own being sold under the name of, and known as, the ‘Blackstone Cigars;’ but in the summer of 1889 the complainants learned for the first time that a cigar purporting to be made by the defendants was being sold throughout New England, and particularly in the city of Boston, under the name of, and known as, the ‘Blackstone Cigar.’ Thereupon, the complainants at once caused an investigation to be made, and found, and therefore charge, that subsequent to the adoption by the complainants of the name or mark of ‘Blackstone Cigars,’ ” etc.

The record shows that on July 26, 1889,

Levy Bros. wrote Waitt & Bond a letter, which, with the correspondence which followed, would be sufficient, if their rights were in other respects perfect, to lay a claim as of that date.

On the best theory of the facts for the complainants, the case stands as follows: In 1878 complainants manufactured and sold one lot of 5,000 cigars, and some samples, under the name in question; in 1884, another lot of 5,000; another lot in 1885, after Waitt & Bond commenced the manufacture and sale under the same name and no more, proved to the satisfaction of the court, until 1889. Meanwhile, in April, 1885, Waitt & Bond commenced the sale and manufacture under the name in question, and carried on the same continuously and extensively, as already explained. If there was any suggestion that Waitt & Bond knew the facts as shown by Levy Bros., and had surreptitiously made use of a name which they were well aware Levy Bros. claimed as their own, although they had not put it on the market, except as stated, there might be some ground for an equity against Waitt & Bond; but we believe no case can be found where, with intermittent offers of merchandise bearing a certain name, with such long lapses on the one side, and on the other the uninterrupted and innocent use of the same name for five years without question, and a consequent growth of an extensive and valuable business, the equity courts have interfered in favor of the former against the latter. The extensive dealings of Levy Bros., together with the fact of their relations with A. R. Mitchell & Co., whatever they were, making, through all these years, large sales of the cigars of Levy Bros. in the city of Boston, raise such a violent presumption against Levy Bros. as to the probability of their knowledge of the course of trade of Waitt & Bond touching this cigar as renders it difficult for this court to accept as true the claim that Levy Bros. were ignorant thereof, and did not acquiesce in it. However, we do not intend to rest this case on mere presumptions, on the doctrine of laches, or on that of abandonment, which latter was so fully argued. We rest it on the conclusion that Levy Bros. never acquired any right, sufficient to enable them to assert it to the detriment of any one using the name "Blackstone" under the circumstances, and at the time, under and at which it has been used by Waitt & Bond.

It seems to have been assumed in the discussions of this case that the common-law right to a trade-mark comes more from selection or discovery than from actual occupation of the market. Browne on Trade-Marks, at various points, is relied on; and, among other expressions found therein, the following, in section 52, is stated as though it constituted the whole rule, and required no limitation: "That is, how long does it take to adopt it? The answer is obviously this: The moment one who has selected a symbol to indicate his merchandise applies the mark to his goods, the act is complete. The avowal of his intention to adopt, his registration of the mark, and notice to the whole world, do not constitute adoption; but apply

the mark to the articles for sale, and, *eo instanti*, the act is complete."

It may be that, according to the letter of this citation, the selection of the name "Blackstone," with a single sale, would have been sufficient to confirm in Levy Bros. the exclusive right to its use; and this independently of all questions which might arise from the fact that A. P. Holley & Son, Waitt & Bond, and Levy Bros. were practically occupying different markets. But this is not the law. The right to a trade-mark at common law must not be confused, as it too frequently is, with the *prima facie* right existing under registration statutes. It arises to such a limited extent from the mere matter of selection or discovery of the name or symbol used that this may be of trivial consequence. A singular illustration of this fact is found in *Siebert v. Findlater*, L. R. 7 Ch. Div. 801, where, as applied to Dr. Siebert's bitters, the word "Angostura," indicating the place of their origin, was not selected by him as his trade-mark, but, instead thereof, the words "Aromatic Bitters," to which he added a statement that the bitters were prepared by him at Angostura. The public, however, applied to them the words "Angostura Bitters," so that, by the act of the public, those words became the usual designation of the article, which the court protected in the case referred to. In the well-known *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550, in which the court held the first trade-mark registration statute to be unconstitutional, it said (page 94): "The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. It is often the result of accident rather than design," etc.

Other positive expressions follow on the same page.

The opinion of *Vice Chancellor Sir. W. Page Wood*, in *Collins Co. v. Brown*, 8 Kay & J. 428, is a very good compendium of the common law of trade-marks. So far as the case at bar is concerned, the vice-chancellor expresses the principles and limitations of that branch of the law in the following words (page 427): "The simple question in these cases is, Has the plaintiff, by the appropriation of a particular mark, fixed in the market where his goods are sold a conviction that the goods so marked were manufactured by him; and if so, and if no one else has been in the habit of using that mark, another man has not the right to use that mark, so as to commit the fraudulent act of palming off his own goods as being the goods of the person who is known to have been in the habit of using it."

Many authorities could be cited, illustrating and approving these rules, and with them the principle that it is a fundamental basis of a right of action for the violation of a trade-mark that the public has been defrauded, or may be. It is frequently said that private rights in a trade-mark are only incidental to the prevention of public fraud. This peculiarly illustrates the force of the truth that, prior to the use of the name "Blackstone" by Waitt & Bond, Levy Bros.

had neither made any appropriation, nor fixed in the market any conviction on the part of the public, within the terms of the citation from *Vice Chancellor Wood*,—especially, not to such an extent that there was any possibility of the public being defrauded by others' use of the name. Of course, we do not determine whether, if there had been by one person a willful use of a name which had been in good faith selected by another, and experimentally put on the market, or even put on the market at long intervals, as

in the case at bar, equity would not interfere, or what, under the other circumstances of this case, would have been the result, if the sales by Waitt & Bond had been only experimental; but as against innocent parties, who have, through a period of years, built up an extensive business, it is clear that Levy Bros. had not, on any view of the facts, brought themselves within the law. It is therefore plain that the conclusions of the circuit court were correct.

*The decree of the Circuit Court is affirmed.*

## CALIFORNIA SUPREME COURT.

MILLBRAE CO., *Appt.*

H. H. TAYLOR *et al.*, *Respts.*

(.....Cal.....)

1. The use as a trade-name by a milk dealer of the name of a well known ranch cannot be protected in equity, where the milk which he sells is not from that ranch, even if it is of a superior quality.
2. A contract by the owner of a ranch called "Millbrae," on division of business with a partner in the milk business who had no interest in the real estate, to furnish the latter a supply of milk from that ranch daily for at least one year does not convey the exclusive right to the use of the name "Millbrae" in the milk business so as to prevent the owner of the ranch from using the name after the other party has ceased to buy milk from that ranch.

(June 27, 1894.)

**A** PPEAL by plaintiff from a judgment of Superior Court for the City and County of San Francisco in favor of defendants, and from an order denying a motion for a new trial in an action brought to enjoin the defendants from using a trade-name which was alleged to belong to the complainant. *Affirmed.*

The facts are stated in the commissioner's opinion.

*Messrs. Wheaton, Killoch & Kierce*, for appellant:

This is not a "trade-mark" case, it is a "trade-name" case.

A thing may be a trade-name for one person, as indicating his business, and a trade-mark for another who has affixed it to his merchandise as such.

Browne, Trade-Marks, §§ 91 *et seq.*

The distinction is especially important in those cases wherein the court, though declining to sustain a claim to the exclusive use of a symbol or word, yet will restrain an unlawful interference with it in connection with the good-will of a business.

Browne, Trade-Marks, § 521.

What was it which the partners mutually

agreed was of the value of \$4,000, and which Green & Green took at those figures?

It was the "good-will" of the trade of the milk routes.

The good-will of a business is the expectation of continued public patronage.

Cal. Civil Code, 992.

By this decision the respondents are sustained in an attempt to deprive appellant of the benefit of the use of a trade-name which formed part of the good-will of the milk route business "taken over" by appellant's vendors.

The use of the term "Millbrae" as a trade-name, was and is an essential and vital part of the good-will of the trade of the San Francisco routes.

The name under which a valuable business is conducted has always been considered an important element in its good-will.

*Note to Barber v. Connecticut Mut. L. Ins. Co.* 15 Fed. Rep. 318.

Courts of equity will protect a party in the use of a name of an inn, hotel, or other place of business, where the sign or name is simulated so as to deceive, or is calculated to deceive customers. The adjudged cases proceed solely on the ground of a valuable interest acquired in the good-will of the trade or business.

Browne, Trade-Marks, §§ 95, 528; *Howard v. Henriques*, 8 Sandf. 725; *Osborne v. Douglas*, Johns. V. C. (Eng.) 187; *Sebastian*, Trade-Marks, 2d ed. 226.

The use of the word "Millbrae" upon wagons running over the routes identified them, and a rival adopting the same name would inevitably invade the business of the routes.

*Knott v. Morgan*, 3 Keen, 218.

One who sells the good-will of a business thereby warrants that he will not endeavor to draw off any of the customers.

Civil Code, § 1776.

The vendor of a business and good-will may set up a business similar, but not identical, with the one he has sold; but he must not solicit his old customers, either to deal with him or to refrain from dealing with his vendee, else he will be enjoined.

*Munsey v. Butterfield*, 183 Mass. 492; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811; *Bergamini v. Bastian*, 85 La. Ann.

**NOTE.**—For trade-name as part of the good-will of a business, see *note to Vonderbank v. Schmitt* (La.) 15 L. R. A. 423; *Fish Bros. Wagon Co. v. Fish* 25 L. R. A.

(Wis.) 16 L. R. A. 453; *Le Page Co. v. Rustia Cement Co.* (C. Q. App. 1st C.) 17 L. R. A. 354; also *Watkins v. London* (Minn.) 19 L. R. A. 226.

60, 48 Am. Rep. 216; *Labouchere v. Dawson*, L. R. 18 Eq. 332; *Ginesi v. Cooper*, 42 L. T. N. S. 751; *Crutwell v. Lye*, 17 Ves. Jr. 341a; *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 750; 2 Lawson, Rights, Rem. & Pr. § 687.

The use of a trade-name is protected by courts of equity, even where there has been no conveyance and warranty by an infringing party.

*Browne*, Trade-Marks, 91, 528, and cited cases; *Howard v. Henriques*, 8 Sandf. 725; *Woodward v. Lazar*, 21 Cal. 448, 82 Am. Dec. 751; *Howe v. Searing*, 10 Abb. Pr. 264; *Churton v. Douglas*, Johns. V. C. (Eng.) 174; *Barber v. Connecticut Mut. L. Ins. Co.* 15 Fed. Rep. 312; *Myers v. Kalamazoo Buggy Co.* *supra*.

The trade-name of a milk route business was a proper subject of sale.

Cal. Pol. Code, § 3199; *Russia Cement Co. v. Le Page*, 147 Mass. 206, and cited cases.

If a partner sells his share of the joint property and effects he certainly sells his share of so much of the good-will of the business as is attached to the property and effects, and goes with them to the purchaser.

*Parsons*, Partn. 8d ed. 409; *Blackwell v. Durham*, Am. Trade-Mark Cas. 40; *Menendez v. Holt*, 128 U. S. 522, 32 L. ed. 528.

Under the agreement of dissolution and division of assets, the appurtenances and good-will of the business of the routes became the property of Green & Green as much as the cows at the farm became the property of Mills.

*Cox*, Manual Trade-Mark Cases, case 202.

Whatever rights respondents may have at their farm, they have no right to interfere with the good-will of appellant's San Francisco routes.

*Campbell v. Hollins*, *Cox*, Manual Trade-Mark Cases, case 548; *Selby v. Anchor Tube Co.* Id. case 566; *Levy v. Walker*, Id. case 639.

One may even transfer the right to use his own name as a trade-name.

*Frazer v. Frazer Lubricator Co.* 121 Ill. 147, and cited cases. See also *Symonds v. Jones*, 8 L. R. A. 570, 82 Me. 302; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769; *Burton v. Stratton*, 12 Fed. Rep. 696; *Skinner v. Oakes*, 10 Mo. App. 45; *Hozie v. Chaney*, 148 Mass. 592, 58 Am. Rep. 149; *Churton v. Douglas*, Johns. V. C. (Eng.) 174.

It is one of the principal offices of equity to prevent injury and imposition. Therefore, even if the imitation was unintentional, yet if it be colorable and of such a character that a majority of persons would never notice the difference, its use would be enjoined.

*Metcalfe v. Brand*, 86 Ky. 831.

Exact similarity is not necessary to constitute infringement.

*McLean v. Fleming*, 96 U. S. 251, 24 L. ed. 881. See also *Browne*, Trade-Marks, §§ 537-540; *Keller v. B. F. Goodrich Co.* 117 Ind. 556; *Sperry v. Percival Mill Co.* 81 Cal. 252; *Burke v. Cassin*, 45 Cal. 478, 18 Am. Rep. 204; *Lockwood v. Bostwick*, 2 Daly, 521; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416.

A person who sells the good-will of a business will be enjoined from again setting up business at such a place, and in such a manner as to destroy or diminish the business of which he has sold the good-will.

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The sole issue is between D. O. Mills, vendor of the good-will of a business, and appellant, successor to his vendees.

Another person, not a party to any of the transactions hereinbefore detailed, might lawfully do that which D. O. Mills and his agents, by reason of Mills' transactions with Green & Green, cannot lawfully do.

*Munsey v. Butterfield*, 183 Mass. 492; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811; *Bergamini v. Bastian*, 35 La. Ann. 60, 48 Am. Rep. 216; *Labouchere v. Dawson*, L. R. 18 Eq. 332; *Ginesi v. Cooper*, 42 L. T. N. S. 751; *Crutwell v. Lye*, 17 Ves. Jr. 341a; *Mogford v. Courtenay*, 45 L. T. N. S. 303, 29 Week. Rep. 864.

A vendor should not represent himself as successor to the business, the good-will of which he has sold, either directly or indirectly.

*Horiz v. Chaney*, 148 Mass. 592, 58 Am. Rep. 154; *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 750; 2 Lawson, Rights, Rem. & Pr. § 687.

Appellant in this case asserts no exclusive right to a trade-mark. No question as to the rights of the public at large is at issue. It is contended that after a man has sold his interest in the good-will of a particular business, it is wrong and unlawful for him to interfere with that good-will, to the injury and loss of his vendee. Equity does not permit unconscionable, unlawful methods of competition in business.

*Browne*, Trade-Marks, §§ 43, 93; *Snow v. Holmes*, 71 Cal. 148; *Pierce v. Guillard*, 68 Cal. 71, 58 Am. Rep. 1.

*Messrs. Maxwell & McEnerney*, for respondents:

At the time of the commencement of this action plaintiff was, and it had for some time been, vending Marin county milk exclusively under the trade-name "Millbrae."

This amounted to a fraud upon the public and brought the plaintiff within the maxim that he who comes to a court of equity should come with clean hands.

*Cocks v. Chandler*, L. R. 11 Eq. 446; *Joseph v. Macovsky*, 19 L. R. A. 53, 96 Cal. 521; *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 17 L. R. A. 129, 185 N. Y. 24.

The name "Millbrae Dairy" was intended to indicate the place of production of the commodity dealt in, and could not have been transferred except in connection with a transfer of the place of production.

*Atlantic Mill Co. v. Robinson*, 20 Fed. Rep. 218; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Blackwell v. Dörré*, 8 Hughes, C. C. 151; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706; *Carmichel v. Latimer*, 11 R. L. 395, 23 Am. Rep. 481; *Newman v. Alford*, 51 N. Y. 189, 10 Am. Rep. 568.

Upon the dissolution of a copartnership no partner takes the exclusive right to the trade-name.

*Huwer v. Dannenhoffer*, 82 N. Y. 499.

*Haynes, O.*, filed the following opinion: Action to enjoin the defendants from using a "trade-name," which it is alleged belongs to the plaintiff (a corporation), and for damages. Findings and judgment were against



the plaintiff, and this appeal is taken from the judgment and an order denying its motion for a new trial. An outline of the facts, condensed from the findings, may be thus stated: Some time prior to 1865, the defendant D. O. Mills became and still is the owner of a tract of land in San Mateo county, at the railroad station now, and ever since 1865, known as Millbrae station. From 1865 until August, 1883, A. F. Green and defendant Mills were copartners, engaged in the business of raising and keeping cows of superior quality and breed upon said land, and selling the milk therefrom in the city of San Francisco, said business being conducted, at least since 1875, under the trade-name of "Millbrae Dairy;" the word "Millbrae" being compounded of the name of the owner of the ranch (omitting the "s") and the Scotch word "brae." In August, 1883, F. H. Green purchased a one-third interest in the cows and other personal property and business, and the firm as thus constituted continued the business until September 1, 1886, under the same trade-name. At the date last named the copartnership was dissolved by mutual consent, and in the settlement A. F. and F. H. Green took the milk routes and business of selling the milk in San Francisco, with the wagons, horses, and appurtenances, and defendant Mills, who was at all times the sole owner of the land, took all the dairy implements, supplies, cows, and other personal property at the ranch, and on the same day entered into an agreement with said A. F. and F. H. Green whereby he agreed to sell to them and they agreed to buy, not less than 270 nor more than 390 gallons of milk per day, at a price therein specified, the milk to be thus furnished by defendant Mills to be exclusively from his own dairy, and this agreement was to continue for at least one year. A similar agreement was made each year, the last being dated September 1, 1889, the quantity named therein being not less than 360 and not exceeding 410 gallons per day. This contract stipulated that it should be in force for at least one year, and thereafter until one of the parties should give the other three months' notice of his intention to terminate it. About July 1, 1890, A. F. and F. H. Green organized a corporation under the name of the Millbrae Company (the plaintiff herein), and conveyed to it their said business, property, and good-will, they being the principal stockholders therein, and practically owning and carrying on said business through said corporation, and on the 1st of August, 1890, ceased to take milk from defendant Mills under said contract, and thereafter the plaintiff procured from Marin county the milk with which it supplied its customers. Until the formation of the corporation, the business continued to be conducted by A. F. and F. H. Green under the name of the "Millbrae Dairy," and their delivery wagons were so marked, and that name was printed upon their bills and receipts, upon which it was also stated that the milk was "produced on Millbrae farm, San Mateo county." After the organization of the corporation, the name on the wagons and bills was changed to "Millbrae Company," and on

the bills it was stated simply "pure country milk, produced from rich pasture, wholesome feed, healthy cows;" without any indication as to the locality except the word "country." On September 1, 1890, the defendant D. O. Mills commenced the business of selling milk from his said dairy in the city of San Francisco, and engaged defendant Taylor as agent for that purpose, and employed defendant Cole to manage the sale and distribution of the milk in the city; and in this business adopted and used upon his wagons and upon his bills the original trade-name, "Millbrae Dairy," but specified upon his bills and advertisements that the milk sold was from the Millbrae dairy, in San Mateo county, and added: "Do not confound it with the Millbrae Company." At the time of the dissolution of the copartnership, a valuation was put upon all the property, and among other items of the city branch of the business, which was taken by A. F. and F. H. Green, was "100 cans' trade, \$4,000."

The foregoing facts are not disputed, and are sufficient to present the principal question in the case. There are several specifications of the insufficiency of the evidence to justify certain findings, but these can be more briefly disposed of after deciding the principal question, since if the findings excepted to were framed as appellant suggests they would not change the result. It is insisted by appellant that the "trade-name" is a part of the good-will sold by defendant Mills to Green & Green, and for which they paid a large sum of money; that such name is an important element in such good-will, and that plaintiff has the exclusive right to its use. Appellant is in error as to the facts to which he applies the law, and hence is wrong as to his conclusions. The findings upon this subject are not only supported, but are made clear by the testimony of F. H. Green, who was one of the parties to the contract under which it is claimed the good-will of the business and the right to use the trade-name was sold by defendant Mills. He said: "Prior to that time (referring to his purchase of an interest in 1883) the business had been carried on by D. O. Mills and my father, under the name of the 'Millbrae Dairy.' I think they gave it the name of the Millbrae dairy in 1875 or 1876. In 1883 the business was in the name of the Millbrae dairy. I continued in business with them some three years. In 1886 we entered into an agreement to divide the business up. Mr. Mills took the interest in the country, and my father and myself took the interest here. Since that time my father and myself conducted the business under the name of the Millbrae dairy." It will also be observed that on the day of the dissolution of the partnership the contract was entered into for the sale by Mills to the Greens of the milk produced at Millbrae, and by which the Greens agreed to sell the same in San Francisco, and that defendant Mills has ever since continued the business of keeping cows and producing milk at the same place and under the same name. There was nothing said in the contract about the sale or transfer of the good-will, or of the use of the name under which the business had been conducted. It

was not a sale of the entire business with which the name was connected, but a "division" of the business, and the name was equally applicable and equally important to each part. So long as the Greens or their successors continued to sell Millbrae milk, there was no conflict of interest in the use of the name, nor was there any agreement, covenant, or obligation that the Greens should have the right to use it longer than they continued to sell Millbrae milk. On the contrary, the fair and reasonable implication was that the name should only be used in connection with the sale of milk produced by the owner of the ranch and dairy familiarly known by that name, and which name was even more important to be retained by the owner of the ranch than by one whose right to sell the milk depended upon a yearly contract. Nor was this contract terminated by defendant Mills, but plaintiff, for its own advantage, voluntarily terminated it by a three-months notice, under the terms of the contract, and now insists that it may deprive defendant Mills of all use and benefit of the well-established name in disposing of his milk, while using the false name of "Millbrae" for selling the milk of a competing producer.

It is not necessary to review the cases cited by appellant, for the question involved is no longer an open one. In the case of *Joseph v. Macowsky*, 96 Cal. 531, 19 L. R. A. 53, it was said: "A person who comes into a court of equity for an injunction in a case of this kind must come with clean hands. He cannot be granted relief upon a claim to the exclusive use of a trade-mark which contains a false representation, calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured. *Browne, Trade-Marks*, §§ 71, 474; *Palmer v. Harris*, 60 Pa. 156, 100 Am. Dec. 537; *Fetridge v. Wells*, 13 How. Pr. 385; *Hobbs v. Francis*, 19 How. Pr. 571; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706. In *Stegert v. Abbott*, 61 Md. 284, 48 Am. Rep. 101, the court said: 'It is a general rule of law in cases of this kind that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade-mark or labels.'" If, at the time the partnership was dissolved, D. O. Mills had sold to his copartners the ranch and dairy, as well as his interest in the business of selling the milk there produced, the property in the trade-name and the exclusive right to use it would have passed to the purchasers, and Mills could not have applied the name to another ranch or dairy and used it in the like business to the injury of the plaintiff. By the division of the partnership property and business, coupled with the contracts for the sale of the same milk, the Greens acquired the right to use the trade-name so long as they sold Millbrae milk; but they could not rightfully use it after they ceased to sell that milk, without wronging both Mills and the public. It does not aid the plaintiff's case that Marin county milk, which it now sells, is as good or even better than Millbrae milk. As was said in a similar 25 L. R. A.

case, "the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce." *Prince Mfg. Co. v. Prince's Metallic Paint Co.* 185 N. Y. 24, 17 L. R. A. 129. For a full discussion of the questions principally involved in the case at bar, see the case last above cited, and also *Pepper v. Labrot*, 8 Fed. Rep. 29, and *Huwer v. Dannenhoffer*, 82 N. Y. 499. In *Atlantic Milk Co. v. Robinson*, 20 Fed. Rep. 217, it was held that the right to the symbol is inseparable from the right to make and sell the commodity which it has been appropriated to designate. *Pierce v. Guittard*, 68 Cal. 63, 58 Am. Rep. 1, is entirely consistent with *Joseph v. Macowsky*, *supra*, and is against appellant.

It is claimed that the second finding is, in effect, that defendant Mills first used and adopted the name "Millbrae" before his partnership with A. F. Green, and that this is not justified by the evidence. Whether this name was adopted before or after is wholly immaterial. It had certainly been used many years before the dissolution, and was well known. It was the name of a locality, and attached thereto, no matter by whom nor when it was originated. Whether Millbrae farm is or is not shown by the evidence to be "peculiarly" fitted and adapted to the purpose of producing milk, or that it is not shown to produce better milk than other farms or dairies, is also immaterial. The name used to indicate milk produced on that farm had become valuable, and the question here is not one of comparison with other milk or other ranches, but whether defendant Mills shall be deprived of the use of a name that is valuable to him. The finding that "D. O. Mills never sold nor conveyed to A. F. Green and F. H. Green nor to either of them, the good-will of the business of selling milk in the city of San Francisco" is, I think, supported by the evidence. The evidence shows that at the time of the dissolution of the copartnership four milk routes were operated. Those routes were not defined in the evidence. There was no agreement that Mills should not engage in that business in the city. Whatever might be said of the "routes" then operated, there is nothing in the evidence to indicate that he intended to exclude himself from the business of selling milk in the city, unless during the continuance of his contracts with his former partners. Besides, so far as the use of the trade-name is concerned, the good-will of the milk routes is an immaterial factor. It was found by the court that Green & Green "were to take from D. O. Mills all the milk which might be necessary to carry on the said business;" and this, it is said, is not justified by the evidence. The agreement, as we have seen, specified a minimum and maximum quantity, and, while they did not contract not to buy or sell other milk, and the evidence shows that they sometimes did so, yet the finding is substantially true. It was a division of the business, and during the continuance of these contracts they advertised no other milk, and there is no evidence tending to show that it was not usually sufficient to supply their customers. The finding that the use of the word "Millbrae" was a representation to the

public that the milk sold was produced at Millbrae farm or dairy is incontrovertibly supported by the evidence, as is also the finding that the use of the same word by the plaintiff after it ceased to sell Millbrae milk was a false representation. The assurance given by plaintiff to its customers that it was selling them Marin county milk could not have been necessary if the use of the word "Millbrae" did not imply that it was selling milk from Millbrae dairy.

It was further alleged in the complaint that defendants Taylor and Mills entered into a scheme which had for its object the going into the business of selling milk in said city, and of obtaining customers by enticing away the customers of the plaintiff; that in pursuance thereof they induced the defendant Cole, who had been in the employment of the plaintiff and its predecessors for fifteen years, and had full knowledge of their milk routes, to leave the plaintiff and enter into their service, and were thus able to impose upon the customers of the plaintiff and sell them milk while such customers believed they were purchasing from plaintiff; that defendants' wagons closely resembled plaintiff's, and had painted on them the words "Millbrae Dairy," and were run under the personal charge of defendant Cole, and by these means, and particularly by using the name "Millbrae," and having the same painted upon their wagons, and having them in charge of defendant Cole, have been drawing away plaintiff's customers, and allege damages in the sum of \$500. Upon these issues the court found that no scheme was entered into; that none of plaintiff's customers were imposed upon, or bought milk from defendants when they supposed they were buying from plaintiff; that the wagons used by defendants do not resemble plaintiff's wagons; that none of plaintiff's customers have been drawn away except by fair and open competition; that none of said customers were misled by the defendants' use of the trade-name "Millbrae," and that plaintiff has not sustained any damage. Appellant claims that none of these findings are supported by the evidence. That defendants sold milk to a very considerable number of the former customers of plaintiff is not disputed. Whether defendants obtained these customers by improper means is a mixed question of law and fact; the means used being a question of fact, but whether such means were improper is a question of law, depending upon the relation of the parties, and their rights and duties towards each other. There is no doubt that plaintiff has sustained loss by the competition of defendants, but whether such loss is a legal injury, entitling the plaintiff to recover damages, is quite another question. The use of the trade-name, so long used by plaintiff and its predecessors, must necessarily aid the defendants in securing custom, but, having the right to use it, plaintiff cannot complain.

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The circular used by defendants for advertising their business were headed "Millbrae Dairy, of Millbrae, San Mateo County," and informed the people that they would sell their own milk, and further said, "Do not confound it with the Millbrae Company." We think these findings are fully justified by the evidence, notwithstanding the evidence shows that plaintiff suffered loss in consequence of what defendants did. Some of these findings, taken by themselves, are mixed conclusions of law and fact, and necessarily so. But they must be read in connection with the other findings, showing the relations of the parties and their rights and duties toward each other. Appellant contends that "a person who sells the good-will of a business will be enjoined from again setting up business at such a place and in such a manner as to destroy or diminish the business of which he had sold the good-will; that the sole issue is between D. O. Mills, the vendor of the good-will of a business, and appellant, successor to his vendees." We think that the only good-will that was sold by Mills was the good-will of the routes then operated for the sale of Millbrae milk; that it was not the intention of Mills to shut himself out from them, nor from any part of the city, if his vendees should cease to sell his milk. His vendees might have exacted other conditions, but they did not do so. In the language of F. H. Green, it was a "division of the business" theretofore carried on by the so-called vendor and vendees as partners, and that business was the sale of Millbrae milk. Mills did not sell the good-will of the business of selling any other milk, as no other milk was sold, and his vendees could not divert the place where that business was conducted to the sale of a competing article, and shield themselves from his competition by claiming that the good-will continued, not only as to the place, but as to the place used for selling a different and competing article. This conclusion makes it unnecessary to consider the cases cited by appellant in support of the proposition that the vendor of the good-will of a business "must do nothing to impair or injure it" (a proposition which certainly requires material qualifications), or those other cases which undertake to specify with more or less particularity what the vendor who again enters upon a similar business may or may not do in furtherance of it.

I think the evidence justifies the findings, and that the judgment and order appealed from should be affirmed.

We concur: Temple, C.; Searls, C.

#### Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

## NEW YORK COURT OF APPEALS.

Simon **PALTROVITCH**, *Resp't.*,  
v.  
**PHOENIX INSURANCE CO.** of Hartford,  
Conn., *Appt.*

148 N. Y. 73.)

1. The stipulations of a policy which relate to the procedure merely, after the occurrence of a loss, are to be reasonably and not rigidly construed.
2. By rejecting a certificate of a notary respecting a loss on the ground that there is a nearer notary whose certificate should be given, but without giving his name or address, an insurance company may be regarded as not desiring a further certificate and as waiving a condition requiring the certificate of the nearest notary,—especially where the certificate furnished was kept twenty-three days without objection.

(June 19, 1894.)

**A**PP<sup>EAL</sup> by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of a Circuit Court for Erie County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Box, Norton & Bushnell*, for appellant:

The insertion in the policy of the clause providing for the certificate of the magistrate or notary was made compulsory upon the defendant by chapter 486, Laws of 1886, and, therefore, cannot be considered harsh or unreasonable.

*Quinlan v. Providence Washington Ins. Co.* 183 N. Y. 356.

The failure of the plaintiff to procure the certificate of the magistrate or notary living nearest the place of the fire, after being duly required so to do by defendant, prevents a recovery upon the policies.

*O'Neil v. Buffalo F. Ins. Co.* 8 N. Y. 123; *Inman v. Western F. Ins. Co.* 12 Wend. 452; *Gilligan v. Commercial F. Ins. Co.* 20 Hun, 98, affirmed 87 N. Y. 626; *McNally v. Phenix Ins. Co.* 187 N. Y. 389; *Daniels v. Equitable F. Ins. Co.* 50 Conn. 551; *Johnson v. Phenix Ins. Co.* 112 Mass. 49, 17 Am. Rep. 65; *Lane v. St. Paul Fire & Marine Ins. Co.* 17 L. R. A. 197, 50 Minn. 227.

The certificate attached to the proofs of loss was not only a nullity, not having been made by the notary living nearest the place of the fire, but it was also superfluous. The policy does not call for such a certificate unless "if required," and no such requisition had been made when the statements of loss were served.

*Jones v. Howard Ins. Co. of New York*, 117 N. Y. 108; *McNally v. Phenix Ins. Co. supra.*

It cannot be claimed that the defendant

waived its right to require the production of the certificate required by the terms of the policy, by retaining the certificate attached to the statements of loss for twenty-three days, for the reason that the certificate, which the assured is required to furnish only, "if required," and the statement of loss which he is required to render "if fire occur" are clearly separate and distinct instruments.

*McNally v. Phenix Ins. Co.* 187 N. Y. 389; *Lane v. St. Paul Fire & Marine Ins. Co.* and *Daniels v. Equitable F. Ins. Co. supra.*; *Brown v. Hartford F. Ins. Co.* 52 Hun, 260, affirmed 182 N. Y. 589.

Neither can it be claimed that the examination of the assured under the policies constituted a waiver of defendant's right to insist upon the certificate, for the reasons:

The policies expressly and in terms, reserved to the defendant the right to examine the assured without waiving "any provision or condition" of the policy.

*Hill v. London Assur. Corp.* 30 N. Y. S. R. 539; *Conway v. Phenix Mut. L. Ins. Co.* 140 N. Y. 79.

A party cannot be held to have waived a forfeiture unless he knew of the facts constituting the forfeiture.

*Robertson v. Metropolitan L. Ins. Co.* 88 N. Y. 541; *Weed v. London & L. F. Ins. Co.* 116 N. Y. 106.

*Mr. Edward L. Jellinek*, with *Messrs. Shire & Van Peyma*, for appellee:

A liberal and reasonable construction of the stipulations of the contract which prescribe the formal acts on the part of the insured, necessary to the recovery of the loss, is sanctioned and required by the rules of the law.

*McNally v. Phenix Ins. Co.* 187 N. Y. 389; *May, Ins.* 3d ed. 217; *Hinman v. Hartford F. Ins. Co.* 38 Wis. 159; *McLaughlin v. Washington County Mut. Ins. Co.* 23 Wend. 525; *Griffey v. New York Cent. Ins. Co.* 100 N. Y. 417, 58 Am. Rep. 203; *Kratzenstein v. Western Assur. Co.* 5 L. R. A. 799, 116 N. Y. 54; *Hoffman v. Aetna Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337.

The defendant, if in good faith, and desirous of the nearest notary's certificate, could have apprised the plaintiff of the fact by giving the name and residence of the notary. The appellant did not object to the certificate sent to it because of any defect therein, or of any delinquency of the notary. It was done simply to make a defense to the policy.

*Turley v. North American F. Ins. Co.* 25 Wend. 374.

The defendant's detention of the proofs of loss and certificate of notary for twenty-three days waived their right to further or more perfect proofs or certificate.

*Keeny v. Home Ins. Co. of Columbus, Ohio*, 71 N. Y. 396, 27 Am. Rep. 60; *Jones v. Howard Ins. Co. of New York*, 117 N. Y. 108.

The examination of the plaintiff after the receipt of the proofs of loss was a recognition of the validity of the policies, and the defendant thereby waived even a previous right to insist upon a forfeiture thereof.

*Titus v. Glens Falls Ins. Co.* 81 N. Y. 418;

**NOTE.**—As to what will constitute a waiver by an insurer of provisions in the policy as to making proofs of loss, see *note* to *German Ins. Co. of Freeport, Ill. v. Gray* (Kan.) 5 L. R. A. 70, 25 L. R. A.

*Carpenter v. German American Ins. Co.* 185 N. Y. 298.

Finch, J., delivered the opinion of the court:

The loss by fire, which the plaintiff seeks to recover, occurred in the city of Buffalo on the 11th day of May, 1891. The insured made out and forwarded his proofs of loss, which reached the defendant company on the 15th of the following June. Accompanying such proofs of loss was a certificate in the substantial form required by the policy, which was signed by A. J. Roehner, a notary public. The policy provides that such a certificate, made by the magistrate or notary "living nearest the place of the fire," shall be furnished by the insured, if required. No such requirement had been made when the proofs of loss were sent, but the certificate was furnished voluntarily, and in advance, to meet the emergency of a possible demand for it. The proofs of loss were kept until the 8th day of July by the company, and then returned to the insured, with a notice that the company required a certificate from the notary "living nearest the place of the fire," and that the certificate furnished would not be accepted as a compliance with the policy. There was no statement that other notaries were found to be living nearer the place of the fire, and stating their names and residences, as good faith, and a moderately fair treatment of the insured, required; but he was left to carry on his own investigations about notaries in his own way, and at his own risk. It turned out that three other notaries lived nearer "the place of the fire," in one sense of the phrase. This company, in its anxiety for its precise and rigid rights, hired a city engineer to measure the distances with a tape, and both by way of the streets, and in an air line over the tops of the houses, and so was able to prove that there were three notaries who boarded and slept a few hundred feet nearer the place of the fire than the one whom the insured supposed to be the nearest. But these later-discovered notaries had their offices and transacted their official business at much greater distances away, and there had their signs, and expected their customers. Where they boarded and slept they had no signs, and there was nothing to indicate their presence and existence; and the plaintiff, unaware of their proximity, and not suspecting the sort of investigation to which he was to be invited, took the nearest one he could find, whose office and notarial sign and residence were at the same place. It is upon this narrow and technical ground, with no pretense of substantial justice in it, that the action of the insured is now defended.

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We have recently held—and, I think, very properly—that the stipulations of a policy which relate to the procedure merely, after the occurrence of a loss, are to be reasonably, and not rigidly, construed. *McNally v. Phoenix Ins. Co.* 187 N. Y. 398. And I think that the phrase, "living nearest the place of the fire," ought not to be confined entirely to the food and sleep of the notary, and should take account of the place where he lives officially, and to which, by some public sign, he invites those who do business with him. *Turley v. North American F. Ins. Co.* 25 Wend. 374. But, at all events, good faith on the part of the company requires that when they reject one certificate on the ground that there is a nearer notary, whose certificate they require, they should give the name and address of that nearer notary, to enable the insured to comply with their demand, and that if they do not do so a jury will be justified in concluding that they do not in reality require the further certificate for any practical or beneficial purpose, but have waived it as an essential condition, for they either want another notary's certificate, or they do not. If they desire it, they will name him, so that the insured may comply; otherwise, it is clear that they do not want the further certificate, and will be disappointed if they get it, and make the demand solely and only to secure a technical defense. When to that is added the fact that the company kept the certificate sent for twenty-three days, without objection, I think the jury were justified in saying that the demand of a further certificate was not made in good faith, and a different performance of the condition was waived. A suggestion was made to induce a favorable view of the technical point raised. It is said that the evidence justified a suspicion of fraud. None was alleged, except a very exaggerated estimate of the loss, and that the jury corrected by their verdict. It is always easy to say that the company suspects as a reason for a purely technical defense. All parties should have their rights in this court, fairly and fully; but a severely formal defense, resting wholly upon immaterial matters of procedure, ought not to be allowed to work injustice. While we feel bound to enforce these contracts fully and fairly, according to their terms, yet, where those terms respect the modes of proof and procedure after the loss, we shall give them always a reasonable and liberal construction, and not a severe and technical one. In this case we approve of the conclusions reached by the court below.

*The judgment should be affirmed, with costs.*

All concur.

## MARYLAND COURT OF APPEALS.

William H. ANDERSON, *Appt.*,

2.

N. Rufus GILL, *Exr.*, etc., of Mary A. Dodge, Deceased.

(.....Md.....)

1. To hold the drawer of a check liable after a collecting bank has surrendered it to the drawee bank and taken for it the latter's check on a third bank, the utmost diligence to present the substituted check for payment must be exercised by the collecting bank.
2. The fact that the loss would have fallen on the depositor if a check held for collection had not been presented

**NOTE.**—Accepting something besides money from the bank as a discharge of drawer of check.

ANDERSON v. GILL presents a question of much interest and importance. There is little doubt that the practice of taking drafts in payment of checks is quite common and the fact that there are so few cases in which the question of the effect of such action upon the liability of the drawer has been considered speaks well for the stability of the banks or for the conservatism of the legal profession.

There is a case decided in 85 Car. II., which is very much in point. Plaintiff by his agent sold goods to defendant. The agent called on defendant for payment and received a note on the latter's banker giving a receipt in return. Upon presenting the note the banker asked the agent if he would have money or notes and was informed that notes would be taken payable to the person to whom the money was to be transmitted. Before the notes could be collected the banker failed and the court held that the plaintiff had accepted the banker for his debtor by taking the notes and said "there was a negotiation of the matter which discharged the defendant." *Vernon v. Boverly*, 2 Show. 296.

The cases in which the question has been discussed are quite fully in accord with that decision.

In *People v. Cromwell*, 102 N. Y. 477, the county treasurer had left money with bankers to pay interest coupons. Plaintiff holding certain coupons presented them for payment and asked for a draft which was given him and which was afterward returned for nonpayment. The court held that the authority of the bank extended only to payment in money and when plaintiff accepted a draft in lieu of money he had acted on his own responsibility and that the county was thereby discharged from liability. In that case the court says that if upon presentation of a check the creditor accepts anything other than legal currency in payment, the debt is discharged. The authority of the depository is simple and limited to the act of making payment and if the creditor goes further and deals with it for any other transaction than that of receiving payment, he does so upon his own responsibility, and must bear the consequence if any of such transaction.

Acceptance by the payee of a certificate of deposit from the bank and permitting the amount to be placed to his credit on the books of the bank, will amount to payment as between former parties to the paper. *Hughes v. Kellogg*, 8 Neb. 114.

So taking a certification of the check will release the debtor. *Minot v. Russ*, 16 L. R. A. 510, note. 156 Mass. 458.

If a check is presented for payment and when 25 L. R. A.

sooner than it was necessary where the bank failed before the time for collecting it expired, does not relieve the collecting bank of liability for the loss, if, having presented the check before such failure and accepted the drawee's check on another bank in payment, it delays presenting the latter until it is worthless because of the failure of its drawer.

(June 20, 1894.)

**A**PPEAL by defendant from a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover the amount of a check which defendant had drawn in favor of plaintiff's intestate, but which failed of collection because of the fail-

the money is tendered the holder for his own convenience declines to receive payment at that time, he takes the risk of the continued solvency of the bank. *Simpson v. Pacific Mut. L. Ins. Co.* 44 Cal. 143.

Accepting the credit of a check on a debt due the drawee will amount to a payment of the check. *Pratt v. Foote*, 9 N. Y. 463.

In *Bolton v. Richard*, 6 T. R. 139, 1 Esp. 106, the payee of the check did not require the banker to comply with the requirement of the checks but deposited the check with the banker and on future settlements between them treated the banker as his debtor for the amount, and it was held that this released the maker.

But when the check was entered short in the plaintiff's account, the mere fact that on the faith of it the plaintiff was permitted to overdraw his account is not sufficient to discharge the maker. *Brown v. Kewley*, 2 Bos. & P. 512.

In *Fernald v. Bush*, 131 Mass. 591, the creditor received a draft or check from the debtor after business hours on December 13. This was seasonably presented to the drawee on the 14th, and the drawee's check on a third bank taken in exchange for it, which was presented on the 15th, and dishonored because of the failure of the intermediate bank. In deciding the case the court said neither the (creditor) nor their agent (the collecting bank) by accepting from the drawee their check in lieu of money, could prolong the liability of the drawer; and by holding that check without presenting it for payment until December 15th, they discharged him from such liability.

In *Nebraska Nat. Bank v. Logan*, 20 Neb. 273, a check was sent by the drawee in payment of the drawer's check but it was refused and returned and the question did not turn so much on the effect which this check had on the liability of the respective parties as on the question of diligence in the collection of the first check.

And when the case came a second time before the court, it was decided against the drawers because it appeared that they knew of the insolvency of the drawee and instead of presenting the check and collecting the money themselves, they took the risk of its going to a distant point and being returned and collected before the drawee actually stopped payment. 35 Neb. 182.

There is a somewhat analogous class of cases in which the question has arisen between the parties to a bill of exchange as to the effect of taking the check of the drawee upon the liability of the drawer. One of this class is *Whitney v. Esso*, 90 Mass. 308, 96 Am. Dec. 762, in which the drawer of a draft was held discharged by the taking of the drawee's check on a local bank in exchange which

ure of the bank on which it was drawn. *Reversed*

The facts are stated in the opinion.

Mr. Edward C. Eichelberger, for appellant:

Instead of demanding the money, which was on deposit to pay said check, as called for by said check—without the consent, knowledge, or agreement of the defendant, and without the authority of any custom authorizing him so to do, the runner took the check of J. J. Nicholson & Sons on the Western National Bank in payment of said check, and surrendered said check of the defendant to said Nicholson & Sons. This was done by the runner, the agent of the plaintiff's testatrix, in direct violation of the duty of the payee of said check, and of the duty of the Old Town Bank, the agent of Mrs. Dodge, in collecting said check.

*Ward v. Smith*, 79 U. S. 7 Wall. 447, 19 L. ed. 207; 1 Morse, Banks & Banking, §§ 240, 247; 3 Morse, Banks & Banking, §§ 421, 426; *Hazlett v. Commercial Nat. Bank of Philadelphia*, 182 Pa. 118.

He (and of course his principal, acting through her agent) ceased to be the agent of Mary A. Dodge and became the agent of J. J. Nicholson & Sons, to collect the check on the Western National Bank.

1 Morse, Banks & Banking, § 247, p. 247; 3 Morse, Banks & Banking, §§ 421, 426.

Except by agreement or usage, a bank has no right to take anything but money in payment of paper it holds for collection. If it takes a check it is agent of the drawer in collecting the check, and not until the money is obtained has it fulfilled its duty as agent of the holder of the paper.

was dishonored for want of funds and no notice of protest or dishonor of the draft was ever given to the drawer of the check.

But in *Burkhalter v. Second Nat Bank of Erie*, 48 N. Y. 583, it was held that if the check was returned, the draft reclaimed, and protest made and notice given in due time, the drawer would not be discharged.

In *Smith v. Miller*, 48 N. Y. 174, 3 Am. Rep. 690, the payee of a draft received a check from the drawee and neglected to present it for payment until the next day, when it was dishonored, whereas, if it had been presented on the same day upon which it was received it would have been paid. The court said the plaintiffs instead of insisting upon the money received the check of the drawee upon one of the banks in the same city. There was no impropriety in the receipt of the check and as the drawee were entitled to the draft upon payment of it, there is nothing in the case upon which fault could be imputed to the plaintiff in surrender of the draft on receipt of the check. If the check was worthless when given, or became worthless before it could have been with reasonable diligence presented for payment, the loss would have fallen upon the defendants, and they would not have been discharged from their liability, unless the plaintiffs had omitted to notify them in due time of the nonpayment of the bill.

When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which with proper and reasonable diligence it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest, whom he represents.

It was the duty of the plaintiffs to present the check at the bank, at least during the day on which they received it, and obtain either the money or a certificate or cause the same to be protested for nonpayment; and not having done so, they were chargeable with negligence and the consequent loss. By their delay and neglect, unless some evidence in explanation or excuse can be given, they made the check their own and the defendants were discharged.

*First Nat. Bank of Meadville v. Fourth Nat Bank of New York*, 77 N. Y. 823, 33 Am. Rep. 618, was an action against the collecting agent for negligence and although the court says that the taking of a check or note discharged the drawer in that case, no such question was before the court. And its attempt to reconcile the cases of *Turner v. Bank of Fox Lake*, 4 Abb. App. Dec. 494, 3 Keyes, 426, and *Burkhalter v. Second Nat. Bank of Erie*, 48 N. Y. 583, with *Smith v. Miller*, 48 N. Y. 174, 3 Am. Rep. 25 L. R. A.

690, upon the question of what is necessary to hold the drawer, and mistating the latter case for that purpose, will not be likely to have much effect upon the question.

It will be noticed that instead of taking the broad ground that accepting from the bank something besides money will release the drawer of a check, the court in *ANDERSON V. GILL* has placed its decision more on the grounds which rule the other class of cases, but it would seem that there is a broad distinction between the two classes and that the reasons, which apply in one case will not necessarily do so in the other. A check on a banker calls for money and if money is not taken when it is presented to the drawee it must be either because some other mode of payment or course of dealing is more convenient to the payee or because it is more advantageous to the bank that money should not be paid. In the former case, *i. e.*, where the payee for his own convenience accepts something besides money for the check, he surely should not be allowed to charge the drawer with loss resulting from such election, and if it is for the convenience of the bank, the very fact that the bank makes the request is so suspicious that it ought to put the payee upon inquiry and incite him to diligence to secure the money, which unless satisfied of the safety of some other means of payment would require him to demand the money at once. On the other hand it would not be a matter of surprise if the drawee of a bill of exchange had not the money in his possession with which to pay it and the giving of a check on his banker is a natural and ordinary means of converting the bill into cash the effectiveness of which can generally be tested in a few hours at most. So that if there is nothing suspicious in the transaction and due diligence is exercised to convert the check into money or notify the drawer of the bill of failure of payment, there can ordinarily be no harm to the drawer in taking the check. The distinction is just here, in case of a draft on a private individual, the presumption is from the ordinary course of business that the assistance of a bank will be required to furnish the money and a check is a proper means of obtaining it, where as a check on a bank means money on presentment and if the bank is open and the money is not realized, it must be because of some new transaction between the payee and the bank which cannot be regarded as part of the drawer's business, so as to make him responsible for its success or failure.

As against the collecting agent, the payee may make the receipt of a check in payment of a draft his own risk. *Hazlett v. Commercial Nat. Bank of Philadelphia*, 182 Pa. 118.

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*Smith v. Miller*, 48 N. Y. 171, 8 Am. Rep. 690, 52 N. Y. 545; Dan. Neg. Inst. § 1601.

What was the duty incumbent upon the plaintiff's testatrix, the payee of said check (acting through her agent), to preserve any rights of the plaintiff's testatrix against the defendant—the maker of the check in this case—after having voluntarily surrendered said check and received the check of Nicholson & Sons instead of taking the money called for by the check, and which money it is conceded in the case was there to pay said check when presented? Clearly the utmost diligence in collecting said check thus wrongfully taken, immediate presentment, presentment as soon as possible by the use of the utmost diligence.

1 Morse, Banks & Banking, §§ 240, 247; 2 Morse, Banks & Banking, § 421; *Smith v. Miller*, *supra*; *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 16 Hun, 832, 24 Hun, 241, 77 N. Y. 820, 83 Am. Rep. 618, 89 N. Y. 412; *Merchants Nat. Bank of Baltimore v. Bank of Commerce of New York*, 24 Md. 12; Dan. Neg. Inst. § 1590; *Fernald v. Bush*, 131 Mass. 591.

While the maker of a check is not discharged from liability unless he has sustained loss or injury through the negligence of the holder or payee, he is discharged if he has sustained injury or loss through such negligence.

Dan. Neg. Inst. 1586, 1587; 2 Morse, Banks & Banking, § 421; Story, Prom. Notes, 498; *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 647, 19 L. ed. 1019; *Smith v. Miller*, 48 N. Y. 171, 8 Am. Rep. 690; *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 77 N. Y. 820, 83 Am. Rep. 618, 89 N. Y. 412; *Exchange Bank of Wheeling v. Sutton Bank* (Md.) 23 L. R. A. 178.

While it is true by the lawmerchant, the plaintiff's testatrix would have had the whole of the day after the reception of the check, up to 3 P. M., to present said check, yet the first presentment of the check fixes the rights of the parties.

2 Morse, Banks & Banking, § 426; Dan. Neg. Inst. 1598; *Simpson v. Pacific Mut. L. Ins. Co.* 44 Cal. 139; *Minot v. Russ*, 16 L. R. A. 510, 156 Mass. 458; *Metropolitan Nat. Bank of Chicago v. Jones*, 12 L. R. A. 492, 187 Ill. 684; *Born v. First Nat. Bank of Indianapolis*, 7 L. R. A. 442, 123 Ind. 78; *Merchants Nat. Bank of Baltimore v. Bank of Commerce of New York*, 24 Md. 12.

A second presentment is sometimes attempted to be made in the effort to preserve the rights against the drawer of a check or bill, but is subject to whatever loss has fallen upon the drawer through the action of the holder or payee in consequence of his action at the first presentment.

1 Morse, Banks & Banking, 247.

The contract of the maker of a check with the payee is that the money shall be at the banker's to pay said check when first presented at any time between banking hours to 3 P. M. of the day succeeding its reception, but not that it may be presented once on that day, a check taken in place of the money called for by the check, and then that action ignored, and a second presentment be allowed, irre-

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spective of what loss has been occasioned to the maker by the action of the payee.

2 Morse, Banks & Banking, § 426; Dan. Neg. Inst. 1593; *Simpson v. Pacific Mut. L. Ins. Co.* 44 Cal. 143; *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350, 11 Am. Rep. 709; *Minot v. Russ*, *Metropolitan Nat. Bank of Chicago v. Jones*, and *Born v. First Nat. Bank of Indianapolis*, *supra*.

Messrs. N. R. Gill & Sons, Rich & Bryan, and William Knower, for appellees:

It is difficult to understand how, upon principle, Mr. Anderson can found any defense on the fact that a conditional or tentative payment was attempted to be made in the first instance by the Nicholsons, through their check on the Western Bank.

As that abortive payment was rescinded and the proper unqualified demand made for cash payment within the time during which Anderson had agreed the check would be honored, it is not perceived that he has any legal ground of complaint.

Under such circumstances he is still liable. *Turner v. Bank of Fox Lake*, 8 Keyes, 426; *Fernald v. Bush*, 131 Mass. 590; *Burkhalter v. Second Nat. Bank of Erie*, 42 N. Y. 538; *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 77 N. Y. 823, 83 Am. Rep. 618; *Smith v. Miller*, 48 N. Y. 174, 8 Am. Rep. 690.

If the taking of Nicholson's check on the Western Bank had in any way enlarged or extended Anderson's liability, or had caused any of the things necessary to hold him on, the check not to be done, or not to be done in due time, he could have relied upon it as a defense.

2 Dan. Neg. Inst. 4th ed. § 1625; 1 Morse, Banks & Banking, 3d ed. § 247.

Anderson has no right to complain, provided the absolute demand was made for the payment of his check during the time he had agreed it should be good. His liability is fixed by his contract and not by what might have been done by any unusual activity, the necessity for which no one could foresee.

*O'Brien v. Smith*, 66 U. S. 1 Black, 99, 17 L. ed. 64.

If, instead of suing Anderson on the contract he made when he gave the check, the plaintiff had sued the Old Town Bank in an action on the case for negligence in receiving anything but money before surrendering the check to the Nicholsons, or for not having presented the Nicholson check at once, it is probable that we could have recovered.

*First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 77 N. Y. 823, 83 Am. Rep. 618, 89 N. Y. 416; *Merchants Nat. Bank of Baltimore v. Bank of Commerce of New York*, 24 Md. 51.

Although there is authority to the contrary.

*Russell v. Hankey*, 6 T. R. 12.

McSherry, J., delivered the opinion of the court:

On the 18th of January, 1892, Anderson, the appellant, drew his check in favor of Mary A. Dodge on J. J. Nicholson & Sons, bankers in the City of Baltimore, for \$692.08, and delivered it to the payee the same day. She



forthwith deposited it to her credit in her account with the Old Town Bank of the same city, duly indorsed for collection. On the following day the 14th, the Old Town Bank sent the check by its runner to the banking house of Nicholson & Sons, where it was presented for payment shortly before eleven o'clock, A. M., during the usual hours of business. Anderson had to his credit on deposit with Nicholson & Sons at that time \$5,000 available for the payment of the check. Instead of getting cash for the check the runner accepted in lieu thereof a check drawn by Nicholson & Sons on the Western National Bank for the precise amount of Anderson's check, and delivered up the latter to Nicholson & Sons.

The banking house of Nicholson & Sons was situated about three blocks distant from the Western National Bank and it would not have required more than from five to ten minutes for the runner to have gone from the one to the other. But in place of doing this and presenting Nicholson & Sons' check to the Western National Bank and getting it cashed or certified, he took it to the Old Town Bank where it remained in the possession of the latter until after Nicholson & Sons failed and closed their doors at 1.30 P. M. the same day. By his failure Anderson lost the \$5,000 on deposit to his credit with them. Up to that hour the Western National Bank had ample funds belonging to Nicholson & Sons with which to cash the check given to the Old Town Bank. Shortly before three o'clock, and after the failure of Nicholson & Sons, the Old Town Bank sent the check it had received from Nicholson & Sons in lieu of Anderson's check, to the Western National Bank, and presented it for payment, but it was dishonored; whereupon the runner went with it to the banking house of Nicholson & Sons to surrender it and to demand a return of Anderson's check, but he was unable to gain admittance.

About 5 P. M. of the same day the cashier of the Old Town Bank was allowed to enter, and at his instance a notary took a copy of Anderson's check, and protested the check, of which notice was mailed the same evening to Anderson, and received by him the next day. Subsequently the Old Town Bank replevined the check from the trustees of Nicholson & Sons, and still has it—that case not having been disposed of yet. After the Anderson check had been presented to Nicholson & Sons on the morning of January the 14th, and after the runner of the Old Town Bank had surrendered it and accepted in lieu of it the check on the Western National Bank, two other checks were given by Nicholson & Sons upon the Western National Bank, one for \$1,900 to the runner of the Merchants National Bank, and one for \$1,800 to the runner of the National Bank of Baltimore, and each of these was presented to the Western National Bank before 1.30 P. M. of the same day, and paid or certified by it.

With this state of facts existing, the executor of Mary A. Dodge, sued Anderson to recover the \$692.03 due by him to her when the check was given of January the 18th, 1892; and the inquiry presented by the record

is, whether, under the circumstances, Anderson is still liable for that debt. It was held by the court below that he was, and from the judgment against him he has appealed.

As between the parties to a check the drawer remains liable upon it to the holder until the bar of the statute of limitations supervenes and releases him, if availed of, unless the omission or neglect of the holder to present it within a reasonable time after its receipt has resulted in injury or loss to the drawer.

A failure of the bank which is the drawer of the check and which held on deposit a fund to meet it, by which failure that fund is lost, presents the usual, if not the only, case in which delay of the holder in making presentment, or giving notice of dishonor, devolves loss upon him. Dan. Neg. Inst. § 1590.

Speaking generally, what is a reasonable time depends on the facts of each particular case; but it is thoroughly settled that the reasonable time allowed the holder for presenting a check when he receives it in the same place where the bank on which it is drawn is located, is, till the close of banking hours on the next secular day; and if in the meantime the bank fails the loss will fall on the drawer. Dan. Neg. Inst. § 1591; Byles, Bills, \*14; *Moule v. Brown*, 4 Bing. N. C. 266; *Boddington v. Schlencker*, 4 Barn. & Ad. 752.

Every drawer of a check assumes the risk of the drawee's solvency during that period of time. It is consequently obvious that Anderson would have continued liable had the check been presented on the fourteenth during business hours though after the failure of Nicholson & Son. But it was presented to the drawees before the failure, and would have been paid when presented, had the cash been then demanded; or had the check on the Western National Bank been presented for payment or certification at any time that day before Nicholson & Sons actually suspended and closed their doors, the money would have been obtained. Whilst, therefore, it is apparent that the mere passivity of the holder—her mere failure to present the check on the fourteenth, prior to the suspension of the drawees—would not of itself have discharged the drawer; yet, another element has entered into the case, and the holder having chosen to present the check before there was any obligation on her part to do so, and having, furthermore, chosen, through her agent, to surrender it and to accept the drawee's check instead of money, what then became the degree of diligence which she owed to Anderson in order to still hold him liable? This is the crucial question in the case.

Now, a check on a bank or banker is payable in money, and in nothing else. Morse, *Banks & Banking*, 2d ed. p. 268.

The drawer having funds to his credit the drawee has a right to assume that the payee will, upon presentation, exact in payment precisely what the check was given for, and that he will not accept, in lieu thereof, something for which it had not been drawn. It is certainly not within his contemplation that the payee should, upon presentation, instead

of requiring the cash to be paid, accept at the drawer's risk a check of the drawee upon some other bank or banker. The holder had a right to make immediate demand for payment upon receipt of Anderson's check, though she was not bound to do so. When her agent, the Old Town Bank—the collecting bank being the agent of the holder—*Dodge v. Freedman's Sav. & T. Co.*, 93 U. S. 379, 23 L. ed. 920, did make demand it was only authorized to receive money, *Ward v. Smith*, 74 U. S. 451, 19 L. ed. 209, and the acceptance by the collecting agent of anything else rendered it as liable to the holder as though it had collected the cash. *Fifth Nat. Bank of Pittsburgh v. Ashworth*, 128 Pa. 212, 2 L. R. A. 491. The acceptance of Nicholson & Sons' check on the Western National Bank was either payment of Anderson's check or it was not. If it was, as it would be according to the Massachusetts doctrine *Duncan v. Kimball*, 70 U. S. 3 Wall. 87, 18 L. ed. 50, then his liability was extinguished. If it was not a payment, then the holder's collecting agent is responsible to her for having given up the check without payment; and if injury resulted to Anderson by reason of that agent's failure to use due diligence in converting Nicholson & Sons' check into money, then also is Anderson discharged, because the agent's failure to use due diligence is the failure of that agent's principal. But whilst a check drawn bona fide on a banker having funds of the drawer is prima facie payment, if accepted as cash, *Woodville v. Reed*, 26 Md. 190, still, in the absence of an express agreement, the acceptance of a check of either the debtor or a third party is, in fact, merely conditional payment, that is, satisfaction of the debt, if and when paid, *Haines v. Pearce*, 41 Md. 221; but the acceptance of such check implies an undertaking of due diligence in presenting it for payment, and if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment, *Kilpatrick v. Home Bldg. & L. Asso.* 119 Pa. 30; *Middlesex Freeholders v. Thomas*, 20 N. J. Eq. 59. What, then, is the degree of diligence required under such conditions?

The rule fixing the close of business hours of the next secular day as a reasonable time within which a check may be presented so as to hold the drawer when drawn on a bank in the same place where it is delivered, has relation only to the contract and liability of the parties to the instrument, and does not apply to a check given by the drawee to the payee, or to the agent of the payee, of the original check, upon its surrender. There is no unbending or inflexible rule governing this latter condition of facts, and in the nature of things there could not well be. What would be due diligence under one condition of facts might be negligence under different circumstances; and all that can be definitely laid down is that each case must in this particular be decided upon its own peculiar facts, though in no instance can the liability of the drawer be extended beyond the period which would ordinarily limit it. The holder of a substituted check taken upon the surrender of the original check to the drawee thereof must use such diligence in presenting it

for payment as a prudent man would under like conditions use. This imposes no hardship upon the person who voluntarily accepts the drawee's check instead of cash. If he has had ample and abundant time to convert the drawee's check into money and still omits to do so he obviously has not used due diligence, and the results of such negligence should not be visited upon the original drawer who was in no way responsible therefor.

Whether a delay to present a drawee's check till the close of business hours is due diligence cannot be asserted as an invariable rule. In some instances it might be, whilst in others it would manifestly not be. We have said that what is due diligence or a reasonable time within which to make presentment, depends upon the circumstances of each case; and so the authorities hold. This too is by 45 and 46 Vict., chap. 61, § 45—Bills of Exchange Act—the statutory law of England.

Where the facts are undisputed it is a question of law for the court. *Bell v. Hagerstown Bank*, 7 Gill, 228; *Sasser v. Farmers Bank of Maryland*, 4 Md. 409; *Staylor v. Ball*, 24 Md. 184; *Woodruff v. Plant*, 41 Conn. 844. That a higher degree of diligence is demanded under facts like those before us than that which obtains between the parties to the instrument is obvious, because, as we have said, the drawer of the original check must be held to have contemplated that when presented it would be paid in money only, and the payee and drawee have no right, except at their own peril, to substitute some other mode of settlement which results in injury to the drawer. *People v. Cromwell*, 103 N. Y. 477.

Had the holder through her agent caused Anderson's check to be certified by Nicholson & Sons the drawer would have been discharged at once. *First Nat. Bank of Jersey City v. Leach*, 52 N. Y. 350, 11 Am. Rep. 708; *Girard Bank v. Bank of Pennsylvania Twp.* 89 Pa. 92, 80 Am. Dec. 507; *First Nat. Bank of Washington v. Whitman*, 94 U. S. 343, 24 L. ed. 329.

The reason for this is, that as soon as the check is certified the funds cease to be under the control of the depositor and pass under the control of the person who procures the certification of the check drawn in his favor. But whilst the transaction before us was different, the drawer was undoubtedly placed in a position of peril by the act of the collecting agent. When Nicholson & Sons gave to the Old Town Bank their check in exchange for Anderson's it is a legitimate inference, founded on the well known and universal custom and course of dealing on the part of banks and bankers, that they charged Anderson's account with the amount of that check and thus reduced the sum to his credit \$692.03 below the \$3,000 which stood therebefore his check to Mrs. Dodge had been presented and taken up. He could not probably have checked out at noon on January the 14th the whole \$5,000 because his account had, as the necessary result of the act of the Old Town Bank, been reduced the exact amount of his check to Mrs. Dodge, in lieu of which the Old Town Bank had accepted Nicholson

& Sons' check on the Western National Bank. His control, therefore, over that much of his deposit might have been as effectually gone as if his check had been certified by Nicholson & Sons. This circumstance, whilst not making Nicholson & Sons' check to the Old Town Bank a payment, unless specially agreed to be taken as such, serves, though adverted to only by way of illustration, to emphasize the necessity the Old Town Bank was under of promptness and diligence in collecting the check on the Western National Bank, or of having it duly certified with a view of both relieving itself from liability to Mrs. Dodge and also of holding Anderson liable as drawer, in the event of a refusal by the Western National Bank to honor Nicholson & Sons' check on it.

We hold, then, that when the payee of a check, or his agent, takes from the drawee, who has ample funds of the drawer, a check of the drawee on some other bank or banker instead of money, he, the payee, or his agent, must use the utmost diligence to present the substituted check for payment; 2 Dan. Neg. Inst. § 605; 3 Randolph, Com. Paper, § 1105; *Smith v. Miller*, 48 N. Y. 171, 8 Am. Rep. 690, 52 N. Y. 545; *East River Bank v. Gedney*, 4 E. D. Smith, 552; *Merchants Nat. Bank of New York v. Samuel*, 20 Fed. Rep. 664; *People v. Cromwell supra*; *Merchants Nat. Bank of Baltimore v. Bank of Commerce of New York*, 24 Md. 12; Chitty, Bills, 18th Am. ed. \*400.

While the Old Town Bank was not bound to have made demand upon Nicholson & Sons when it was made, still having made it, and, by its own choice, not having received the cash, it cannot, if it has not used due diligence, claim the right to undo what it had done, and by a subsequent demand put itself in the position it would have occupied had it not made the first demand at the time it did make it, or done the act it then did. "If presentment for payment be actually made on the very day the check is drawn and payment tendered, the holder cannot then change his mind and leave the funds at the drawer's risk until the next day. He is allowed until the next day as matter of convenience and accommodation to him, and whilst he need not hurry to make presentment the same day, having once done so, he has fixed the money at his own risk." 2 Dan. Neg. Inst. § 1593, citing *Simpson v. Pacific Mut. L. Ins. Co.* 44 Cal. 141.

That Anderson was in fact injured by what was done is manifest, and it is no answer to say he might or would have been equally injured had the holder of the check remained passive until after the failure of Nicholson & Sons. In the one case the injury was the direct result of the payee's negligence after the presentation of Anderson's check to the drawee; in the other, had it occurred, it would have been only incident to a mere permission or lawful inaction or passivity.

The record shows that the runner of the Old Town Bank presented Anderson's check at the counter of Nicholson & Sons about ten forty-five A. M. That Anderson had at that time ample funds to his credit with the drawee for its payment in cash, but that

the runner surrendered the check and accepted Nicholson & Sons' check on the Western National Bank in lieu of the cash. This check was not presented to the Western National Bank for nearly four hours after its receipt, though with due diligence it might have been presented either five or ten minutes after it went into the possession of the agent of the Old Town Bank; and if it had been then presented, or even had been presented within two and a half hours after its receipt, it would have been paid.

The record further shows that two other checks for considerable amounts were drawn by Nicholson & Sons on the Western National Bank after the delivery of the one to the runner of the Old Town Bank, and both of these were presented and paid or certified before Nicholson & Sons closed their doors. Had the same diligence been used by the Old Town Bank the check delivered to it would have been paid also. But no such diligence was used, and because it was not the check was dishonored. Anderson was not privy to the transaction, and obviously ought not to be held responsible for the negligence of the payee's own agent. If he should be the Old Town Bank would be discharged from all responsibility, though by its acts, and not by his, the loss would fall on him. He would be held because of its failure to use due diligence, though it was the payee's and not his agent.

*Smith v. Miller, supra*, was an action for unpaid balance of the price of goods sold by the plaintiffs to the defendants. The defendants set up a defense of payment by a draft drawn by them on James K. Place & Co., of New York, to the order of the plaintiffs. The draft was received by the plaintiffs by mail on the morning of November 19, and was immediately indorsed by the plaintiffs, and at about 1.30 in the afternoon of the same day was presented for payment at the counting house of J. K. Place & Co., the drawees, who were merchants in New York in good standing. In payment of the draft J. K. Place & Co. gave their check on the Manufacturers' National Bank to the order of the plaintiffs for the full amount. At the time the check was received by the plaintiffs J. K. Place & Co. had funds in the bank to meet the check, which would have been paid had it been presented on that day. The check was deposited on the same afternoon in the Citizens Bank for collection and was not presented for payment at the Manufacturers' Bank till 12 M. the next day, on the morning of which day J. K. Place & Co. failed and on that account payment of this check was refused. It was held the plaintiffs could not recover on two grounds, the second of which was their negligence in not presenting the check for payment upon the day they received it, although they had but two hours on that day in which to present it. In the course of its opinion the court said: "But a check is payable instantly; and as between the drawer and payee the later has in analogy to the rules applicable to inland bills of exchange, until the day after the receipt of a check to present it for payment when drawn on a bank in the same place

where given and received. But the duty of the plaintiffs to the defendants is not determined by that rule of commercial law. That rule has respect only to the contract liability of the parties to the instrument. When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day or for any time beyond that within which with proper and reasonable diligence it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents.

Two checks drawn later in the day, one for \$11,000 and one for \$9500, were presented at the bank and certified before 3 o'clock of that day and subsequently paid. The same diligence by the plaintiffs, as was exercised by the holders of these checks, would have obtained the money. . . . By their delay and neglect they . . . made the checks their own and the defendants were discharged."

*Merchants' Nat. Bank of New York v. Samuel, supra*, was a suit by the indorsee of a draft against the drawers. It was received by the plaintiffs on June 18, 1883, and presented for payment on the same day. Instead of paying cash the drawees gave the plaintiffs a check on their bank in New York, which was accepted and the draft was delivered up to the payee. The check was not presented until June 19, and was then dishonored. Upon refusal plaintiff went to the drawees of the draft and returned the check and received the draft back again, and upon the same day had it protested for nonpayment. Thereafter it instituted this suit. The verdict was for defendants. The court said: "The payment of the draft was to be in cash; and if anything except cash was received and in consequence thereof the drawer of the draft was damnified, then the damages sustained he has a right to be indemnified for by the negligent party. . . . The draft should have been paid in cash; and if the plaintiff chose to receive, instead of cash, the drawee's check, it did so at its own risk, and if any loss followed the plaintiff must bear the same."

*Merchants' Nat. Bank of Baltimore v. Bank of Commerce of New York, supra*, though not strictly in point throughout is an express decision as to what constitutes negligence on the part of a collecting agent. There the New York Bank transmitted to the Baltimore Bank for collection a draft drawn by

Hoffman & Co. on Josiah Lee & Co. It was received on the morning of October 30, 1880, and presented by the runner of the Merchants' Bank to the drawees at 1 P. M. of the same day. Lee & Co. gave the runner a check drawn by them on the Mechanics' Bank, and the runner surrendered the draft, and though the banking house of Lee & Co. and the Mechanics' Bank were in the same block, he took the check to the Merchants' Bank without presenting it for payment. A little before 3 P. M. of the same day the check was presented to the Mechanics' Bank but dishonored and Lee & Co. suspended. The runner of the Merchants' Bank returned the check to Lee & Co. and got back the draft and had it protested. Other checks drawn by Lee & Co. after the one in question, and aggregating \$13,000, were presented and paid.

There was evidence tending to show that Lee & Co. were of doubtful credit, and upon this point there was some conflicting evidence. The court instructed the jury that the Bank of Commerce was entitled to recover from the Merchants' Bank provided the jury found that the Merchants' Bank in failing to present the check of Lee & Co. for payment before 3 P. M. was guilty of a want of due care, skill, and diligence in their employment as collectors of the draft, and provided they also found that the check on the Mechanics' Bank would have been paid had it been presented for payment between the hours of 1 and 2 o'clock of that day.

The verdict was for the Bank of Commerce and the judgment entered thereon was affirmed upon appeal. The negligence which made the collecting agent liable to its principal, the Bank of Commerce, was its delay of one hour in presenting Lee & Co's check for payment.

It follows from the views we have expressed that the Old Town Bank, as the appellee's testatrix, failed to use due diligence and skill to collect the check given to it by Nicholson & Sons on the Western National Bank, whereby injury was done to Anderson, and as a consequence, that Anderson was discharged.

This being so, there was error in granting the appellee's prayer and in rejecting the appellant's first prayer. The latter should have been granted, and, as it is decisive of the case, the judgment must be reversed without awarding a new trial.

*Judgment reversed with costs above and below, and without awarding a new trial.*

## NEBRASKA SUPREME COURT.

Josephine KOFKA, by Next Friend, *Appt.*,

John ROSICKY, Admr., etc., of John Spilinek, Deceased *et al.*

(.....Neb.....)

**\*1. Specific performance** of a parol contract will be enforced by a court of equity where one party has wholly and the other partly performed it, and its nonfulfilment on the one hand would amount to a fraud on the party who has fully performed it.

**2. Specific performance is a matter of discretion** in a court, which withholds or grants relief according to the circumstances of each particular case, where the general rules and principles governing the court do not furnish any exact measure of justice between the parties.

**3. Held, that the oral contract in this case possessed the elements of certainty**, and the proof establishing it was sufficiently clear and satisfactory.

**4. A girl about seventeen months old was given by her parents to her uncle and aunt under an agreement that they would adopt her, and rear, nurture, and educate her, and that she was to be as their own child, and at their death to receive or be left all the property which they might own.** She lived with them until they died, some ten years afterwards, took their name, did not recognize or know her own father and mother in the true relation, but knew them as, and called them, uncle and aunt, and knew and recognized her uncle and aunt as father and mother. The uncle and aunt died possessed of real estate in the city of Omaha, the title to which they did not, either by deed or will, transfer to the child. *Held*, that there was such a part performance of the contract by the parties thereto as entitled her to a decree giving her the title to the property by way of specific performance of the contract.

(June 26, 1894.)

**A PPEAL** by complainant from a judgment of the District Court for Douglas County in favor of defendants in an action brought to compel specific performance of a contract to convey real estate. *Reversed.*

The facts are stated in the opinion.

*Messrs. Switzler & McIntosh* for appellant.

*Messrs. Mahoney, Minahan & Smyth*, for appellees:

The contract must be enforced, if at all, as laid. If the court cannot decree the performance of the whole contract, it will not enforce any part of it.

*Thayer v. Rock*, 18 Wend. 53; *Pond v. Sheean*, 8 L. R. A. 414, 183 Ill. 813; *Meyers v.*

\*Headnotes by HARRISON, J.

**NOTE.**—As to validity of agreement to pay money or give property after the death of promisor, see *note* to *Krell v. Godman* (Mass.) 14 L. R. A. 860.

For a collection of authorities upon the question of specific performance of a parol contract to convey real estate, see *note* to *Frame v. Frame* (W. Va.) 5 L. R. A. 823.

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*Schemp*, 67 Ill. 471; *Prante v. Schutte*, 18 Ill. App. 62; *Hall v. Loomis*, 63 Mich. 709; *Waterman*, Spec. Perf. § 389; *Nickels v. Hancock*, 7 DeG. M. & G. 300; *South Wales R. Co. v. Wythes*, 1 Kay & J. 186, 5 DeG. M. & G. 880.

The plaintiff was not adopted by the Spilineks according to statute. Neither was there any attempt to follow the provisions of our code. The law of adoption was not and is not a part of the common law. It is purely statutory.

Where the statute points out the way in which a thing shall be done, that is the way and the only way in which it may be done.

*Tecumseh Town Site Case*, 3 Neb. 284; *Keith v. Telford*, 12 Neb. 273; *Shearer v. Weaver*, 56 Iowa, 578; *Hous v. Bates County*, 61 Mo. 391.

A court of equity cannot specifically enforce that part of the contract which imposes upon the Spilineks the duty of legally adopting the plaintiff.

To specifically enforce that part of the contract the court would have to dispense with the regulations ordained by statute touching the adoption of children. This a court of equity will not do, because it has not and never has had the power.

*Shearer v. Weaver*, *supra*; *Story*, Eq. Jur. §§ 96, 177; *Long v. Hewitt*, 44 Iowa, 363; *Hous v. Bates County*, *supra*; *Schouler*, Dom. Rel. 232.

Does the record show anything in that transaction which proves or tends to prove an agreement to adopt? Surely not. Then there was no agreement at the time stated in the petition. If there was an agreement at any other time the contract must be amended and that the plaintiff cannot do. She must recover upon it as laid in the bill or not at all.

*Oronk v. Trumble*, 66 Ill. 423.

The only testimony tending, even in the remotest degree, to prove the agreement is that of the Kofkas—testimony under the circumstances, owing to their relationship to the child, most unsatisfactory.

*Eyre v. Eyre*, 19 N. J. Eq. 102; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *Cole v. Potts*, 10 N. J. Eq. 67; *Cooper v. Pena*, 21 Cal. 404.

The whole testimony shows conclusively that the child would have been adopted legally by the Spilineks, would to-day be the heir of all their property, if the Kofkas gave their consent. But they did not, and upon their heads must rest the blame. They cannot complain now and ask a court to do for them, even if it had the power, that which for ten years they persistently refused to do for themselves. They are guilty of laches against which this court will not relieve. Spilinek was, in the language of the authorities, ready, desirous, prompt, and eager at all times to carry out the alleged agreement.

*Pom. Eq. Jur.* § 1408; *Story*, Eq. Jur. § 771; *Alley v. Deschamps*, 18 Ves. Jr. 225; *Campbell v. Hicks*, 19 Ohio St. 433; *Hubbell v. Von Schoening*, 49 N. Y. 826; *Williams v. Hart*, 116 Mass. 518; *Ludlum v. Buckingham*, 85 N. J. Eq. 71.

The court will not specifically enforce any contract, whether it be oral or written, until

the following elements appear therein, to wit: valuable consideration, certainty as to its subject-matter, its stipulations, its fairness, its parties and the circumstances under which it was made. It must be mutual; it must be perfectly fair, equal, and just in its terms and in its circumstances.

*Minturn v. Seymour*, 4 Johns. Ch. 497, 1 L. ed. 914; *Butman v. Porter*, 100 Mass. 337; *Nichols v. Williams*, 22 N. J. Eq. 63; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Ben-dict v. Lynch*, 1 Johns. Ch. 870, 1 L. ed. 175, 7 Am. Dec. 484; *Willard v. Tayloe*, 75 U. S. 3 Wall. 537, 19 L. ed. 501; *Woods v. Farmers*, 10 Watts, 208.

The alleged contract is not certain either in its subject-matter, its purposes, or the circumstances under which it was made.

If the court doubt it must refuse the relief.

*Hennessey v. Woolworth*, 128 U. S. 438, 32 L. ed. 500; *Purcell v. Coleman*, 71 U. S. 4 Wall. 517, 18 L. ed. 436; *Nickerson v. Nickerson*, 127 U. S. 668, 32 L. ed. 814; *Browne*, Stat. Fr. §§ 487, 491; *Walpole v. Orford*, 8 Ves. Jr. 419.

What property was she to have? "All their property at the time of their death." What does that mean? If both died together the meaning is clear. But if they should not do so, then the expression is unintelligible. But suppose one were to die ten years after the other. The property she would take at the death of the first might be much, at the death of the last might be nothing. Does the court doubt? If so, the doubt is fatal to her case.

*Hennessey v. Woolworth* and *Nickerson v. Nickerson*, *supra*; *Asken v. Carr*, 81 Ga. 685; *Gallagher v. Gallagher*, 81 W. Va. 9; *Browne*, Stat. Fr. 487, 491; *Story*, Eq. Jur. § 764; *Gorham v. Dodge*, 122 Ill. 528; *Clark v. Clark*, 122 Ill. 888; *Briz v. Ott*, 101 Ill. 70; *Hamilton v. Harvey*, 121 Ill. 469; *Magee v. McManis*, 70 Cal. 553; *Lanz v. McLaughlin*, 14 Minn. 72; *Miller v. Zuffall*, 118 Pa. 317; *Brown v. Brown*, 47 Mich. 384; *Recknagle v. Schmaltz*, 72 Iowa, 483.

To entitle a party to specific performance the contract at the time it was entered into must have been capable of being enforced by either of the parties against the other.

*Waterman*, Spec. Perf. § 196; *Dodson v. Hays*, 29 W. Va. 577; *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 498; *Cooper v. Pena*, 31 Cal. 404; *Webb v. Allon & Marine Fire Ins. Co.* 10 Ill. 225; *Wallace v. Rappleye*, 103 Ill. 229.

If there is anything fair and just in the contract as laid there certainly is nothing in it as proven.

What did Spillnek receive for all which the plaintiff now seeks from his heirs? Nothing, absolutely nothing. He gave much but received nothing.

*Jackson v. Ashton*, 86 U. S. 11 Pet. 229, 9 L. ed. 698; *Osgood v. Franklin*, 2 Johns. Ch. 1, 1 L. ed. 275, 7 Am. Rep. 513; *Walpole v. Orford*, 8 Ves. Jr. 419.

The contract has not been taken out of the statute by part performance. The things which must be done are: Payment of the purchase price coupled with possession and valuable improvements; or at least payment and possession. In the case of gifts, possession and valuable improvements, and, let it be remembered, those things must be done in pursuance 35 L. R. A.

or obedience to the terms of the contract, not voluntarily, nor in pursuance of or in obedience to some contract other than the one sued on.

*Morgan v. Borgan*, 3 Neb. 209; *Baker v. Wiswell*, 17 Neb. 53, and cases cited; *Poland v. O'Connor*, 1 Neb. 53, 98 Am. Dec. 537; *Dawson v. McFaddin*, 23 Neb. 131; *Neale v. Neale*, 76 U. S. 9 Wall. 1, 19 L. ed. 590.

Let us assume that her affection, her obedience, and her services, if there were any, would take the place of payment, still that would not hold. Because by the terms of the contract she was not required to do those things.

*Horn v. Ludington*, 32 Wis. 73; *Morgan v. Borgan*, *supra*.

She was not in possession.

*Moore v. Small*, 19 Pa. 468; *Cronk v. Trumble*, 66 Ill. 428; *Wood v. Thornly*, 58 Ill. 484; *Padfield v. Padfield*, 92 Ill. 198; *Hart v. Carroll*, 85 Pa. 508; *Ballard v. Ward*, 89 Pa. 358; *Miller v. Zuffall*, 118 Pa. 317; *Ferbrache v. Ferbrache*, 110 Ill. 210; *Kaufman v. Cook*, 114 Ill. 11; *Clark v. Clark*, 122 Ill. 888; *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222; *Pond v. Sheean*, 8 L. R. A. 414, 132 Ill. 312.

Plaintiff is not entitled to performance on the ground of equitable fraud.

*Pom. Eq. Jur.* § 1409, note 2; *Morgan v. Borgan*, 3 Neb. 209; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273, 1 L. ed. 183; *Pierce v. Catron*, 23 Gratt. 588.

If she has suffered any loss by reason of acts done by her, in reliance upon the contract, she must bear it. Defendants are not to blame. She was not justified either in law or equity in doing those acts. She did them at her peril and must suffer the consequences.

*Pond v. Sheean*, *supra*; *Gallagher v. Gallagher*, 81 W. Va. 9.

The acts of part performance "must have been such as could have been done with no other view or design than to perform the agreement."

*Waterman*, Spec. Perf. §§ 263, 268; *Wheeler v. Reynolds*, 66 N. Y. 227; *Morgan v. Borgan*, *supra*; *Horn v. Ludington*, 32 Wis. 73.

Courts of equity have declared again and again that it had been better if the doctrine of part performance had never been established.

*Phillips v. Thompson*, 1 Johns. Ch. 148, 1 L. ed. 94; *Hennessey v. Woolworth*, 128 U. S. 438, 32 L. ed. 500; *White v. Damon*, 7 Ves. Jr. 30; *Gorham v. Dodge*, 122 Ill. 528; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *Haslet v. Haslet*, 6 Watts, 484; *Graham v. Graham*, 34 Pa. 476; *Cooper v. Penna*, 21 Cal. 404; *Wall's App.* 111 Pa. 468; *Luss v. Deitz*, 46 Iowa, 206.

The alleged agreement was testamentary in its character and void, not being in conformity with the statute of wills.

1 Redf. Wills, §§ 6-10, 169; *Thomas v. Griffith*, 68 Iowa, 11; *Nutt v. Morris*, 142 Mass. 1; *Graham v. Graham*, *supra*; *Comer v. Comer*, 120 Ill. 428; *Thomas v. Griffith*, *supra*; *Shearer v. Weaver*, 56 Iowa, 578; *Wallace v. Rappleye*, 103 Ill. 250.

This contract having been made by the parents of the plaintiff and she being required by its terms to do nothing to carry it out, she cannot maintain a suit for specific performance.

*Waterman*, Spec. Perf. § 74; *Denbo v. Tipton*, 2 Ind. 20; *Levy v. Brush*, 8 Abb. Fr. N. S. 418; *Wallace v. Rappleye*, 103 Ill. 254.

This contract purports to have been made by the plaintiff's parents for her benefit. It must be ratified by her before she has a right to sue upon it.

She is an infant; infants cannot appoint an agent. Infants cannot ratify an unauthorized act.

*Armitage v. Widoe*, 86 Mich. 127; *Lawrence v. McArter*, 10 Ohio, 87; *Fonda v. Van Horne*, 15 Wend. 681, 80 Am. Dec. 77; *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756; *Cole v. Pennoyer*, 14 Ill. 158.

*Meurs. Ricketts & Wilson amici curia.*

Harrison, J., delivered the opinion of the court:

December 8, 1888, the following petition was filed in the district court of Douglas county: "The plaintiff, Josephine Kofka, appears by her next friend James Kofka, and for her cause of action alleges the fact to be that this plaintiff was born in Omaha, Nebraska, on the 16th day of March, 1877. That her father's name is James Kofka, who appears here as her next friend, and her mother's name is Mary Kofka; both of whom were then residing in Omaha, and have ever since here resided. That the parties to this suit are all of Bohemian nationality. That soon after her birth, to wit, in the month of August, 1878, there was living in Omaha, John Spilinek, deceased, and his wife, Anna Spilinek; the latter being a sister of the plaintiff's mother. During said month the said John Spilinek and Anna Spilinek, who never had any children of their own, requested of plaintiff's parents the privilege of taking this plaintiff with them to live with them as their child. The parents of plaintiff having several children, one of whom at that time was only a few weeks old, fully considered the matter, and, having full confidence that plaintiff would receive at the hands of John and Anna Spilinek the care and affection which is due from parents to child, consented to said request but only upon the expressed and well-understood conditions to be hereinafter named; that is to say, James Kofka and Mary Kofka, the parents of the plaintiff, gave up the care, custody, and control of said child, in the said month of August, 1878, on the consideration and agreement, then and there assented to by the said John and Anna Spilinek, that they would legally adopt and receive the said child as their own, would care for her, rear and educate her, and that she should have their fullest and best affection; and at their death she, the plaintiff, should inherit and be left all the property with which they died possessed. Plaintiff further says that she went to live with the said John and Anna Spilinek at the time above mentioned, on the terms aforesaid. That she continued to live uninterruptedly with them until their death, which came to John Spilinek on September 16, 1888, and to Anna Spilinek on September 19, 1888. The plaintiff says that during all of said time she conducted herself towards the said Spilineks as an affectionate and obedient child, and received at their hands all the devotion and love a child should receive from parents. That she had for several

years previous to their death assisted her aunt, Anna Spilinek, in the work about the house in the way of washing, making up the beds, house cleaning, going on errands, and generally doing at their request anything within her power. That she has of late years been going to the public schools of the city of Omaha, where she was always enrolled and known as Josephine Spilinek; and in fact she has always gone by that name, and never knew any other until the death of the said John and Anna Spilinek. Plaintiff says the said John and Anna Spilinek always called her their own child, and so treated her, and she was told and given to understand by them that her own father was her uncle and her own mother her aunt, and she knew not the contrary until after September 19, 1888; and she always believed, and in her own mind cannot but believe yet, that the said John and Anna Spilinek were her real father and mother. The plaintiff further says that the said deceased, John Spilinek and Anna Spilinek, often during the last ten years expressed and made known to friends and acquaintances and to the plaintiff's parents their intention to leave this plaintiff all their property at their death, and these promises and declarations on the part of both were made up to and within a few days of and on the very day of their death, and plaintiff says that up to the very time of their death they intended to leave their property to this plaintiff. That the said deceased always intended to fulfill their agreement of adoption by legal proceedings according to the statutes, but all parties concerned were on intimate and friendly terms, and the matter was allowed to go by, all feeling secure; and that, for all intents and purposes, plaintiff was as fully their child as if the formalities had been gone through with, until it was finally prevented by their sudden death as hereinafter mentioned. Plaintiff further says that on the 16th day of September, 1888, the deceased John Spilinek was suddenly overtaken by a loss of control of his mental faculties, and while thus afflicted shot himself dead, and inflicted mortal wounds at the same time upon his said wife. That John Spilinek died within a short time on the same day, but his said wife, Anna, lingered until September 19, 1888, when she died from the effects of said wounds. Plaintiff says there was no marital or family difficulty whatever to induce this conduct on the part of said John Spilinek, but it was wholly caused by despondency, brought on by fancied business embarrassments. Plaintiff says that the deceased John Spilinek died intestate, but, had it not been for his sudden act of suicide, he would have made provision by will for his property to go to his wife during her life, and at her death to this plaintiff, as was his oft-expressed desire and intention up to the very time of his death. Plaintiff alleges that Anna Spilinek, deceased, while in the full and complete control of her mental faculties, and recalling her deceased husband's desire in the premises, as well as their agreement, did on September 17, 1888, make and execute a will in writing, which said will was duly probated and

allowed on the 20th day of November, A. D. 1888, by the terms of which all the real and other property she died possessed, subject to two or three small debts, was left to this plaintiff, whom she calls therein 'our adopted child, Josepha Kofka.' The following is a copy of said will: 'Last will of I, Anna Spilinek, of Douglas county and state of Nebraska. Being aware of the uncertainty of life, but of sound mind and memory, do make and declare this to be my last will and testament, in manner following, to wit: I give, devise, and bequeath unto our adopted child, Josepha Kofka, all of mine real estate, money, personal property, and other effects that I may be possessed of or entitled to after my decease, subject, however, to all my legal debts; that is to say, I and my husband owe to Karel Spilinek \$150, and to John Barta \$50, and to Barbara Spilinek \$9.00. I also further declare that out of the above real estate and money \$100 be set and given to my father, Frank Radil. Signed this 17th day of September, 1888, at Omaha, Nebraska. Anna Spilinek. Signed in the presence of James Engelthale, Frank Mrwicka, Vaclav Benak.' The plaintiff says that the defendant John Rosicky is the duly appointed, qualified, and acting administrator of the estate of the said John Spilinek. That the other defendants named, to wit, Anton Spilinek, Frank Spilinek, Vincent Spilinek, and Albert Spilinek, being of ages, respectively, 53, 51, 49, and 42 years, are brothers of said John Spilinek, deceased. That they are all nonresident aliens, living at Skuhrov, Bohemia, except Anton, and he is a resident and citizen of Nebraska. Plaintiff alleges that the defendant Anton Spilinek claims to be the sole heir at law of the estate of John Spilinek, his brothers being nonresident aliens, and disputed the right of this plaintiff to inherit any property whatever from the estate of the said John Spilinek, and he claims to be the sole heir to the real estate mentioned herein, and maintains that this plaintiff has no rights in the premises. The other brothers are made defendants in this case, and brought into court out of caution, in view of our present law with respect to nonresident aliens. The plaintiff says that at the time of his death the deceased John Spilinek was possessed of the following real estate, situated in the city of Omaha, of the value of about \$6,500; that is to say: The east half of lot 4 in block 11, and the east half of the west half of lot 4, in said block 11, S. E. Rogers' addition to Omaha, Nebraska. The defendant Herman Tombrinck claims a mortgage on the property described herein for \$600, bearing date May 4, 1887, which appears of record in Douglas county as a lien on said property; but whether the same is genuine or unpaid this plaintiff has no information, and, in order to put said Herman Tombrinck to his proof in the premises, she denies said mortgage is bona fide and valid lien on said property. The plaintiff says that since she and her parents have fully performed the agreement herein mentioned on their part, whereby they yielded the possession of and control over this plaintiff to said deceased parties, and

she yielded to them the obedience, services, and devotion of a child for over ten years, and would have continued so to do but for their death, and that by their own acts during their lives she knew no other mother or father save them, and that whereas these decedents fully expected and intended she should inherit their property at their death, plaintiff says it would be a fraud on her and on them to have their agreements in that particular violated. The plaintiff therefore brings her cause before this honorable court, on its equity side, and prays that she may be decreed a specific performance of the contract mentioned herein, and that she be declared to be the lawfully adopted child of the deceased, John and Anna Spilinek, that she may be declared the legal heir to the property described herein, and all other property of said deceased, and to hold the same free from any claim or right the other defendants may have or claim in or to the same, and for such further relief in the premises as the facts in the case may entitle her to."

We copy the allegations of the petition entire, for the reason that it is probably as short and complete a statement of the plaintiff's cause of action as can be made, and fully set forth the same. A demurrer to the petition was filed, argued, and overruled, and the answer, filed by defendants, March 7, 1890, which joined the issues upon which the case was tried and determined, contained two counts, the first of which was as follows: "Now come the said defendants, John Rosicky, Adm., Anton Spilinek, Frank Spilinek, Albert Spilinek, Vincent Spilinek, and, answering for themselves only, deny each and every allegation in the petition filed in said cause except those expressly admitted herein. Defendants admit that plaintiff was born in Omaha, Neb. That her father's name was James Kofka and her mother's name Mary Kofka, and that both of them were residing in Omaha when the said plaintiff was born. That the parties to this suit are of Bohemian nationality; that the said plaintiff lived with the said John Spilinek, deceased, for some years. That in 1878, John Spilinek and his wife, Anna Spilinek, a sister of plaintiff's mother, resided in Omaha. That said John Spilinek and Anna Spilinek never had any children of their own. That plaintiff resided with the said John Spilinek and Anna Spilinek at the time of their death, and that John Spilinek died on September 16, 1888, and Anna Spilinek on the 19th day of September, 1888. That the said plaintiff has of late years attended the public schools of the city of Omaha. That on the 16th day of September, 1888, the deceased John Spilinek was afflicted by a loss of control of his mental faculties, and, while thus afflicted, shot himself dead and inflicted a mortal wound at the same time upon his said wife. That the said Spilinek in a short time died, and his said wife lingered until September 19th, when she died from the effects of said wound. That there was no marital or domestic difficulty whatever to induce this conduct on the part of the said John Spilinek, but was wholly brought on by fancied business embarrassments. The deceased died



intestate. That the will, a copy of which is set out in the petition, was signed by Anna Spilinek. That the defendant John Rosicky is the administrator of the estate of said John Spilinek, as alleged in the petition. That the other defendants, Anton Spilinek, Frank Spilinek, Albert Spilinek, and Vincent Spilinek, are brothers of the deceased, as set out in the petition. Said brothers are all nonresidents, except Anton Spilinek, and he is a resident of the state of Nebraska. That said Anton Spilinek claims to be the sole heir-at-law of the estate of John Spilinek, and denies the right of the plaintiff to inherit any property whatever from the estate of the said John Spilinek, and he claims to be the sole heir to the real estate mentioned herein, and maintains that said plaintiff has no right to the premises. That the deceased John Spilinek was possessed of the real estate described in the petition at the time of his death, and that the defendant claims a mortgage upon said premises, as alleged in said petition. Further answering, defendants say that they have no knowledge or belief concerning the date of plaintiff's birth, nor concerning the allegation that she continued to live on uninterruptedly with the said deceased until their death; nor that she conducted herself towards the said deceased as an affectionate and obedient child, and received from the hands of the deceased all the love and devotion that she should receive from her parents; nor that she had for several years previous to the death of the deceased assisted in the work about the house, as alleged in said petition; nor that she was enrolled in the public schools as Josephine Spilinek, and that she was always known by that name, and never knew any other until the death of the deceased; nor that said deceased called her their child." The second count of the answer pleads the statute of frauds. The trial of the case, as regards the rights of plaintiff, was had July 17, 1891, and the issues were determined in favor of defendants, and the action of plaintiff dismissed, and the case brought to this court on appeal by plaintiff.

The evidence in this case discloses that the mother of the plaintiff, Mary Kofka, was the sister of Mrs. Spilinek; that they were living near each other in the city of Omaha, with their husbands, John Kofka and John Spilinek; the Kofkas the happy possessors, at the time (August, 1878) when it is alleged the transaction occurred between them out of which this suit springs, or to which we may refer as its source, of four children, among them the plaintiff, then about seventeen months old. The Spilineks had no children, and it was agreed between the parties that the plaintiff should be taken by the Spilineks, to be reared, educated, and cared for as if she were their own daughter; they stating that any property they might have or own during life should be given to her, or be hers, at their death, and that they would adopt her, and make her their heir. Pursuant to this agreement, the plaintiff was taken to the house of the Spilineks, who at the time of these occurrences were poor, and, as appears from the testimony, living

in a shanty in the street. The plaintiff, from this time until the death of the Spilineks,—of whom John Spilinek died September 18, 1888, having on that day shot first his wife and then himself, he dying immediately, and she two or three days later,—lived with the Spilineks, and was taught to and did call them father and mother, and treated them as such, and did not know her own father and mother, although she saw them almost and possibly every day, but accepted them as and considered and called them aunt and uncle, knowing no better; yet she went to the premises where they resided, and played with their other children, thinking they were her cousins, and treating them as such. That she did not know but what the Spilineks were her parents until after their death, when she was so informed by her mother and other parties. The plaintiff was known at school as "Josie" or "Josephine Spilinek," and so wrote her name at all times after she learned to write. In fact there seems to have been a complete loss of her identity, personality, or individuality, as a Kofka, and an assumption of the Spilinek, as much so, apparently, as if her whole being, both mental and physical, had been changed. The evidence further shows that she was a good, obedient, and dutiful child to the Spilineks, and also that they treated her well and affectionately. At all times, in all places, and under all circumstances, Spilinek and his wife treated, looked upon, claimed, and acknowledged the plaintiff as their "child" or "girl." The Kofkas, on their part, never made any claim to her or her services, or attempted to take her from the Spilineks, or by word or deed to inform her that they bore any other relation to her than that of uncle and aunt; and through all this was interwoven, as a part of the life and vitality of the agreement, the proposition that the plaintiff was to have the property. It was always spoken of when the matter was mentioned between them (which was very frequently), and the Spilineks made it a subject of conversation with a number of persons, friends and acquaintances, some of whom were called, and so testified; and in a letter, written by Spilinek, September 12, we find reference made to "my girl," which must be taken to mean the plaintiff, and in the will of Mrs. Spilinek, made just prior to her death, she fully recognized the position and rights of the plaintiff. We are satisfied, after a careful examination, comparison, and analysis of all the testimony in the record, that the contract was one clear and definite in its terms and obligations, and was both made and performed as such with reference to the property rights to accrue or inure to or in favor of plaintiff as made, or with reference to any other portion of it. The Spilineks had acquired some property, a piece of real estate, the title to which is now in controversy in this case, for which, according to the evidence, Spilinek was at one time offered \$4,000. There was also an agreement to adopt the plaintiff, or at least so the parties testify; and the parents and Spilineks often conversed about "assigning" her, but it does not seem to have been considered by them as one of the essentials of

the compact, and which must necessarily be accomplished, but as something more of a formal nature or character. Nor do we think it was so inseparably connected with the other part of the contract as to carry it along with it, and render it incapable of enforcement, if so capable in any event, provided the agreement to adopt cannot be decreed to be performed, which we think, unquestionably, it cannot be, as in this state the matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed, and must be followed, and involve a written consent by the parties, a relinquishment by those possessing the rights to and over the child, and an acceptance by the person or persons desiring to acquire such rights, and a decree by the judge of the county court, which introduces an element barring the jurisdiction of a court to decree specific performance in the first instance.

Having reached the conclusion that a contract was entered into, the query now arises, Was it one of which a court of equity can and will decree a specific performance? The property which the plaintiff seeks to recover is real estate, and it is contended that the contract, resting entirely in parol, is within the statute of frauds, and hence cannot be enforced. Courts in the past (whether such action was wise or unwise we will not now stop to discuss) have removed or exempted from the operation of the statute of frauds certain cases in which they have concluded that the hardship forced to be endured by the parties was greater than was warranted by the benefit to be derived from enforcing the rule, and there has gradually arisen classes of cases known as "exemptions from the rule of the statute," and one class embraces what is called "cases of specific performance of parol contracts for the transfer or conveyance of real estate." The agreement in this case did not contain anything by which it can be known whether the transfer of the property to plaintiff was to be effected by will or by deed, and our inquiry in reference to the power of the court to decree performance cannot be confined to either, but must include both. There is a line of authorities emanating from some of our able courts of last resort, most notably those of Indiana, Illinois, and Iowa, which denies the right to specific performance of a contract similar to the one under which the claim in this case arises, mainly upon the ground that the statute was enacted to cover just such cases, that it will work no hardship to require parties to put all such agreements in writing, and that the testimony of witnesses should not be received, probably several years after the happening of the event, to establish a contract by parol, by which the course of the descent of lands will be changed. These are strong and cogent reasons, and it is not our province to attack or attempt to refute them, as we understand it. They are the underlying principal reasons for the rule as embodied in the statute, but we do not think the rule should be so rigidly adhered to as to accomplish a fraud as against one of the persons affected by the contract to which

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it is to be applied. It is a matter of discretion in the court, which withholds or grants relief according to the circumstances of each particular case, when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties. 2 Story, Eq. Jur. § 742; *Clark v. Koenig*, 38 Neb. 572.

*Van Dyne v. Vreeland*, first reported in 11 N. J. Eq. 370, and on a second hearing in 12 N. J. Eq. 142 [*Vanduyne v. Vreeland*], was a case in which "the father of an infant child made an agreement with an uncle of the infant, at the uncle's request, to this effect: that the uncle should take the infant, and adopt him as his own child, and that he would treat him as his own son, and that the property he should have should be given to the child, so that it should belong to him at the death of the uncle and his wife. The uncle took the child, and had him baptized, and the child assumed his surname, and lived with him twenty-five years. Held, that the child might maintain his bill upon the agreement after such performance." Also: "Where a father makes an agreement in reference to his infant child, from which benefits are to accrue to the child upon his performance of the agreement, after performance the child in his own name may file his bill to enforce the agreement. The party for whose benefit the agreement is to be performed, and especially if any valuable portion of the consideration has been rendered by him, has a legal right to enforce it. It is of no consequence that the promise to fulfill it was not made directly to the person who is entitled to remuneration. It is enough if it was made by some one who had authority to make it on his behalf." And in the text of the opinion it was stated: "In this case, if the agreement which is the ground of the bill is of such a character that it could be enforced by either party if it were in writing, then I think there can be no doubt but that there has been such a part performance in this case by the complainant as will take the agreement out of the operation of the statute. The bill alleges that the agreement had been fully performed by the father of the complainant,—one of the parties by whom it was made,—and by the complainant, upon whom it imposed certain duties and obligations. The facts stated show that the complainant and his father have performed their part of the agreement as fully as such an agreement could be performed. There is nothing more for them to do. The complainant cannot be denied his redress by the mere interposition of the statute. The question is, Is it an agreement of a character which can be enforced in equity?" In the report of the case in volume 12 it was held: "The principles of equity will be applied to new cases as they are presented, and relief will not be withheld merely on the ground that no precedent can be found." And in the opinion the court says: "The agreement was this: Vreeland and his wife were to adopt the boy. He was to be given up to them, and to be under their management and control; and when they died he was to have their property. It is true the agreement does

not state whether the property should be secured to the complainant by deed, so that he might enjoy it when they died, or whether it should be left him by will. . . . In this case part performance is set up in avoidance of the statute. I think the answer admits, and the evidence shows, a substantial performance of the agreement on the complainant's part, as well as such part performance on the part of the defendant himself as will take the case out of the operation of the statute. There has been such a performance on both sides as puts the complainant in a situation which is a fraud upon him unless the agreement is now fully performed." This was a case very similar in its facts and incidents to the one at bar, and directly in point.

The case of *Van Tine v. Van Tine*, (N. J.) 1 L. R. A. 155, is another case decided by the New Jersey court. The case is stated and the rule announced in the first section of the syllabus as follows: "A father gave his child, then only a few months old, to S., his sister, with a mutual understanding that she was to provide for the child, and bring her up as her own. She thereupon took charge of the child, refused to give her up to her father, and had her baptized in her own name, by which the child was always known. The child always lived with S., assisted her with her household duties, called her 'mother,' and was not informed of her parentage until she was eighteen years old. S. often stated that the child was to have all her property, and about fourteen years before her death made a will, bequeathing to the child all her personal property, at which time she owned none but personal estate. But a few months before her death she purchased the land in question. Her death was sudden, and there was nothing to show that she bought the land to prevent that much of the estate going to the child. Held, that the child was entitled to the land, as the agreement of S. to receive her as her own was valid and binding, though not in writing, and had been partially performed." And in the opinion the court said: "The obligations of parties to each other are ascertained as well by what they say as by what they do; admissions often giving the best and truest interpretations to contracts previously entered into, or doings showing what has previously been agreed to be or promised should be done. When Mrs. Stryker, being childless, said to her brother Peter, the father of Jessie, that she would take Jessie, and treat her as her own child, she meant just what she said, both in law and in conscience. She meant that Jessie should have all the benefit of the relation of parent and child. If individuals are ever to be taken at their word and held to it by the courts, surely they should be so taken under such circumstances as are here presented. How can the court say that Mrs. Stryker did not mean just what she said, and how can it say that she did not, by what she said, most fully and distinctly bind herself to perform all the obligations of a parent towards a child towards Jessie? And were not those obligations so made of the same force as she would have been under to

a child of her own loins? I cannot see how obligations, so voluntarily assumed by a citizen, so affecting the highest welfare of an infant of the tenderest years, can be regarded as otherwise than the most sacred and binding. There was part performance of the obligation." See also *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773, and authorities cited in note on page 784, under the head of "Agreements to Make Particular Disposition of Property by Will. (1) Validity of such agreements, and (8) Mode of enforcement in equity." "It seems to be settled that the payment of the consideration will not, in general, be deemed such a part performance as to relieve a parol contract from the operation of the statute. But the reason for this, viz., that in such a case the repayment of the consideration will place the parties in the same situation they were before, shows that the rule applies to a moneyed consideration. If the consideration for the contract be labor and services, those may sometimes be estimated, and their value liquidated in money, so as measurably to make the promise whole on the promisor's rescission of the contract. But in a case where the services rendered are of such a peculiar character that it is impossible to estimate their value to the promisor by any pecuniary standard, it is out of the power of any court, after the performance of the services, to restore the promise to the situation in which he was before the contract was made, or to compensate him in damages. Such a case is clearly within the rule which governs courts of equity in carrying parol agreements into effect, where possession has been taken of landed property or moneys laid out in improvements upon the land which the testator agreed to devise in consideration of care and maintenance during his life. *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, 7 L. ed. 852.

In *Wright v. Wright* (Mich.) 23 L. R. A. 196, a Michigan case, the court held: "Defendant, in his second year, was indentured to deceased until his majority. When he was eight, deceased and his wife, being childless, adopted him under the law then in force, and his name was changed. He gave them his entire services, without pay, till he was over twenty-two, when deceased died. The widow testified that they intended that he should be their heir, that her husband believed that this was effected by the adoption, that defendant thought he was their child till after her husband's death, and that they never talked about paying him for his services. The adoption law was held unconstitutional. Held, that defendant's performance entitled him to the inheritance, by way of specific performance of the oral contract."—and states in the opinion: "In *Shahan v. Swan*, reported in 48 Ohio St. 25, the supreme court of Ohio expressly recognize the doctrine of these cases. It there said: 'Notwithstanding that it is the established rule in Ohio that the payment of the consideration, even in the personal service of the party seeking relief, does not ordinarily constitute such part performance as will take the case out of the operation of the statute, we do not wish to be understood to

hold that cases may not arise where specific performance of a contract in parol may be had on the ground that the consideration had been paid in personal services, not intended to be, and not susceptible of being, measured by a pecuniary standard.'"

In Missouri, in the case of *Sutton v. Hayden*, 62 Mo. 101, a case in which one "Mrs. Green made an agreement by which she took in its infancy the child of her brother, upon the understanding that at her death all the property owned by her should go to the child, the child was to come and live with her, be as a daughter to her, and take care of her for the remainder of her life. The child entered upon the performance of her part of the agreement, and throughout the course of Mrs. Green's life rendered the services, and, so far as lay in her power, performed her part of the agreement. Mrs. Green died without having in any way secured the property to the child. . . ." Says the court: "There are things which money cannot buy, a thousand nameless and delicate services and attentions, incapable of being subject of explicit contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of that contract." See also, *Sharkey v. McDermott*, 91 Mo. 655, 60 Am. Rep. 270, where it was held: "An agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property at their death, performed on the part of the child, is enforceable as to the property on their death."

In *Brinton v. Van Cott*, 8 Utah, 480, it was held as follows: "A verbal contract, whereby plaintiff agrees to live with and take care of an old woman until her death, in consideration of her promise to leave all her property to plaintiff, is taken out of the statute of frauds by the rendition of the services during the lifetime of the woman; and after her death equity will specifically enforce the contract on the theory of part performance, since the services rendered are of a peculiar character, not intended by the parties to be measured by a pecuniary standard. . . . A contract by which an old woman, in apparent good health, and having the expectancy of many years of life, agrees to leave all her property, worth about \$5,000, to a sixteen year old girl, in consideration of the latter's promise to live with and take care of her as long as she lived, is not void for want of mutuality and fairness; and after her death the contract will be specifically enforced in favor of the girl, who performed her part of the agreement, though the woman died within three or four months after the execution of the contract." Also: "In this

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territory the statute of frauds is in full force. 2 Comp. Laws, § 2831. It is therefore incumbent upon the appellant to show by her complaint that she has partly or wholly performed her contract, so as to take it out of the statute of frauds. 'When the consideration of the agreement consists of work, labor, and services personally done and rendered by the plaintiff, if the value of the same can be ascertained with reasonable accuracy in an action at law, and adequately compensated by the recovery of damages, then neither the services themselves nor the payment for them will avail as a part performance of the verbal agreement. But if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages.' Under these circumstances the rendition of the services is a part performance of a verbal agreement. The act of part performance of a verbal agreement for services must be such that it would be a fraud on the party performing for the other party to refuse to perform his part as agreed between them. Pom. Cont. 114." See also, *Korminsky v. Korminsky*, 2 Misc. 193; *Godine v. Kidd*, 64 Hun, 585; *Jaffee v. Jacobson*, 1 C. C. A. 24, 48 Fed. Rep. 21, 4 U. S. App. 4; *McKinnon v. McKinnon*, 5 C. C. A. 580, 56 Fed. Rep. 409; *Haines v. Haines*, 6 Md. 435.

But we will not further quote or cite authorities. We are fully convinced that the weight of authority and reason preponderates in favor of the position that the contract in the case at bar was such a one as a part performance will relieve from the operation of the statute of frauds; that there was a full performance of the contract on the part of the plaintiff, and such a part performance by the Spilineks, as did so take it out of the operation of the statute. We are further satisfied that the child had a right to bring the action to enforce the contract made for it by the parents, and that the proof of the contract was sufficiently clear, definite, satisfactory, and unequivocal to call for its enforcement by a court of equity, in the exercise of its discretion.

The judgment of the District Court is reversed, so far as it affected the rights of the plaintiff herein, and decree ordered in this court in favor of appellant that the title to the property described in the petition is in appellant, and be quieted in her, except as against the mortgage liens thereupon prior to the death of the Spilineks.

Judgment accordingly.

MINNESOTA SUPREME COURT.

Claus HEINBOKEL, Appt.,  
v.  
NATIONAL SAVINGS LOAN & BUILD-  
ING ASSOCIATION, Resp't.

28 Minn. 340  
59 N.W. 1250.

\*A nonborrowing member of a mutual building association, who has brought himself within the rules by notice of withdrawal, cannot bring an action and take judgment against the association when, under the statute (Gen. Laws 1891, chap. 131, § 27), as well as in the by-laws of the association, there is no money in the treasury legally applicable to the payment of his claim.

(July 23, 1894.)

**A**PPEAL by plaintiff from an order of the District Court for Ramsey County denying a motion for a new trial after judgment in favor of defendant in an action brought to enforce payment of the withdrawal value of shares which plaintiff owns in the defendant association, and of the withdrawal of which he had given notice. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Holcombe & O'Reilly*, for appellant:

A member of a mutual building association who has fully performed all the conditions of the by-laws of the association, and the statute law of the state, relative to his right to withdraw the shares of stock owned by him, cannot be deprived of his right to a judgment against the association for what he may, on the trial, prove to be entitled to receive at its hands.

Endlich, Building Associations, §§ 136, 143; *United States Bldg. & L. Assn. v. Silverman*, 85 Pa. 394; *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Assn.* 5 Misc. 518.

*Mr. J. M. Hawthorne*, for respondent:

*United States Bldg. & L. Assn. v. Silverman*, decided November 8, 1877, 85 Pa. 394, was only allowed to stand unquestioned until the year 1883, when it was criticised and distinguished in *Christian's App.* 102 Pa. 189.

The effect of the *Silverman Case* was further impaired in Pennsylvania in *National Loan & Homestead Assn. v. Hubley*, 34 Phila. Leg. Int. 6, where it was held that a "withdrawing member must show that there are funds on hand for that purpose before he can enforce his demand."

The right to withdraw is not a common-law right. Such right is wholly a creature of the statute and that same statute which gives the stockholders the right to withdraw restricts and limits the fund from which he can withdraw. If it had not been for the statute and the contract entered into by the association, commonly called a by-law, the right to withdraw would not exist at all.

\*Headnote by COLLINS, J.

**NOTE.**—The question decided in the above case is one on which we have found no authorities except those referred to in the report of the case.  
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*Bedford R. Co. v. Bowser*, 48 Pa. 29; *Jewett v. Valley R. Co.* 34 Ohio St. 601; *Morawetz, Priv. Corp.* 2d ed. § 109; *Cooke, Stockholders & Corporations*, 2d ed. § 169.

Withdrawing members are restricted to one half of the monthly receipts.

Gen. Laws 1891, chap. 131, § 27.

A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, section, or word shall be superfluous, void, or insignificant.

*McNamara v. Minnesota Cent. R. Co.* 13 Minn. 338; *Brown v. Balfour*, 12 L. R. A. 373, 46 Minn. 71.

The by-laws establish the terms of a contract between a company and its stockholders.

*Hazeltine v. Belfast & M. L. R. Co.* 79 Me. 411; *Beach, Priv. Corp.* § 321, and cases cited; *Brick Presby. Church Corp. v. New York*, 5 Cow. 538.

This statute and this by-law say what they mean and mean what they say.

*State v. Redwood Falls Bldg. & L. Assn.* 10 L. R. A. 752, 45 Minn. 158; *Texas Homestead Bldg. & L. Assn. v. Kerr* (Tex.) May 2, 1890.

In *Re Sunderland Bldg. Soc.*, L. R. 24 Q. B. Div. 394, the following rule or by law as to withdrawal was approved: "Should more than one member give notice to withdraw at one time, the members so giving notice shall be paid in rotation, according to the priority of notice; provided always that the said society shall not be obliged to make such payments as aforesaid until they have sufficient funds in hand for that purpose, and also to meet the then existing liabilities of the society."

These regulations were reasonable and were binding on the appellant.

*Trigg v. Vermillion*, 113 Mo. 230.

Appellant voted for the resolution requiring withdrawing stockholders to be paid in the order in which their applications were filed. At least 125 other withdrawing stockholders have acted on the faith of this resolution and the appellant is now estopped to raise any questions about it.

*Welland Canal Co. v. Hathaway*, 8 Wend. 483, 24 Am. Dec. 51; *Cummings v. Webster*, 43 Me. 194; *Chapman v. Searle*, 8 Pick. 38; *Griswold v. Seligman*, 72 Mo. 119.

The by-laws of a company made in pursuance of their charter are equally as binding on all their members (and others acquainted with their method of business) as any public law of the state.

*Cummings v. Webster*, *supra*.

All by-laws duly and legally passed are binding and obligatory upon the members of a corporation.

*Anacosta Tribe No. 12, Improved Order of Redmen v. Murbach*, 13 Md. 91, 71 Am. Dec. 625; *McFadden v. Los Angeles County* *Supra*. 74 Cal. 571.

A by-law or rule passed after the stockholder has given notice to withdraw is binding upon him because he is still a member. This is the English rule and it has never been changed in this country.

*Pepe v. City & Suburban Permanent Bldg. Soc.* L. R. 2 Ch. Div. 113.

By the terms of the agreement, the by-laws, the amount to be paid to a withdrawing stockholder is not due from the corporation to him until they have funds on hand legally applicable thereto. Hence the cause of action has not accrued, and under title 2, chapter 66, General Statutes 1878, the statute of limitation does not begin to run until the cause of action accrues.

*Baker v. Kelley*, 11 Minn. 480.

**Mr. C. E. Hamilton** for the Minnesota State League of Local Building Associations.

**Collins, J.**, delivered the opinion of the court:

Section 4 of article 2 of defendant's by-laws reads as follows: "A shareholder may withdraw at any time upon giving sixty (60) days' notice in writing to the association, when he shall receive the amount of the installments actually paid in by him on such shares, together with the interest thereon, if any, at the rate fixed by the board of directors, standing to the credit of his shares at last preceding adjustment of profits, less all fines and fees, amount paid in on expense account, and a proportional part of the losses, if any, and other charges accrued subsequent to said last preceding adjustment of profits: provided, however, that at no time shall more than one half of the funds in the hands of the trustee be applicable to the demands of withdrawing stockholders without the recorded consent of the directors." Subsequent to the adoption of these by-laws, the same regulation, in substance, was incorporated into the statutes of this state (Gen. Laws 1889, chap. 236, § 27); and by an amendment thereto (Gen. Laws 1891, chap. 181, § 27) it was provided that "not more than one half of the amount received in payment on stock by" a building association "in any one month shall be used to pay withdrawals without the consent of the board of directors." The plaintiff became a member of the defendant association in July, 1889, and the question now presented for determination is plainly stated thus: Can a nonborrowing member of a mutual building association, who has brought himself within the rules by notice of withdrawal, be permitted to bring an action and take judgment against the association when, by reason of the statute and the by-law, there is no money in the treasury legally applicable to the payment of his claim? In *United States Bldg. & L. Assn. v. Silverman*, 85 Pa. 394, it was determined that he could, the statute under consideration being almost identical in language with section 27, *supra*, and with defendant's by-law. The same conclusion was reached in the Buffalo (N. Y.) superior court, — *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Assn.* 5 Misc. 518, — the chief justice dissenting; and Mr. Endlich, in his work on Building Associations (sec. 141-148) coincides. The reasoning of the court in the *Silverman Case* is that, as the stockholder ceases to be a member of the association after due notice of withdrawal, he may, upon refusal of payment, sue it, and recover judgment, just as any other creditor. The suggestion that the proviso in the statute stands in the way of his becoming a general

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creditor, and that he must be governed by it, is disposed of by urging that, if this be so, the withdrawing stockholder is in a most unfortunate position, for the association "may never choose to make the necessary provision" for payment of the claim, and therefore he can never have process to compel it so to do. It is asked, when will the association have the money, — "in one, six, or ten years, or ever, and will the statute of limitations be suspended in the meantime?" And finally it is said that the design of the statute can be better met by giving the plaintiff judgment, and then, should it seem equitable to the trial court, it may restrain execution, in order that the association may have a reasonable time in which to raise the necessary money. If a stockholder, upon withdrawal became a general creditor of the association, there would be force in the position that he could (because his rights would be those of a general creditor) bring suit immediately, and obtain a judgment. But it is obvious that a stockholder who withdraws from one of these associations cannot properly be regarded as having the rights of the ordinary creditor, and this was admitted by the same learned court in a later case (*Christian's App.* 102 Pa. 189), in which it was frankly stated that there was manifest error in the *Silverman Case* in putting withdrawing stockholders in the position of general creditors. The conclusion in the case just mentioned loses potency when we discover that the reasoning is unsound. Again, with respect to the query therein as to the effect of the statute of limitations, it can be observed that in no case can the statute commence to run until the right of action accrues.

In assuming the relation of a member of the association plaintiff contracted with reference to and was to be governed by its by-laws in so far as they were reasonable, and not opposed to our statutory provisions regulating associations of this character. He agreed to abide by the condition of the treasury in case of a withdrawal, and to take his money when funds properly applicable for the purpose were on hand. He was not to be paid until these funds were in the treasury, and, although he could at any time cease to be a member, and terminate his obligation to make monthly payments, the amount to be returned to him did not then become due or payable except in a certain contingency. If not absolutely and immediately due and payable at withdrawal, it is difficult to see how his cause of action was then maintainable. When the debt is due and payable, the right to sue, the right to obtain a judgment, and the right to have execution to enforce collection in the usual and ordinary course of procedure are his. And the fallacy of the reasoning in the *Silverman Case* is strikingly apparent when we see that a withdrawing member is first squarely placed in the category of ordinary general creditors, and then — evidently in order to prevent the wreck and ruin of such associations — it is said that he may be deprived of the benefit of immediate process to collect his judgment. The collection of a judgment obtained by an ordinary general creditor cannot be

postponed and delayed in that way. Again, we see no force in the remark that the corporation may never make provision for the payment of the claim, and therefore it cannot be compelled to pay. Provision for the liquidation of the claims of withdrawing members is not optional with the association, for, as long as withdrawals are pending, it is obliged to set aside one half of its receipts for the purpose of meeting and canceling such claims. Its ability to pay depends upon the fidelity with which remaining members discharge their obligations, and this is what all subscribers agree to when taking shares. Again, when considering the language of the by-law and the statute, as well as the rights and remedies of withdrawing stockholders, it must be remembered that if, upon refusal to pay, because not in funds, a suit may be brought at once, and prosecuted to judgment, even if further proceedings could be stayed by the court, such judgment would, as soon as docketed, become a lien upon all real estate, having priority even over a later judgment obtained by a general creditor. In this way a withdrawing member could not only secure superior rights as against other members, but also over a creditor whose judgment was based upon an independent claim. In addition to this, the association would be seriously crippled and embarrassed, for no

sale of its real property could be made so long as the lien remained. The right to withdraw and to receive back what has been paid into the treasury by a member of the association exists solely by virtue of the by-law or the statute. If this right to receive money out of the treasury is made to depend upon its condition, the right is not perfect or absolute until that condition exists. We think the by-law and the statute equally plain, and to mean that, until there is money available for the purpose, no cause of action exists. This is the conclusion of the chief justice, who dissented in the *Englehardt Case*, and also that reached in the supreme court of Texas in May, 1890 (*Texas Homestead Bldg. & L. Assn. v. Kerr*), which we have been unable to find reported except in 18 S. W. Rep. 1020. It follows that there must be proper allegations in the complaint and proof upon trial as to the existence of funds out of which payment can properly be made. Of course we have been speaking of a case in which there has been no bad faith upon the part of the association. If it should neglect its duty towards withdrawing members by failing to take proper steps for replenishing its treasury, a proper remedy could be found.

*Order affirmed.*

**Buck, J.**, did not sit.

## PENNSYLVANIA SUPREME COURT.

**S. M. LINN et al., Appts.,**

v.

**BURGESS, etc., OF CHAMBERSBURG.**

(.....Pa.....)

1. **One seeking to enjoin a municipality from incurring further indebtedness** on the ground that it would exceed the constitutional limit has the burden of showing that such would be the fact.
2. **A municipality may manufacture and supply electricity for municipal purposes** and for the use and benefit of such of its inhabitants as wish to use and are willing to pay for it at reasonable rates.
3. **A fee allowed to the master by the trial court** will not be reduced by the appellate court in the absence of evidence showing it to be clearly excessive.

(March 23, 1894.)

**A**PPEAL by plaintiffs from a decree of the Court of Common Pleas for Franklin County dismissing a bill brought to enjoin defendant from contracting an indebtedness for an electric light plant which was alleged to be unlawful as beyond the power of the defendant to contract, and also as exceeding the constitutional limit of indebtedness. *Affirmed.*

**NOTE.**—The power of a municipal corporation to own and operate electric light plants, which is sustained in the above case, is also recognized in *Crawfordsville v. Braden* (Ind.) 14 L. R. A. 283, and cases cited in note thereto.

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The material portions of the master's report were as follows:

"1. It is admitted that all the plaintiffs in this case are taxpayers of the borough of Chambersburg, and that all except Augustus Duncan and Benjamin C. Ross are citizens resident in the said borough.

"2. The defendant in this proceeding is the burgess and town council of the borough of Chambersburg, a municipal corporation incorporated into a borough by Act of March 21, 1803 (Pub. Laws, 879), and by the said act of incorporation the limits and boundaries of the said borough were particularly set forth, and it was enacted: 'That from and after the first Monday in May (1803) the burgess and town council duly elected and their successors shall be one body politic and corporate in law, by the name and style of the burgess and town council of the borough of Chambersburg, and shall have perpetual succession. And the said burgess and town council aforesaid and their successors, shall be capable in law, to have, get, receive, hold, and possess goods and chattels, lands and tenements, rents, liberties, jurisdictions, franchises, and hereditaments, to them and to their successors in fee simple or otherwise, not exceeding the yearly value of five thousand dollars, and also to give, grant, sell, let, and assign the same lands, tenements,

On the question what constitutes an indebtedness within the provisions limiting debts of municipal corporations, see *Beard v. Hopkinsville* (Ky.) 23 L. R. A. 402, and note.

'hereditaments, and rents, and by the name and style aforesaid they shall be capable in law to sue and be sued, plead and to be impleaded, in any of the courts of law in this commonwealth, in all manner of actions whatsoever, and to have and use one common seal, and the same from time to time at their will to change and alter.' See section 8. Also, 'That it shall and may be lawful for the town council to meet as often as occasion may require, and enact such by-laws, and make such rules, regulations, and ordinances as shall be determined by a majority of them necessary, to promote the peace, good order, benefit, and advantage of said borough, particularly by providing for the regulation of the market, streets, alleys, and highways therein; they shall have power to assess, apportion, and appropriate such taxes as shall be determined by a majority of them necessary for carrying the said rules and ordinances from time to time into complete effect; Provided, that no by-law, rule, or ordinance of the said corporation shall be repugnant to the constitution or laws of the United States or of this commonwealth; Provided also, that no tax shall be laid, in any one year, on the valuation of taxable property exceeding one cent in the dollar, unless some object of general utility shall be thought necessary, in which case a majority of the freeholders of said borough, in writing under their hands, shall approve of and certify the same to the town council, who shall proceed to assess the same accordingly.' See section 6.

"3. The said borough of Chambersburg has continued to hold and exercise the rights and privileges and perform the duties granted and imposed upon it, as a body politic or municipal corporation, from the date of its incorporation until the present time, under its original charter and the acts of the general assembly of Pennsylvania since passed in relation thereto.

"4. Since the early part of the year 1890, at the date of the filing of the bill in this case, March 22, 1892, and at the present time, the said borough of Chambersburg owns, controls, and operates an electric light plant for the purpose of providing an ample supply of light for its streets, public buildings, and grounds, and a short time prior to the filing of this bill, to wit, about December 7, 1891, the said borough made some additions to the engine, dynamos, and other machinery about the plant, and since that date it has been supplying a number of the inhabitants of the borough with electricity for the purpose of lighting their stores and places of business, and it has charged and received certain fixed charges and prices for the said supply of electricity and light.

"5. The capacity of the said plant as used and operated for street lighting purposes, prior to the additions above referred to, was sufficient for the supply of seventy arc lights of 2000 candle power each, and this entire number of lights was used in lighting the streets and public buildings of the borough.

"6. The additions and improvements made to the plant prior to the filing of the bill in this case and within a short time thereafter, consisted of the following items: Conversion of the single cylinder engine into a compound cylinder, and necessary pulleys and shafting, and the erection of a new stack to the boiler,

at a cost of \$698; the erection of a commercial circuit, for wires, poles, brackets, insulators, etc., and labor, at a cost of about \$200; the purchase of thirty or forty arc lamps, at a cost of from \$1,200 to \$1,600; the purchase of a fifty arc light dynamo, at a cost of \$2,875. These additions and improvements were made by the borough for the purpose of increasing the capacity of the plant so as to be able to supply electricity to the inhabitants of the borough for lighting purposes in their stores and dwellings, at fixed charges and prices, and the said borough has been furnishing and still is supplying the said citizens with electricity for lighting purposes as aforesaid. Prior to March 22, 1892, seven arc lamps were in use by citizens of the borough, and since that date the number has been increased until at least thirty arc lamps of 2000 candle power are now in use by sundry citizens of the said borough, and the same are furnished with electricity by the borough at rates and prices fixed by the burgess and town council of the borough of Chambersburg by ordinance."

The seventh finding sets out the Act of May 20, 1891.

"8. In accordance with the provisions of section 2 of the said Act of May 20, 1891, and in the manner provided by the Act of April 20, 1874, and the amendment thereto passed June 9, 1891, the said borough, on December 7, 1891, at a regular meeting of the burgess and town council of the said borough, signified its desire, by a majority vote of the said town council, to make an increase of indebtedness of the said borough in the sum of \$10,000 for the purpose of increasing the electric light plant to furnish the citizens with commercial light and electricity, and to submit to the vote of the qualified electors of the borough the question as to the said increase of indebtedness at the election to be held in February, 1892. And the said burgess and town council of the said borough gave notice to the qualified electors of the said borough, by weekly advertisement in three newspapers published in said borough, for thirty days prior to February 16, 1892, setting forth the action of the said town council, and that an election would be held at the places of holding the municipal elections in said municipality on February 16, 1892, Tuesday, between the hours of 7 A. M. and 7 P. M. of said day, for the purpose of obtaining the assent of the electors thereof to such increase of indebtedness, and the said notice contained a statement of the amount of the last assessed valuation of property, the amount of the then existing debt, the amount and percentage of the proposed increase, and the purpose for which the indebtedness was to be increased, the form of the ballot and method of voting, and the particular places for voting in the several wards.

"9. The said election, as specified in the said notice, was duly held on February 16, 1892, and resulted in favor of the increase of the debt of the said borough in the sum of \$10,000, for the purpose specified in the said notice. The return of the said election was duly certified, and with a certified copy of the action of councils and the advertisement, it was made a record of the court of quarter sessions of Franklin county, and a certified copy of the record as aforesaid delivered by the clerk of the



said court to the corporate authorities and by them entered upon the minutes of the said corporation.

"10. By virtue of the authority thus conferred upon them the burgess and town council of the said borough proceeded to increase the indebtedness of the said borough in the sum of \$10,000, for the purpose of enlarging and extending the electric light plant of the said borough, and passed an ordinance on March 8, 1892, entitled 'An ordinance relating to the supply of incandescent and arc lighting and electricity, by the borough of Chambersburg, Pa.' This ordinance provides for contracts to be entered into by the borough with each individual citizen desiring the use of electricity for lighting purposes in stores, dwellings, churches, fairs, festivals and other places, and prescribes the duties of the borough on the one part and the purchaser or consumer on the other part, and fixes the rates and prices to be charged by the borough for the supply of electricity, by arc and incandescent lights, to these persons and places.

"11. In furtherance of the design and purpose of the burgess and town council of the borough of Chambersburg to increase the capacity and enlarge the electric light plant of the said borough, for the supplying of electricity to its inhabitants for lighting purposes, the said authorities, before the date of the filing of the bill in this case, and after the said election held on February 16, 1892, by letter through the chairman of the committee on electric light, invited proposals from the Thomson-Houston Electric Light Company of Philadelphia, the Westinghouse Electric and Manufacturing Company of Pittsburgh, and the Edison Electric Light Company, and received proposals or bids from the first two companies for the furnishing of a dynamo for incandescent lighting, of a capacity of 650 incandescent lamps, and the necessary appliances to operate the same, and the said borough received an incandescent dynamo of the capacity indicated, with appliances, from the Thomson-Houston Company, but have never consummated the purchase or put the same in operation, owing to the filing of the bill in this case. The said borough also entered into a contract with the Taylor Engine Company for the purchase of an engine and boilers, and necessary appliances at a cost of \$5,889, for the purpose of supplying additional motive power to meet the increased demand for power in running the commercial lighting. This contract was entered into before the bill in this case was filed, and after February 16, 1892, and without inviting bids for the same or advertising for proposals, but the engine, etc., have never been delivered, on account of the filing of the bill in this case. The said borough, during the same period, advertised for and received bids for the necessary changes in the building and brick stack, but never entered into contract for the same on account of the filing of the bill in this case.

"14. The bonds provided for by the action of the burgess and town council of the borough of Chambersburg and the election of February 16, 1892, for the increase of the indebtedness of the borough in the sum of \$10,000, were never issued by the said municipality, the ac-

tion in reference thereto being delayed by the filing of the bill in this case.

"19. On April 20, 1892, at the date the burgess and town council of the said borough of Chambersburg provided for the issuing of the bonds of the said borough in the sum of \$10,000 for the purpose of enlarging the electric light plant, the said burgess and town council passed the following resolution: 'Resolved, That in order to provide for the payment of the interest and principal of said bonds that an annual tax equal to at least eight per centum of the amount of said increased debt be levied and assessed, to be applied exclusively to the payment of the interest and principal of said indebtedness,' and on May 23, 1892, the said burgess and town council fixed the tax levy for the year commencing June 1, 1893, at four mills on the dollar for borough purposes, and five mills on the dollar for the payment of interest and the liquidation of the principal of bonds.

#### CONCLUSIONS OF LAW.

"1. The proposed increase of indebtedness by the burgess and town council of the borough of Chambersburg in the sum of \$10,000, does not increase or cause the entire indebtedness of the said borough to become greater than seven per centum of the assessed value of property within the limits of the said borough.

"2. The Act of May 20, 1891, and the action of the burgess and town council of the borough of Chambersburg, in pursuance thereof, are not in violation of section 7, article 9, of the Constitution of Pennsylvania, and the said section of the constitution does not, in letter, or spirit and meaning, restrain or prohibit the legislation and action above referred to.

"3. The proposed enlargement of the electric light plant of the borough of Chambersburg, as set forth in the findings of facts, for the purpose of manufacturing and furnishing electricity for lighting purposes to all the inhabitants of said borough who may desire to use the same, at fixed and uniform rates and charges established by ordinance of said borough, the said plant to be owned and operated by the said borough, constitutes a public service, of benefit and convenience to all the inhabitants of the said borough. (2)

"4. The legislature of the state of Pennsylvania has authority to confer the power upon municipalities of manufacturing and distributing electricity for the purpose of furnishing light to their inhabitants for private use, and it has conferred such power upon the borough of Chambersburg by Act of May 20, 1891. (3)

"7. The burgess and town council of the borough of Chambersburg have a lawful right to issue the bonds of the borough in the sum of \$10,000, for the purpose of raising money wherewith to erect and enlarge the present electric light plant of the said borough, for the purpose of supplying electricity for commercial purposes. (5)

"8. The said burgess and town council of the borough of Chambersburg have a lawful right to enlarge the electric light plant of the said borough, to issue bonds in the sum of \$10,000 to provide for the expense incurred.

and to furnish electricity for lighting purposes for private use, and the plaintiffs are not entitled to any relief against said acts of the said municipality. It is therefore recommended that the bill of the said plaintiffs be dismissed at the cost of the said plaintiffs."

The master's fee was fixed at \$300.

Exceptions to the master's findings of law and to the fee were dismissed, in the following opinion by STEWART, P. J.:

"The purpose of this bill is to restrain the borough of Chambersburg from engaging in the manufacture of electricity for the supply and use of its citizens.

The effort is made on two distinct grounds: First, that the Act of May 20, 1891, entitled 'An act to authorize any borough now incorporated, or that may hereafter be incorporated, to manufacture electricity for commercial purposes for the use of the inhabitants of said borough, and for this purpose to erect, purchase, or condemn electric light plants,' etc., under which the defendants claim to exercise this right, is unconstitutional, and therefore void.

"Second, that the debt proposed to be incurred by the borough, or which it will necessarily incur, for the purpose aforesaid, will increase the indebtedness of the borough to an amount in excess of the constitutional limit of 7 per cent of the assessed valuation of the taxable property.

"In both contentions the conclusions of the master are adverse to the plaintiffs, and they except thereto.

"The exceptions which relate to the constitutionality of the Act of May 20, 1891, are overruled. It is sufficient to say, in this connection, that our attention has not been called to any exception or prohibition in the constitution with which the act conflicts; and that we know of none.

"Nor can the exceptions to the master's conclusions with respect to the indebtedness of the borough be sustained. It is immaterial whether occupations be regarded as taxable property within the meaning of the constitution, or not, so far as the result here is concerned. Eliminate entirely from the calculation the tax assessed upon occupations, and seven per centum of the assessed valuation of what remains makes a total which exceeds, by several thousand dollars, the debt of the borough at the time referred to.

"But there is no reason why this tax should be eliminated. Indeed there is express authority for including it in the calculation. This very point was raised and decided in the case of *Brown's App.*, 111 Pa. 80, and it now admits of no controversy.

"We have considered the exceptions to the costs taxed, but are unable to see any good reason why the bill as taxed should not be allowed. The master's work was protracted, and he has given it careful study and attention."

**Mr. O. C. Bowers**, for appellants:

The business of manufacturing electricity for commercial purposes as contemplated by the above recited act of assembly and ordinance, is a private business enterprise; and the act is in violation of the spirit and meaning of 25 L. R. A.

section 7 of article 9 of the Constitution of Pennsylvania.

Cooley's Const. Lim. p. 260.

The evils almost necessarily consequent upon the conferring of such powers on municipalities, and the reasons for denying them, are most cogently set out in the opinion of the supreme court of South Carolina, in *Mauldin v. Greenville*, 8 L. R. A. 296, 33 S. C. 1, which was an action brought to enjoin the city of Greenville from purchasing and operating an electric plant.

"When the construction of railways and canals was first entered upon by an expenditure of public funds to any considerable extent, the states themselves took them in charge, and for a time appropriated large sums and incurred immense debts in enterprises, some of which were of high importance and others of little value, the cost and management of which threatened them at length with financial disaster, bankruptcy, and possible repudiation.

Many of the states, in view of a bitter experience of the evils already developed in undertaking to instruct and control them, amended their constitutions so as to prohibit the state, when again the fever of speculation should prevail, from engaging anew in such undertaking."

Cooley, Const. Lim. p. 264, notes; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Parkeburg v. Brown*, 106 U. S. 487, 27 L. ed. 238; *Weimer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Sharpless v. Philadelphia*, 21 Pa. 168, 59 Am. Dec. 759.

In citing *Opinion of the Justices*, 15 L. R. A. 811, 155 Mass. 593, the Massachusetts court holds that a municipality has no authority to engage in the business of buying and selling wood and coal.

In *Spaulding v. Peabody*, 10 L. R. A. 397, 153 Mass. 129, it was held that "power in a municipal corporation to construct and maintain works for the manufacture and distribution of gas or electricity for the purpose of lighting its streets cannot be implied as an incident to power expressly granted it to erect and maintain street lamps.

See also *Western Sav. Fund Soc. of Philadelphia v. Philadelphia*, 81 Pa. 183, 72 Am. Dec. 730.

"Though the legislature first decides that the use is public, the decision is not conclusive. They cannot make that a public purpose which is not so in fact."

Cooley, Const. Lim. p. 606; *Wheeler v. Philadelphia*, 77 Pa. 354; *Goe v. Epping*, 41 N. H. 539; *Crowell v. Hopkinton*, 45 N. H. 9; *Freeland v. Hastings*, 10 Allen, 570; *People v. Flagg*, 46 N. Y. 401; *Kelly v. Marshall*, 69 Pa. 319.

**Mr. J. D. Ludwig**, for appellees:

That the act of assembly in question does not violate the letter of article 9, section 7, of the Constitution is at once apparent, and needs no discussion. That it does not violate the spirit of section 7, article 9, of the Constitution, see *Wheeler v. Philadelphia*, 77 Pa. 355.

The presumption is that the legislature has judged correctly of its constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the government can be called upon to interfere between

the people and their immediate representatives.

*Sharpless v. Philadelphia*, 21 Pa. 185, 59 Am. Dec. 759.

The interpretation of a state constitution is entirely different from that applicable to the Constitution of the United States.

*Com. v. Hartman*, 17 Pa. 118; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759.

In *Western Sav. Fund Soc. of Philadelphia v. Philadelphia*, 31 Pa. 188, 72 Am. Dec. 780, the right of the city of Philadelphia to supply gas light in their streets and houses is recognized.

The tendency of modern legislation, as well as the decisions of this learned court, are in the direction of increased power of municipal corporations.

*Lehigh Water Co's App.* 102 Pa. 515.

In *Opinion of the Justices*, 8 L. R. A. 487, 150 Mass. 593, the house of representatives submitted to the justices of the supreme court of Massachusetts the question whether or not the legislature has the constitutional right to enact laws conferring on cities and towns the power to manufacture gas and electric light for public use, and also for sale to their own citizens.

In the case of *Crawfordsville v. Braden*, decided by the supreme court of Indiana, 14 L. R. A. 268, 180 Ind. 149, it was held that a city may provide and maintain the necessary plant to generate and supply the electricity needed for electric lights therein.

*Smith v. Nashville*, 7 L. R. A. 469, 88 Tenn. 464, is also in point as to the principle involved.

The proper authority to determine what should and what should not constitute a public burden is the legislative department of the state, and in determining this question, the legislature cannot be held to any narrow or technical rule.

*Cooley*, Const. Lim. 6th ed. p. 599; *Kirby v. Shaw*, 19 Pa. 258; *Com. v. Butler*, 99 Pa. 540; *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 783; *Weister v. Hade*, 52, Pa. 474; *Hilbish v. Catherman*, 64 Pa. 154.

Independent of specific legislative authority it is one of the inherent powers of municipalities to light their streets and public places with electric light and at the same time and in connection therewith to supply electricity to its inhabitants for the lighting of their residences and places of business.

*Crawfordsville v. Braden*, *supra*; Dill. Mun. Corp. 4th ed. § 8, A.

#### Per Curiam:

This bill was brought to restrain the borough of Chambersburg from manufacturing and supplying electricity for the use and benefit of its inhabitants under the provisions of the Act of May 20, 1891 (Pub. Laws. 90). It is grounded mainly on allegations which, in substance, are (1) that said act is unconstitutional, and (2) 25 L. R. A.

that the debt, which would necessarily be incurred by the borough in carrying into effect its proposed undertaking, will increase its indebtedness to an amount in excess of the constitutional limit of seven per centum of the assessed valuation of taxable property within the corporate limits.

As to both of these allegations, the learned master's findings of fact and legal conclusions are in defendant's favor. The first five specifications charge error in overruling the several exceptions to the master's conclusions of law recited therein respectively. For reasons sufficiently stated in the report and in the opinion of the learned president of the common pleas, approving the same, we think there was no error in refusing to sustain either of said exceptions.

The burden was on the plaintiffs to prove that the indebtedness of the borough would be necessarily increased to an amount exceeding the constitutional limit, etc. In that they were unsuccessful.

While the legislative intention may not be as clearly and happily expressed as it might have been, we fail to discover anything in the provisions of the act that is in conflict with the constitution.

The power of the legislature to authorize municipal corporations to supply gas and water for municipal purposes, and for the use and benefit of such of their inhabitants as wish to use and are willing to pay therefor at reasonable rates, has never been seriously questioned. In view of the fact that electricity is so rapidly coming into general use for illuminating streets, public and private buildings, dwellings, etc., why should there be any doubt as to the power to authorize such corporations to manufacture and supply it in like manner as artificial gas has been manufactured and supplied? It is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age.

The subjects of complaint in the remaining specifications are the learned judge's refusal to reduce the master's fee, and the decree dismissing the bill. As to the former he says: "We are unable to see any good reason why the bill as taxed should not be allowed. The master's work was protracted, and he has given it careful study and attention." In the absence of any evidence that would justify us in saying that the fee is clearly excessive, we must assume that the compensation sanctioned by the court was not unreasonable.

The decree dismissing the bill is the logical sequence of the facts and legal conclusions properly drawn therefrom. The questions involved are so well considered and so satisfactorily disposed of by the learned master and court below that further comment is unnecessary.

*Decree affirmed and appeal dismissed with costs to be paid by appellants.*

## WEST VIRGINIA SUPREME COURT OF APPEALS.

Eliza WILLIAMSON *et al.*

v.

Joseph T. JONES, *App't.*

(..... W. Va. ....)

- \*1. A person who causes his land to be sold for some purpose of his own, under a judicial proceeding which turns out to be void, and receives and retains the proceeds of sale, cannot afterwards be heard to question its validity. He has made his election.
2. If such person afterwards stands by and sees the purchaser expend large sums in developing oil on the property, he may not afterwards set up such defect in the purchaser's title; he is estopped.
3. Petroleum or mineral oil in place is as much a part of the realty as timber, coal, iron ore, or salt water.
4. It is a part of the inheritance, and an unlawful removal thereof is a dishonor of him in remainder, constituting waste, which a court of equity in a proper case will restrain and enjoin.
5. A case in which the remainder created by the will is held to be vested, not contingent, and those in remainder not to be parties to the suit by representation.

(April 4, 1894.)

\*Headnotes by HOLZ, J.

**NOTE.—Nature of property in mineral oil or gas.**  
A modern and distinctively American branch of law is that of property in mineral oil or natural gas, while it has come to be a subject of great practical importance. Especially recent is the development of the law in respect to natural gas, although it is in substance an application of the rules established in respect to petroleum.

*Natural gas.*

The description of property rights in respect to gas is very clearly made in *Westmoreland & Cambria Nat. Gas Co. v. DeWitt*, 5 L. E. A. 781, 180 Pa. 235. In this case the master said: "Gas is a mineral, and while *in situ* is a part of the land, and, therefore, possession of the land is possession of the gas." But after quoting this the court said: "This deduction must be made with some qualifications. Gas, it is true, is a mineral, but it is a mineral with peculiar attributes which require the application of precedence arising out of ordinary mineral rights, with much more careful consideration of the principles involved than the mere decision. Water also is a mineral, but the decisions in ordinary cases of mining, etc., have never been as unqualified precedents in regard to flowing or even to percolating water. Water, and oil, and still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful as minerals *feras naturas*." In common with animals and unlike other minerals, they have the power and the tendency to escape without the volition of the owner; their "fugitive and wandering existence within the limits of a particular tract is uncertain," as said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. 147, 148. They belong to the owner of the land and are part of it so long as they are on or in it, and are subject to his control; but when they escape and go into other land or come under another's control, the title of the former owner is gone. Possession of the land, therefore, 25 L. R. A.

**A** PPEAL by defendant Jones from orders of the Circuit Court for Tyler County entered in a suit which had been instituted to establish rights in certain real estate, which enjoined defendant from pumping petroleum from land and appointing special receivers to take charge of the property. *Modified.*

The facts are stated in the opinion.

*Messrs. Caldwell & Caldwell*, for appellant:

The circuit judge erred in requiring an additional injunction bond in the penalty of only \$12,000, instead of at least in the penalty of \$70,000.

Two injunction bonds aggregating only \$14,000 were insufficient.

*Oil Run Petroleum Co. v. Gale*, 6 W. Va. 589.

The circuit judge erred, first, in not "fixing" in his order the reasonable time within which the additional injunction bond should be given.

*Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 896.

The circuit judge erred in refusing to read on the hearing on the 14th day of November, 1893, of the motions to dissolve the injunction in part, and entirely, the affidavits which had been filed by the defendant Jones on or before October 17, 1893.

Anderson, Law Dict. p. 846, under *Deposition*; Black, Law Dict. defining *Affidavit*; High, Inj. § 1010; W. Va. Code, chap. 183, § 8; 2 Barton, Ch. Pr. § 187; 2 Dan. Ch. Pr.

is not necessarily possession of the gas. If an adjoining or even distant owner drills his own land, or taps your gas so that it comes into his well or under his control, it is no longer yours but his."

Whether natural gas is a "volatile substance" partaking of the nature of petroleum, rock, or carbon oil, was held in *Ford v. Buchanan*, 111 Pa. 81, to be a question of fact and not of law. In this case the lease was for mining "oil and other valuable volatile substance," and the court said the construction of those words was a mixed question of law and fact in which the court, and necessarily a jury, must have the aid of scientific men, and therefore on a case stating the question whether the words included natural gas, the court refused to decide.

Natural gas is a mineral within the Municipal Act, Rev. Stat. O. chapter 184, section 565, which gives corporations of any county or township power to sell or lease mineral rights under highways. *Ontario Nat. Gas Co. v. Gosfield*, 18 Ont. App. 626.

Natural gas is as much an article of commerce as iron ore, oil, coal, petroleum, or any other of the like products of the earth. The gas in the earth may not be a commercial commodity, but when brought to the surface and placed in pipes for transportation, must assume that character, as completely as coal in the cars or petroleum in the tanks. *State v. Indiana & Ohio Oil, Gas & Min. Co.* 6 L. E. A. 579, 2 Inters. Com. Rep. 758, 120 Ind. 575.

Where gas escapes in large quantities from an oil well, the lessee of the premises for the express and sole purpose of mining and taking carbon oil therefrom, at a fixed royalty, is not accountable to the landlord for the gas or its value, if he separates it from the oil and appropriates it to his own use. *Wood County Petroleum Co. v. West Virginia Transp. Co.* 28 W. Va. 210, 57 Am. Rep. 659.

See similar question *infra* as to oil in salt well.

A lease to be void if no "oil" is found in paying-

5th ed. 1598, 1676; *North v. Perrow*, 4 Rand. (Va.) 3; *Arbuckle v. McClanahan*, 6 W. Va. 108; *Haylett v. McMillan*, 11 W. Va. 477.

The judge of the circuit court erred in not dissolving the injunction as to three tenths of the land in controversy.

*Pithole Creek Petroleum Co. v. Rittenhouse*, 12 W. Va. 313; *Haylett v. McMillan*, 11 W. Va. 464; *Schoonover v. Bright*, 24 W. Va. 698; *Herman, Estoppel & Res Judicata*, 2d ed. §§ 1069, 1220, and cases there cited; *Ellis v. White*, 61 Iowa, 644; *Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 434; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Sherman v. McKeon*, 38 N. Y. 275.

Mrs. Williamson cannot deny the authority of her attorney to bring about the sale.

*Wandling v. Straw*, 25 W. Va. 692.

The receipt of the money touches the conscience and estops her.

*Freeman, Void Judicial Sales*, § 50.

Under the equitable doctrine of representation, by Mrs. Williamson, the life tenant, her sisters and sisters' children were constructive parties to the proceedings in which the land was sold, and the whole injunction ought to have been dissolved by the circuit court.

*Baylor v. Dejarnette*, 13 Gratt. 152; *Faulkner v. Davis*, 18 Gratt. 683, 98 Am. Dec. 698.

The injunction should have been dissolved, because it never ought to have been granted, even if Captain Jones had been a mere trespasser, he being entirely solvent.

*Schoonover v. Bright*, 24 W. Va. 698; *Cox v. Douglass*, 20 W. Va. 181; 3 Pom. Eq. Jur. § 1848.

If Captain Jones was rightfully in possession, and committed waste yet there was no irreparable injury, and he being solvent, pecuniary compensation would have been complete redress, and the injunction should have been refused.

2 Beach, Eq. Jur. §§ 720, 728; Kerr, Inj. § 199; *Wood County Petroleum Co. v. West Virginia Transp. Co.* 28 W. Va. 210, 57 Am. Rep. 659.

Mrs. Williamson was estopped by accepting the proceeds of sale.

2 Herman, Estoppel & Res Judicata, 2d ed. § 1069; *Ellis v. White*, 61 Iowa, 644; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584.

This is true even if the court had had no jurisdiction.

*Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 434; *Herman, Estoppel & Res Judicata*, 2d ed. § 1220; *Pool v. Breese*, 114 Ill. 594; *Town v. Blackberry*, 29 Ill. 137; *Test v. Larsh*, 76 Ind. 452; *Moore v. Roberts*, 64 Wis. 538; *Sutton's App.* 112 Pa. 593; *Mills v. Hoffman*, 92 N. Y. 181; *Kile v. Yellowhead*, 80 Ill. 208; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Ferguson v. Landram*, 5 Bush, 230, 96 Am. Dec. 350; *Murray v. Roberts*, 6 L. R. A. 846, 160 Mass. 358; *Hall v. Wadsworth*, 35 W. Va. 375.

The payment has the same effect as a conveyance.

*Sherman v. McKeon*, 28 N. Y. 275; *Freeman, Void Judicial Sales*, § 50.

The burden of proof is on him who asks to be protected as a bona fide purchaser for value without notice.

quantities is not saved from forfeiture by finding "gas." *Truby v. Palmer* (Pa.) 4 Cent. Rep. 929; *Palmer v. Allen*, 26 W. N. C. 514.

The incorporation of a company for the furnishing of natural gas is not authorized by the Pennsylvania Act of 1854, authorizing the incorporation of companies for "the carrying on of any mechanical, mining, quarrying or manufacturing business," nor by the Act of April 20, 1868, (*Bright, Purd.* 1000, P. 1, 40) including "companies formed for mining coal, and for mining, quarrying, and preparing for market lime, marl, soda, hydraulic cement, and other minerals, with the right of preparing for market the products of their said mines and quarries, and vending the same." The court said: "It is quite impossible for us to regard a gas well as a mine or a quarry, or natural gas a mineral substance to be mined or quarried or prepared for market, within any conceivable meaning to be imputed to the legislature which passed this act. At that time natural gas was unknown as a fuel, but had it been perfectly well known, it would have required far more precise and specific words than these to authorize the formation of gas for supplying it." It is evident that this case is clearly distinguishable from the others holding natural gas to be a mineral, as the language of the statute here involved refers more particularly to mines and quarries than to the mineral nature of the article in question.

The possession of the soil by the owner for the purposes of tillage gives him no possession of gas under the surface, as against parties to whom he has leased the land for gas purposes, and who remain in possession of a well which gives them the sole control of the gas, so far as its utilization is concerned, and the sole possession of which it is capable, apart from the land. *Westmoreland & C. Nat. Gas Co. v. De Witt*, 5 L. R. A. 731, 130 Pa. 235, 26 L. R. A.

The explosion of nitro-glycerine in a gas well on one's own land is not unlawful interference with the rights of other persons from whose lands the gas is thereby drawn. *People's Gas Co. v. Tyner*, 16 L. R. A. 443, 31 Ind. 277.

Allowing gas to escape into the open air or go to waste because it is not profitably utilized to flow from a well which has been lawfully drilled, without malice or negligence, in one's own premises, gives no legal ground of complaint to a neighboring owner on the ground that gas is thereby drained from the adjoining lands to the detriment of his well, and the latter has no right to plug the well, or prevent the waste of the gas even at his own expense. *Hague v. Wheeler*, 23 L. R. A. 141, 157 Pa. 324. The court says that if the owner of the gas well makes such use or waste of the product that it is injurious to the property and the health of others, such use or waste may be restrained or damages recovered therefor; but that, subject to these limitations, his power as owner is absolute, until the legislature shall, in the interest of the public, as consumers, restrict or regulate it by statute.

See also *infra* as to boring gas well through coal and as to leases.

#### Petroleum.

Oil produced from wells on land leased for oil purposes during the owner's life is income and not a part of the corpus of the estate as between life tenants and remaindermen. *Woodburn's Estate*, 27 W. N. C. 305.

In conveyances of land a reservation of timber and "all minerals" does not include petroleum oil. *Dunham v. Kirkpatrick*, 101 Pa. 43, 47 Am. Rep. 606.

The court said: "It is true that petroleum is a mineral. No discussion is needed to prove this

*Boone v. Chiles*, 85 U. S. 10 Pet. 211, 9 L. ed. 400; *Stewart v. Lansing*, 104 U. S. 505, 26 L. ed. 866; *Smith v. Sac County*, 78 U. S. 11 Wall. 189, 20 L. ed. 102.

*Pendente lite* purchasers are not necessary parties.

*Goddin v. Vaughn*, 14 Gratt. 102; *Price v. Thrash*, 80 Gratt. 515.

If the remainder people ought to have been represented in the Joshua Russell suit, this could only be so as to eight fifteenths of the remainder, after Mrs. Williamson's life estate.

There was no merger of the liens against the land.

Anderson, Law Dict. under *Merger of Estates*; *Smith v. Roberts*, 91 N. Y. 478; *Cook v. Brightly*, 46 Pa. 444; *Winona & St. P. R. Co. v. Deuel County*, 8 Dak. 21.

None of the land was released from these liens by the executor of David Hickman.

*Smith v. Roberts*, 91 N. Y. 470; 2 Pom. Eq. Jur. §§ 787, 788, 791, 798, 799; 2 Bl. Com. 157; *White v. Greenish*, 11 C. B. N. S. 209, 238, 8 Jur. N. S. 568; *Jones v. Davies*, 7 Hurlst. & N. 507; *Lady Platt v. Sleep*, Cro. Jac. 275; 2 Lomax, Dig. p. 406, \*241.

If a judgment is merely erroneous, the title acquired by a sale under it is valid, and cannot be impeached collaterally.

1 Black, Judgm. § 218; *Lawson v. Conaway*, 16 L. R. A. 627, 87 W. Va. 178; *McCoy v. McCoy*, 29 W. Va. 795; *Sayre v. Harpold*, 88 W. Va. 558; *Corrothers v. Sargent*, 20 W. Va. 351; *Tracey v. Skumate*, 23 W. Va. 475; *Wandling v. Straw*, 25 W. Va. 707; *Hall v. Hall*, 13 W. Va. 1; *Lancaster v. Wilson*, 27 Gratt. 628;

*Voorhees v. Jackson*, 85 U. S. 10 Pet. 449, 9 L. ed. 490.

Where the record shows that a party appeared by attorney, the authority of the attorney cannot be questioned in a collateral proceeding.

*Wandling v. Straw*, 25 W. Va. 701; *Mandeville v. Perry*, 6 Call. (Va.) 83.

Under David Hickman's will, if Mrs. Williamson's sisters had vested remainders, these vested remainders were subject to the contingency of being defeated by her leaving by will the land to her sisters' children, and such vested remainders possess the essential qualities of contingent estates.

4 Kent, Com. 204; *Thrasher v. Ballard*, 35 W. Va. 524.

Mrs. Williamson, the life tenant, was the representative party and there was no necessity for making her sisters or their children parties to the proceedings in which the land was sold, because their interests were all by way of remainder subject to the contingency of Mrs. Williamson's exercise of her power of appointment. They were constructive parties by Mrs. Williamson, as their representative.

*Baylor v. Dejamelle*, 18 Gratt. 164; *Faulkner v. Davis*, 18 Gratt. 688, 98 Am. Dec. 696; *Hawthorne v. Beckwith*, 89 Va. 786; *Monarque v. Monarque*, 80 N. Y. 826.

By filing their petition as assignees of the liens the executor of David Hickman and Mrs. Williamson became parties to the consolidated suits to enforce the liens against the land and the circuit court had jurisdiction over them, although the jurisdiction was not material to the

fact. But land and other waters impregnated or combined with mineral substances are minerals; what are rocks, clays, and sand; anything dug from mines or quarries, in fine, all inorganic substances are classed under the general name of minerals, . . . but if the reservation embraces all these things it is as extensive as the grant, and, therefore, void." Therefore, the court presuming that the parties used the word, not as scientists but as business men, governed by ideas of every-day life, did not construe the reservation of "all minerals" as intended to include petroleum, especially as the parties were doubtless unaware of the existence of the oil at the time of the conveyance.

In another case the court says of petroleum: "It is a mineral substance obtained from the earth by the process of mining, and lands from which it is obtained may, with propriety, be called mining lands." *Gill v. Weston*, 110 Pa. 818.

Petroleum unexpectedly coming up in a salt well which has been rightfully dug by the lessee on land leased for the production of salt, cannot be recovered from the lessee by the lessor in an action for trover. *Kier v. Peterson*, 41 Pa. 861. It seems to be the opinion of some of the judges in this case, that the oil belongs to the lessee; but in a concurring opinion, one of the judges takes a different view, and agrees to the decision against the plaintiff on the ground that trover is not the proper remedy, because the lessor is out of possession of the land, and has never acquired any right to the possession of the oil which comes rightfully into the possession of the lessee, in operating the salt well, and on which he has expended labor in separating it. This judge suggests that a bill of equity for an account would be the lessor's remedy, and that he ought to be allowed the value of the oil at the moment of its separation from the freehold, which would be obtained by deducting from the

present value of the product, the value of the labor which the lessee had been obliged to expend. In his opinion he says: "Petroleum, or, as it is called in the West Indies, Barbadoes tar, is a species of mineral, which, while it exists in its natural deposit in the earth, is included in the very comprehensive idea which the law adjudges to the word 'land.' It is part of the land. It is land."

Oil being a mineral, a bill by a co-tenant for an account concerning it must be brought in the county where the lands lie; under the Pennsylvania Act of April 26, 1850, providing that suit in the county where the lands lie may be brought by a tenant in common of minerals. The fact that oil was unknown as a product from land at the time when this act was passed does not prevent its application. *Thompson v. Noble*, 3 Pittsb. 201.

Under the New York Statute of 1883, chapter 52, "all oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests and rights held under and by virtue of any lease, or contract, or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation." *Willets v. Brown*, 42 Hun. 140.

On a sale of oil property, including the apparatus for producing, and the tanks for storing oil, with some oil in the tanks, providing that all the rigs, tanks, boilers, engines, etc., shall remain on the land as part and parcel of the premises, until all payments are made, and that in default of any payment, the oil produced on the premises shall be run into the lines to the credit of the vendor, with a clause in the contract that all the oil produced shall be the property of the vendee, or if any be sold the avails shall belong to him, the vendor has an equitable lien upon the property and the oil produced until the full payment of the purchase price. *Ibid.*

validity of the sale as to her interest in the land.

*Zane v. Fink*, 18 W. Va. 698; *Riggs v. Armstrong*, 23 W. Va. 740; *Jack v. Des Moines & Ft. D. R. Co.* 49 Iowa, 627; *Bulkley v. Stephens*, 29 Ohio St. 620; *Sturm v. Fleming*, 32 W. Va. 404.

The plaintiffs are estopped by laches and their bill should be dismissed.

*Twin Lick Oil Co. of West Virginia v. Marbury*, 91 U. S. 598, 23 L. ed. 831; *Clegg v. Edmondson*, 8 De G. M. & G. 818.

Laches is not limitation, a mere matter of time, but principally of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.

*Gallier v. Cadwell*, 145 U. S. 372, 38 L. ed. 739; *Twin Lick Oil Co. of West Virginia v. Marbury*, 91 U. S. 597, 23 L. ed. 828; *Harwood v. Cincinnati & C. Air Line R. Co.* 84 U. S. 17 Wall. 78, 21 L. ed. 558; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 422; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 855; *Holgate v. Eaton*, 116 U. S. 83, 29 L. ed. 538; *Davison v. Davis*, 125 U. S. 90, 35 L. ed. 655; *Société Foncière et Agricole des États Unis v. Milliken*, 185 U. S. 305, 38 L. ed. 208; *Cox v. Montgomery*, 36 Ill. 398; *Goltzner v. German Roman Catholic St. Vincent Orphan's Asylum of Philadelphia*, 147 Pa. 818; *Perry v. Pearson*, 135 Ill. 218; *Richardson v. Levi*, 69 Hun, 482; *Condon v. Hughes*, 92 Mich. 887; *Hammond v. Wallace*, 85 Cal. 522; *Whittaker v. South West Virginia Imp. Co.* 84 W. Va. 217;

*Great West. Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 90.

A judicial sale.

*Kline v. Vogel*, 90 Mo. 239.

A mortgage foreclosure sale.

*Chetwood v. Berrian*, 39 N. J. Eq. 203; *Hunt v. Blanton*, 89 Ind. 88; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *McMurray v. Noyes*, 73 N. Y. 528, 28 Am. Rep. 180; *Smith v. Clay*, Ambl. 645; *Davison v. Associates of the Jersey Company*, 71 N. Y. 333; *Re Lord*, 78 N. Y. 111; *Pratt v. California Min. Co.* 24 Fed. Rep. 869, 9 Sawy. 354.

Gross negligence is construed in equity to amount to constructive fraud.

*Bigelow*, Estoppel, 452-467, and especially note 1, p. 453; *Anderson*, Law Dict. under Estoppel, p. 415; *Gallier v. Cadwell*, 145 U. S. 372, 38 L. ed. 740.

Plaintiffs must assert their rights without "delay and promptly" when large expenditures are being made on property under belief of good title, etc.

*Hoyt v. Latham*, 143 U. S. 568, 36 L. ed. 265; *Twin Lick Oil Co. of West Virginia v. Marbury*, 91 U. S. 592, 23 L. ed. 831; *Johnston v. Standard Min. Co.* 148 U. S. 370, 37 L. ed. 486; *Koster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 99, 36 L. ed. 908; *Sumner v. Seaton*, 47 N. J. Eq. 119.

Oil property requires, and of all properties the most requires, the parties interested in it to be vigilant and active in asserting their rights.

*Prendergast v. Turton*, 1 Younge & C. Ch.

The exception and reservation of a deed of all the oil, gas, and other minerals in or beneath the surface of the premises conveyed, with the exclusive right to take, mine, bore and operate for the same, with right of way over the premises for twelve years, and the right during that period to use the premises for tanks, engines, boilers, machinery, and other structures, with the right to remove them, is an interest in real estate, a chattel real, subject to the lien of judgment against a grantor, and to sale or execution thereon, notwithstanding the Act of New York of 1883, chap. 372, making oil lease and fixtures, and oil interests and rights under lease, and other right or license to operate for oil, personal property except for taxation. The statute pertains to land leased for oil purposes and oil interests held under and by virtue of a lease or contract, or by a license to operate for oil, and has no reference to an estate carved out of the fee. *First National Bank of Kichburg v. Dow*, 41 Hun, 12.

#### Right to drill through coal of another owner.

In several cases a question of great importance has arisen in respect to the right to drill through a layer of coal belonging to another person to reach oil or gas below and the extent and qualifications of this right are yet unsettled. The supreme court of Pennsylvania has decided that the right to drill oil and gas wells through a stratum of coal belonging to another person, to reach oil and gas in a lower stratum belonging to the owner of the surface, is a right which exists at all times, though it must be exercised so as to do no violence to the rights of the owner of the soil. *Chartiers Block Coal Co. v. Mellon*, 18 L. R. A. 702, 152 Pa. 236. In this case the court refused to grant an injunction on the ground that it might cause more injury than it would prevent. A concurring opinion in the case lays down the broad proposition that the several layers or

strata composing the surface crust are, by virtue of their order and arrangement, subject to reciprocal servitudes. The judge wishes to go farther than the majority of the court is willing to do. He is in favor of denying the injunction against boring an oil well through coal of another owner, not merely in the exercise of discretion, but on the ground that the ownership of the coal is subject to an easement of the owner of the surface to bore through for oil or gas. The majority of the court recognizes the ownership of the oil or gas as belonging to the owner of the surface of the land, and that he has a right of access thereto, and says: "The only question is, how that right shall be exercised, by what authority and under what limitations," but adds: "We do not see our way clear to apply the doctrine of the service and way of necessity to the facts of this case. While the rights of the surface owner to reach in some way his underlying strata is conceded, it involves too many questions affecting the rights of property and of injury to underlying strata to be settled by the judiciary. It is a legislative rather than a judicial question." In another place the court remarks: "We find ourselves upon a new road without charter or compass to guide us, and we propose to move slowly." The decision is, in short, merely a denial of an injunction remitting the owner of the coal to a remedy at law, if his rights are violated by boring a well.

To the same effect it was held by the court of common pleas in *Robbins v. Guffey*, 48 Phila. Leg. Int. 462, that the doctrine of a way of necessity did not apply to the right of the landowner to bore through a stratum of coal belonging to another person for gas or oil; but that right of access to the gas or oil was a new and distinct right, which, in the absence of legislation, the court would not enunciate and define. In this case also, a preliminary injunction against boring an oil well through coal was denied.

110. *Troin Lick Oil Co. of West Virginia v. Marbury*, 91 U. S. 593, 23 L. ed. 33; *Clegg v. Edmondson*, 8 De G. M. & G. 787; *Gallagher v. Cadwell*, 145 U. S. 373, 36 L. ed. 740; *Clarke v. Hart*, 6 H. L. Cas. 633; *Johnston v. Standard Min. Co. supra*; *Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719; *Hoyt v. Latham*, 143 U. S. 553, 36 L. ed. 259; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134; *Great West Min. Co. v. Woodmas of Alston Min. Co. supra*.

Estoppel applies to infants and married women.

*Knight v. Watts*, 26 W. Va. 207; 2 Herman, *Estoppel & Res Judicata*, §§ 1120, 1121; *Gibson v. Herriott*, 55 Ark. 85.

The court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed by its own circumstances.

*Brown v. Buena Vista County*, 95 U. S. 160, 24 L. ed. 423.

There was no irreparable injury and therefore whether Captain Jones was a trespasser or committed waste, no injunction should have been granted to plaintiffs.

*Schoonover v. Bright*, 24 W. Va. 698; *Cox v.*

*Douglass*, 20 W. Va. 181; *Cresap v. Kemble*, 26, W. Va. 606; 2 Beach, Eq. Jur. §§ 720, 728; Kerr. Inj. § 199.

There can be no irreparable injury where pecuniary compensation is full and complete compensation. The plaintiffs in this case want the oil pumped and sold.

*Livingston v. Livingston*, 6 Johns. Ch. 497, 2 L. ed. 196, 10 Am. Dec. 853; *Jerome v. Ross*, 7 Johns. Ch. 315, 2 L. ed. 305, 11 Am. Dec. 484.

Whether the waste is producing what is technically considered irreparable injury or not "an injunction to stay waste is never granted against a defendant in possession and claiming by title adverse to that of the plaintiff."

10 Am. & Eng. Encyclop. Law, p. 824; *Nethery v. Payne*, 71 Ga. 374; *Nevitt v. Gillette*, 1 How. (Miss.) 108, 26 Am. Dec. 696; *Campbell v. Conradt*, 26 Kan. 70; *Sanderlin v. Baxter*, 76 Va. 306, 44 Am. Dec. 165; *Leininger's App.* 106 Pa. 398.

An injunction in restraint of waste will not be granted on a hypothetical or disputed title.

*Davis v. Leo*, 6 Ves. Jr. 787; *Whitelegg v. Whitelegg*, 1 Bro. Ch. 57.

Again in the United States circuit court an injunction against drilling oil or gas wells through a coal mine where all the coal was gone except that remaining for props, was denied in *Rend v. Venture Oil Co.*, 48 Fed. Rep. 248, and the alleged danger of the escape of gas, and an explosion of the mine in consequence, was not regarded in the proofs presented as sufficient to justify an injunction, especially as the court said the state courts were at that time trying to define those rights as rules of property under the law of the state.

#### *Nature of interest in leases.*

A grant of the exclusive right or privilege of digging and boring for oil and other minerals for a term of years must be treated as a lease for the production of oil and not of the sale of the oil or of the land. *Duffield v. Hue*, 123 Pa. 94.

The grant of an exclusive privilege of a company on land to bore for oil, with the right to the exclusive use of one acre of land around each well, in consideration of one third of all the oil produced in addition to certain payments, is held to be a grant of an incorporeal hereditament, constituting an estate in the grantee which was divisible by the express terms of the grant, and a sublease of a portion of it was, therefore, held not to constitute a forfeiture. *Funk v. Haldeman*, 53 Pa. 223.

This case is followed in *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. 173, holding that the only remedy for disturbance of such a right is an action on the case that ejectment would certainly not lie.

Only a license to enter upon the land for the purpose of oil operations is conferred by an instrument which, in consideration of one dollar, purports to convey the exclusive right of entering upon the lands and erecting buildings and fixtures with the right of way to and from the same, for the purpose of searching for minerals or to bore for oil or other valuable volatile substances, and gather and preserve the same, delivering to the grantor one-tenth part of all the product, with the further stipulation that the grantee or lessee shall commence operations within one year, or as early as practicable thereafter, or forfeit all rights, while the other party retains free use of the premises for tillage except that part actually necessary for the 25 L. R. A.

mining operations. *Shepherd v. McCalmont Oil Co.* 36 Hun. 37.

A contract giving the right to explore for oil in consideration of a cash payment of \$100, and of the agreements of the parties including the promise to convey the land for a certain sum, if oil should be found, and giving the exclusive right to sink wells, for each of which \$100 per year should be paid for ten years, so long as the well was pumped continuously; with the further provision that buildings and machinery might be removed if oil was not found, does not give any estate in the land, which is enforceable by ejectment, but only a license. *Dark v. Johnston*, 55 Pa. 164, 33 Am. Dec. 722.

So a lease of premises for the purpose and with the exclusive right of drilling for oil, giving the right for one year or so long as gas or oil is produced in paying quantities, is not strictly a lease but a license coupled with a conditional grant, conveying the grantor's interest in the gas well conditioned that gas or oil is found in paying quantities. *Herrington v. Wood*, 6 Ohio C. Ct. Rep. 226.

Since a lease for the purpose of drilling for oil gives no interest in the land except the right of possession for the purpose of operating for oil, the consideration being a share of the product, a delay for eleven years after completing an unsuccessful test well was regarded by the court as an abandonment of the lease, where, during the time, the value of the territory for oil purposes had increased. *Barnhart v. Lockwood*, 152 Pa. 82. The court held that an oil lease was not a grant of property in the oil, but merely a grant of possession for the purpose of searching for and procuring oil.

An agreement giving only the right to work land for oil, the lessee to have three fourths of what is brought to the surface, gives no estate either in the land or the minerals; while he has a right to part of the oil brought to the surface, he has no property to the oil *in situ*. *Thompson's App.* 101 Pa. 225.

Even if a lease of land merely for the purpose of oil operations is not to be regarded as constituting a corporeal tenement, it is otherwise with a lease of all the lessor's right, title, interest, and claim in and to all the land described. *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 82.

But while in some cases the courts have declared



The essential idea of waste is disherison, and that is not waste which does no injury to the heir.

3 Bl. Com. 281; *Kidd v. Dennison*, 6 Barb. 14; *Livingston v. Reynolds*, 26 Wend. 123, 2 Hill, 167; *Omaha Hotel Co. v. Kountze*, 107 U. S. 393, 27 L. ed. 615; 3 Pom. Eq. Jur. § 1848; 1 Washb. Real Prop. \*132, 133, and cases there cited; 3 Bl. Com. 223; *Jackson v. Brownson*, 7 Johns. 232, 5 Am. Dec. 258.

No man has a right to sue for what does not injure him, and the taking of oil by Captain Jones worked no injury to the remainder people. If Captain Jones had not taken it; the oil would have been taken by the adjoining land owners before the life estate fell in.

*McCullough v. Irvine*, 13 Pa. 438; 8 Bacon, Abr. 379, 382; 3 Bl. Com. 325.

Petroleum oil is not the property of the owner of the land.

*Wood County Petroleum Co. v. West Virginia Transp. Co.* 28 W. Va. 210, 218, 57 Am. Rep. 650.

Water, petroleum oil, and gas are "subjects of the same nature."

*People's Gas Co. v. Tyner*, 16 L. R. A. 443,

that a lease of land for oil purposes gave merely a license and not an estate in the land, in other and later cases this statement is limited or modified. Thus, the exclusive right to operate for oil on premises for a period of twenty years is held to be an estate for years for mining purposes and not a mere license, so that the lessee is entitled to notice of partition proceedings between the owners of the fee. *Duke v. Hague*, 107 Pa. 57.

And the right to the exclusive possession of the land for obtaining oil, with actual possession of a considerable part, if not of the whole of the premises, is held in *Kitchen v. Smith*, 101 Pa. 452, to be "not a mere license" so as to preclude a levy for taxes on the personal property of the lessee which was on the premises, and, therefore his payment of the taxes to protect his property is not voluntary but entitles him to recover therefor from the lessor.

In the case of *Brown v. Beecher*, 120 Pa. 590, in respect to a contract leasing lands for a term of years, with the use and exclusive right and privilege, during that period, of digging or boring for oil and other minerals at a fixed rent or royalty reserved out of the production, the court said that there could be no doubt that it conveyed an interest in the land, and was in this respect distinguished from a license. The interest, however, was held to be a chattel interest.

"As oil is not less part of the reality than timber or coal, and not less valuable, there is no reason why it should not also come within the protecting and supervising powers of the court. *Stoughton's App.* 88 Pa. 198." On this ground it is held that the guardian of an infant has no power to make an oil lease, without approval of the court, of the infant's property, because the oil is part of the realty, and a so-called lease is, in effect, "the grant of part of the corpus of the estate, and not of a mere corporeal right." The court says also, that "not infrequently the oil forms by far the most valuable part of the estate, and to permit the guardian to dispose of it at will, and without security, would often lead to consequences disastrous to the wards."

An oil lease for ninety-nine years, or so much of that time as oil can be produced in paying quantities, is held to be a chattel interest which may constitute partnership assets as to third parties though the title is not recorded in the partnership name, and, therefore, a levy or sale thereof for

131 Ind. 277; *Westmoreland & C. Nat. Gas Co. v. De Witt*, 5 L. R. A. 731, 130 Pa. 249.

These are not the subjects of absolute property, and being therefore *jura naturæ* capable of a qualified ownership only, they belong to him who first appropriates them.

2 Kent, Com. 347; 2 Washb. Real Prop. 327; *Acton v. Blundell*, 12 Mees. & W. 324.

The defendant Jones could legally appropriate the gas, oil, and water percolating through the land; animals *feræ naturæ* and such like, without committing "waste."

*Wood County Petroleum Co. v. West Virginia Transp. Co.* 28 W. Va. 218; *Com. v. Chace*, 9 Pick. 15; *Rea v. Brooks*, 4 Car. & P. 181, 1 Hawk. 144, §§ 25, 26; *Taber v. Jenny*, 1 Sprague, C. C. 315; *Cooley, Torts*, pp. 435, 436; 2 Bl. Com. 15, 18.

The appointment of receivers is a severe measure not to be adopted except in an urgent and strong case, is always reluctantly made, and a court of equity, in such a case as the one at bar, should not have departed from its "ordinary course of administering justice" at least until a final hearing of the case.

*Beverly v. Brooke*, 4 Gratt. 209; 28 Am. &

partnership deed gives a title superior to that of an assignee, of the interest of one of the partners. *Chamberlain v. Dow*, 16 W. N. C. 532.

In *Brown v. Beecher*, 120 Pa. 590, it was again held that an oil lease was partnership assets, such that the sale thereof to satisfy a judgment against the partnership would transfer title as against the sale of his interest, by one partner.

A claim in trespass for disturbance of the exclusive right of a lessee to bore for oil may be sustained under the Pennsylvania Procedure Act of May 25, 1887, abolishing the distinctions between trespass and case. *Duffield v. Rosenzweig*, 144 Pa. 527.

A leasehold estate subject to the special lien of mechanics, materialmen, and laborers, under the Pennsylvania Act of April 8, 1888, giving such liens on leasehold estates, and not a freehold estate, is created by the lease of land for twenty years, or as long as the said parties of the second part use it for the purposes of producing oil or minerals or gas, at the election of the lessee. *McElwaine v. Brown* (Pa.) 9 Cent. Rep. 789.

The Pennsylvania Act of April 27, 1855, in respect to the leasehold mortgages of any colliery, mining land, manufactory, or other premises, giving them the force and effect of real estate mortgages, is held applicable to a mortgage of a leasehold of oil land, notwithstanding the fact that the petroleum was not discovered until after the act was passed. *Gill v. Weston*, 110 Pa. 313.

A covenant in an oil lease to prosecute the business of producing oil with due diligence, is a covenant running with the land and binding upon the assignee of the lease. *Bradford Oil Co. v. Blair*, 113 Pa. 33, 57 Am. Rep. 442.

The taking of oil by a lessee under a lease of the corporeal tenement with an added exclusive right to bore for and take oil is not waste, but a rightful exercise of his rights. *Chicago & A. Oil & Min. Co. v. United States Petroleum Co.* 57 Pa. 53.

A lease of a certain tract of land for gas purposes, providing that no wells shall be drilled within 300 feet of certain buildings, is as much of a lease of that part of the territory as of any other part subject to the provision as to locating wells upon it, and the lessee is entitled to an injunction against the drilling of a gas well within these limits by any other person. *Westmoreland & C. Nat. Gas Co. v. De Witt*, 5 L. R. A. 731, 130 Pa. 235. B. A. R.

Eng. Encyclop. Law, p. 16; *Boyes v. Montauk Gas Coal Co.* 87 W. Va. 73.

*Messrs. J. A. Hutchison, T. I. Stealey, and J. H. McCoy* for appellees.

**Holt, J.**, delivered the opinion of the court:

These two appeals are both to interlocutory orders entered in one case by the circuit court of Tyler county,—the one overruling defendant's motion to dissolve an injunction which had been awarded against him, enjoining him from pumping and removing petroleum from the land in controversy; the other appointing special receivers to take charge of the property. But the appeal and supersedeas to the order of injunction of July 18, 1898, was dismissed in this court by the appellant. Sixteen grounds of error are assigned, but there is no reason for considering them separately. Some of them relate to important questions of practice, but are not grounds for reversing the orders complained of. The case has not reached a final hearing on the merits; nor is any evidence in, except such as is documentary, and some *ex parte* affidavits. Still, in this immature state of the case, the important questions for decision must arise out of the facts, as in all other cases, and these are to be gathered from the record as it now stands; but, as far as may be, they will be understood to be taken provisionally.

The facts thus ascertained from the pleadings and evidence, as far as may be necessary for the present purpose, are as follows:

David Hickman, of Tyler county, W. Va., the father or grandfather of the principal plaintiffs below, died in the year 1863, leaving his last will and testament, which was duly proved, and admitted to record in Tyler county. The seventh clause—the only one bearing on this controversy—is as follows: "I give and bequeath to my daughter Eliza Williamson, the wife of Dr. William S. Williamson, for life, the shares I own in the Thomas Jones land, adjoining Sistersville.

... with the power to her to dispose of the same by will amongst her sisters or sisters' children, as she may think proper, and in the event of her death without a will, the said shares . . . shall revert to her sisters in equal proportions." By the eighth clause he gives to his daughter Eliza Williamson a legacy of \$400, and he appointed Mrs. Williamson and Christian Engle the executors. The latter alone qualified. By a codicil he so modified the seventh clause as to constitute Christian Engle trustee, to whom he devised said lands (including also 100 acres not in any way here involved) for the sole use of his said daughter for life, but the devise in all other respects to remain as provided for in the seventh clause.

The history of the shares in the Thomas Jones land thus owned and devised for life to his daughter by David Hickman is, so far as it is necessary for our purpose, as follows: Robert Greer and wife by deed dated 21st April, 1832, conveyed to Thomas Jones a tract of about 205 acres, which is here called the "tract of 165 acres," treated for this purpose as including the adjoining tract of 54

poles. Between the defendant in this suit, Joseph T. Jones, and the family of Thomas Jones, the former owner of the land, no relationship existed or appears. It is a mere coincidence of names, without bearing or significance. In the year 1849 (about the 22d day of February) Thomas Jones departed this life intestate, seised and possessed of the tracts of 165 acres and of 54 poles, then regarded as of little value, now in the center of what is called and known as the "Sistersville Oil Field," with twenty-six producing wells on this tract, put down and operated by defendant Joseph T. Jones, claiming the same by purchase as hereafter mentioned. Thomas Jones left surviving him as his heirs at law ten children,—six sons, namely, Lewis, John H., Thomas, David, Joel, and Milton; and four daughters, namely, Martha, Sarah, Elizabeth, and Emeline. This land was not partitioned among the Jones heirs. Lewis Jones had bought the interest of John H. Jones, Thomas Jones, and Emeline Jones, and also claimed to be the owner of the undivided share of his brother David Jones. David Hickman was indorser for Lewis Jones on a negotiable note, which Hickman had to pay; and Lewis Jones, to secure the payment thereof, by trust deed dated December 15, 1853, conveyed to R. Hickman and Thomas J. Stealey, trustees, these five undivided shares. On the 12th of March, 1855, the trustees sold four of these interests to David Hickman, the trust creditor, and conveyed the same to him by deed of that date, which was admitted to record in May, 1855. The trustees did not sell the David Jones interest, as it had been previously sold and conveyed under a decree to John Wharry. In September, 1854, Milton Jones conveyed his share to Absolom George. Martha Jones had married John Massey. On the 25th day of March, 1861, Martha Massey and John, her husband, Absolom George, and John Wharry sold and conveyed these three undivided shares to David Hickman. This deed was recorded on the 25th day of April, 1861. Thus it appears that at the time of his death, in 1863, David Hickman owned seven undivided tenth parts of the Thomas Jones land. These are the shares mentioned in the seventh clause of his will. On the 1st day of July, 1857, the administrators of James Peden, deceased, instituted a suit in equity in the circuit court of Tyler county against Lewis Jones, curator of the estate of Thomas Jones, deceased, and the children and other heirs-at-law of Thomas Jones, deceased, on a claim for \$41.09. On ——— day of February, 1859, Joshua Russell instituted a suit in equity against the curator of the estate and the heirs-at-law of Thomas Jones, to enforce payment of the balance of \$32.63, due on a note from decedent to Russell. On the 23d day of September, 1862, these two suits were consolidated, and a sale was decreed of the tract of land of 165 acres and the tract of 54 poles to pay these debts, which had been proved before, and on July 28, 1862, been reported by the commissioner to whom the cause had been referred, viz. to Joshua Russell, \$51.94, amounting to \$99.61; to Peden's administrator \$83.10, amounting to \$130.21; Samuel

Davis, \$35.70. A. D. Soper was appointed special commissioner to make the sale. None of these claims were liens on any of the interests bought by David Hickman, or affected them in any way, they having been sold and conveyed to him and his vendors before either of these suits was brought; but he was a *pendente lite* purchaser of the one tenth which was sold and conveyed to him by Martha Massey (*née* Jones) and her husband by deed of March 25, 1861. David Hickman was not a party to the suit. He was a bona fide purchaser for value, or grantee of such purchaser, as to six tenths, with his deeds duly entered of record before the institution of the suits. He was a *pendente lite* purchaser as to one tenth. Soper, the commissioner to sell, died, and this decree remained unexecuted. On the 10th day of June, 1864, Peden's administrators, by James M. Stephenson, their attorney, assigned their decree to the estate of David Hickman, and the two other creditors by decree also assigned their decrees. The three are alike, and one will show for all. The one from Peden's administrators reads as follows:

"Exhibit C. John O. Peden and David Peden, Adm'rs of James Peden, dec'd, vs. Lewis Jones, Curator of the Estate of Thomas Jones, dec'd, and Daniel Reynolds. In Chancery in the Circuit Court of Tyler County.

A decree at the September term, 1862,	
in favor of the complainant against	
the defendant, for .....	\$ 41 00
Interest thereon from the 25th day of	
August, 1863, to the 10th day of June,	
1864 .....	39 08
Costs at law .....	7 50
Costs in chancery .....	42 50
	<b>\$130 21</b>

"June 10th, 1864. Received from Christian Engle, executor of David Hickman, deceased, one hundred and thirty dollars and twenty-one cents, the debt, interest, and costs, above stated; and the benefit of the decree aforesaid is hereby transferred to the estate of the said Hickman, the executor being authorized to enforce the said decree for the benefit of the said estate in any manner he may think proper, but without cost to the complainants. J. M. Stevenson, Attorney for Plaintiffs."

On the 10th day of October, 1868, the court entered in the cause the following decree: "Decree. And at another day, to wit, at a circuit court held for the said county of Tyler, on the 10th day of October in the year 1868, in the above-named causes, one in favor of Joshua Russell for \$51.94 and interest, and one in favor of the administrators of James Peden for \$83.10, and interest, and \$35.75, to Samuel Davis, has been assigned to and paid by the executor of David Hickman since the date of the decree; and it also appearing by the said decree that two tracts of land owned by Thomas Jones, deceased, were decreed to be sold for the payment of the said debts, unless otherwise paid, and it also appearing that the said David Hickman, at his death, was the owner of seven undivided tenth parts of said land, and the executor of said Hickman not desiring the sale of the

parts of said land owned by the said estate, but only that part of said land not owned by the estate of said David Hickman, deceased: It is therefore adjudged and decreed that the commissioner heretofore appointed to make sale of said lands sell the outstanding interest in order to the payment of their portion of the debts aforesaid, the said debts being the debts of Thomas Jones, deceased, and a lien on the whole of said land."

From October, 1868, to December 23, 1881, no orders were entered in these two consolidated causes save orders of continuance. In the mean time Eliza Williamson purchased the outstanding one tenth, being the share of Joel Jones, from his children who conveyed the same to her by deed dated the 19th day of January, 1870, and on the 6th day of December, 1872, she bought from the children of Elizabeth Kester, deceased (*née* Jones), her one tenth share, which was conveyed to her by deed of the last-named date; and on the ——— day of December, 1887, she bought at a tax sale the remaining outstanding share in the name of Thomas Jones' estate, which the clerk of the county court conveyed to her by deed dated April 1, 1890. On the ——— day of ———, 1886, Eliza Williamson, who had become *sui juris* by the death of her husband, brought a suit in equity against C. Engle as executor and trustee under the will of David Hickman, asking for the will to be executed by, among other things, directing her legacy of \$400 to be paid to her, and that the trusts be carried out in regard to the Thomas Jones land, etc. On the 18th day of October, 1886, defendant Engle filed his answer, which resulted in the entry of the final decree in the cause.

"Exhibit D. At a circuit court continued and held for the county of Pleasants, at the court-house thereof, on the 18th day of October, 1886, the following decree was entered: 'Eliza Williamson, Complainant, vs. C. Engle, Trustee, etc., and Others, Defendants. In Chancery. This day came the defendant Christian Engle, trustee for Eliza Williamson, and executor of David Hickman, deceased, and tendered in open court his separate answer to complainant's bill, together with Exhibits A, and B, C, D, E, and F, to said answer, and asked that the same be filed, which is accordingly done, whereupon the complainant, by her counsel, agrees to abide by and perform the arrangement and agreement entered into between herself and Christian Engle as executor of David Hickman, dec'd, in relation to the liens against the Thomas Jones lands, as alleged and shown by the answer of said Christian Engle, and the exhibits therewith filed in this cause, and to accept the said liens against said Jones land, which are mentioned and fully recited in said answer of said Engle, and the Exhibits D, E, and F, therewith filed, and amounting on the 25th day of June, 1864, in all to the sum of \$265.52, with interest thereon from said 25th day of June, 1864, in full of the balance of \$265.52 (and the interest thereon accrued and accruing from June 25, 1864), of the bequest of \$400 to her by her father David Hickman, deceased, which she alleges in her bill to be due to her on ac-

count of said bequest; and that said Thomas Jones lands may be sold in the chancery suits of Peden's administrators and Joshua Russell, pending in the circuit court of Tyler county, under the decree of sale made therein as stated in said answer of said Engle, for the payment of said liens and the interest thereon accrued and accruing. And the complainant further agrees that this cause be dismissed at her cost, but no docket fee to be taxed therein. To which proposition and agreement by the complainant the defendant C. Engle by his counsel accedes and agrees. It is therefore ordered that the foregoing agreement of complainant and defendant C. Engle, executor, etc., be entered up as the decree of this court in this cause; that said Jones land be sold under the decree in said two chancery suits in Tyler circuit court for the payment of said liens and interest thereon for the use and benefit of said Eliza Williamson as aforesaid; and that this cause be, and the same is hereby, dismissed at the cost of complainant, Eliza Williamson, less the docket fee as aforesaid. D. D. Johnson, Attorney for Complainant. B. Engle, Attorney for Defendant Engle, Trustee, etc." "A copy from the minutes. Attest: J. L. Knight, Clerk Circuit Court, Pleasants Co., W. Va."

On the 26th day of December, 1881, in the cause of Peden's Administrator, etc., v. Lewis Jones, Curator of the Estate of Thomas Jones, Deceased, etc., C. Engle, executor of David Hickman, and Eliza Williamson, by Ben. Engle, her attorney, filed their petition, giving a history of the case, the assignments of the sums decreed therein, a history of the Jones land, the disposition of the seven tenths by David Hickman, the testator, Eliza Williamson's purchase of two of the three outstanding tenths; that since the death of her husband the land had been of no profit, but a burden to her. They pray that they may be made parties defendant in the Peden suit; that the Thomas Jones land may be sold for the payment of the liens so held by Engle, executor, etc., to pay Eliza Williamson the amount she is entitled to by reason of the interest held by her in said lands in her own right; that the decree of September 28, 1862, and of October, 1868, may be set aside, and a decree entered appointing a new commissioner to make sale of the lands on such terms as the court may deem most advantageous to the parties in interest, to Eliza Williamson as devisee and as owner in her own right, etc. Thereupon the court, without making any new parties, entered the following decree: "And at another day, to wit, at a circuit court held for the said county of Tyler, on the 26th day of December, in the year 1881: Joshua Russell, Complainant, vs. Lewis Jones, Curator of the Estate of Thomas Jones, Deceased, and Others. In Chancery. John O. Peden, *et alia*, Adm'rs of James Peden, Deceased, Complainants. vs. Lewis Jones, Curator of the Estate of Thomas Jones, Deceased, and Daniel Reynolds, Defendants. In Chancery. This day Christian Engle, executor of the last will and testament, with the codicils thereto annexed, of David Hickman, deceased, and Eliza Williamson, in her own right, pre-

25 L. R. A.

sent their joint petition in writing in open court, praying to be made parties defendants to the above two causes, which were, by an order of this court made therein at the September term thereof in 1862, consolidated and heard together, which petition is now ordered to be filed, which is accordingly done. And this cause came on again this 26th day of December, 1881, to be further heard upon the bill, proceedings, orders, and decrees formerly had and made herein, and the said petition of C. Engle and Eliza Williamson, filed as aforesaid, and was argued by counsel for said petitioners. And it appearing to the court that the land owned and held by Thomas Jones, deceased, in his lifetime, in fee simple, consisting of two tracts,—one of one hundred and sixty-five acres, particularly described in the deed from Robert Grier and wife to said Thomas Jones, a copy of which is filed as Exhibit A, and made part of said petition; and the other tract containing fifty-four (54) poles, more particularly described in a deed from Samuel Corbitt and wife to Thomas Jones, a copy of which is also filed as Exhibit B to said petition,—was subject to and decreed to be sold to pay certain liens in said causes set forth, in which order and decree A. D. Soper was appointed to make sale of said lands, who departed this life without having executed said order of sale. And it appearing also from said petition that C. Engle, executor of David Hickman, deceased, holds said liens as set forth in said causes, in favor of Joshua Russell and Peden, administrators, together with a lien in favor of Samuel Davis, amounting to the sum of \$35.70, by assignment thereof, and that as trustee under the will of said David Hickman, deceased, he holds seven undivided shares or interests of one tenth each in said land, and that Eliza Williamson holds in her own right two undivided shares or interests of one tenth each in said land; and it also appearing that said lands cannot well be partitioned, and that the interest of the parties will be promoted by a sale of the entire two tracts in one body; and it also further appearing to the court that the interests held by C. Engle, as trustee as aforesaid, are for the use and benefit for life of said Eliza Williamson, by virtue of a provision in the will and codicils thereto of the said David Hickman, deceased: It is therefore adjudged, ordered, and decreed that Benjamin Engle be and is hereby appointed a special commissioner to make sale of said land, as particularly described in Exhibits A and B, filed with said petition in the bill and proceedings of, and the decrees and orders heretofore made in, said two causes, who is hereby directed to give notice by publication in some one or more newspapers published in Tyler county for four consecutive weeks of the time, terms, and place of sale, which shall be made at the front door of the court-house of Tyler county, on some court day, upon the following terms, to wit: One third of the purchase money to be paid cash in hand, and the residue thereof to be paid in three equal installments, to become due and payable respectively in eight, sixteen, and twenty-four months from the day of sale, with legal in-

terest, to be paid semiannually, on each and all of said deferred payments from the day of sale. And said commissioner is hereby directed to require the purchaser to give bonds with approved security for said deferred payments, to become due and payable as aforesaid, with interest to be paid semiannually, as hereinbefore provided; and the said commissioner is hereby further directed to retain a lien upon the said real estate to secure the payment of the deferred installments of purchase money therefor, and the interest thereon; and said commissioner will report his proceedings under this order to this court at a future term thereof."

On the 14th day of April, 1892, the court modified the decree of December 26, 1891, authorizing and empowering the commissioner, Benjamin Engle, to sell the undivided seven-tenths interests held by C. Engle as trustee under the will of David Hickman, and the undivided two tenths then held by Eliza Williamson in her own right in said real estate either at public auction or at private sale, and may sell said seven tenths and two tenths together; and the undivided one-tenth interest in said two tracts yet outstanding is to be sold at public auction, but in all other respects the commissioner is to be governed by the terms and conditions of former decrees of sale. No bond was required by these decrees to be executed by Commissioner Engle before acting, but he gave and filed a bond in the penalty of \$2,000 on March 15, 1890, conditioned according to law. The causes were continued from time to time until the decree of December 12, 1891, confirming the sale. On that day Commissioner B. Engle returned and caused to be filed his report of sale. He reports that on the 10th day of December, 1891, in front of the court-house door of Tyler county, in pursuance of the decrees of sale, he sold at public auction the two tracts of land in the bill and proceedings mentioned; that J. C. Tennent, being the highest and best bidder, became the purchaser thereof at the price of \$4,000,—\$2,000 paid cash in hand, and three bonds for \$666.66 each, interest from date, payable semiannually, and due in 8, 16, and 24 months, without personal security, but a lien retained on the land. This sale, there being no objection thereto, was confirmed by decree of December 12, 1891. Out of the cash payment the commissioner was decreed and directed to pay to C. Engle, executor of the last will and testament of David Hickman, deceased, the sum of \$265.52, the amount of charges or liens held by him as such executor, with interest on said sum from the 26th day of June, 1864, to December 12, 1891; to pay three tenths of the residue to Eliza Williamson, and the remaining seven tenths of Christian Engle, trustee under the will, to be by him invested at interest for the benefit of Eliza Williamson for life; that the commissioner, after having first given bond with security in the penalty of \$2,000, withdraw and collect the sale bonds as they fall due, and pay proceeds as directed above. And he was directed to execute and deliver a deed to the purchaser, retaining a lien for the deferred installment. On motion of the purchaser, he had leave to sue out a

writ of possession. Up to that time Mrs. Williamson held the land in possession. Before receiving any money under the decree, Christian Engle, as trustee, was required to execute and file in the papers a bond in the penalty of \$2,500, with good security, conditioned according to law, and the causes were ordered to be dropped from the docket.

Benjamin Engle, as commissioner, conveyed the lands to Tennent, the purchaser, by deed dated the 4th day of February, 1892, retaining a vendor's lien for the deferred installments, which have since been paid. In making this purchase, James C. Tennent acted as the agent of defendant Joseph T. Jones, who paid all the purchase money, and to whom Tennent conveyed the land by deed dated 8th February, 1892. Defendant Jones took possession, bored 23 fine producing oil wells, at a cost of about \$6,000 each. He produced from June, 1892, when the first well was completed, until September 21, 1893, about 403,681 barrels of oil, received for oil sold during that time about \$189,580.90, and that drilling and operating had been at a cost of about \$225,000.

David Hickman left six daughters, who were entitled to take under the seventh clause of his will: (1) The plaintiff Eliza Williamson, whose husband, Dr. Williamson, has died since the death of David Hickman. (2) Laura Weirich, who died in 1868, without issue surviving her, leaving a will, in which she gave to her sister Mary Hickman a part, and to her husband, Dr. Israel Weirich, the residue of her interest in her father's estate, and appointed her brother, David Hickman, her executor. Dr. Weirich died intestate in 1887, without issue, etc. (3) Caroline Stealey, who died in 1890, intestate, leaving as her children and heirs-at-law David H., Nancy Engle, wife of Benjamin Engle, Kate, Eliza, and Nellie; the last being under 21 years of age. (4) Mary Hickman intermarried with William Arthurs, and in 1890 died, leaving three infant children her heirs-at-law, viz., Mary, John, and David. (5) Mercy P. Wells is living; also (6) Rosalie Stealey. Eliza Williamson conveyed her interest to William H. Gillespie by deed dated 22d June, 1893. Mrs. Wells and husband sold and conveyed her interest to W. H. Gillespie by deed dated June 28, 1893, and Rosalie Stealey sold and conveyed her interest to Gillespie, whatever such interest may be, and Gillespie qualified as guardian of the infant children of Mary Arthurs.

The bill of injunction was brought on July 13, 1893, by Eliza Williamson and W. H. Gillespie, assignee of Eliza Williamson; Mary P. Wells, and Rosalie Stealey, and Gillespie as their assignee; David Arthurs, May Arthurs, and John Arthurs, infants, by Gillespie, their next friend; David H. Stealey, Eliza Stealey, Kate Stealey, and Nellie Stealey, the latter a minor, by Thomas J. Stealey, her next friend, plaintiffs, against Joseph T. Jones, J. C. Tennent, Nannie Engle, Christian Engle, executor of the last will and testament of David Hickman, deceased, and Christian Engle, as trustee under said will; the Eureka Pipe-Line Company,

a corporation created by the laws of West Virginia, and the W. L. Melton Pipe Lines, a corporation created by the laws of the state of Pennsylvania,—and charges in substance that defendant Joseph T. Jones has no valid title to these oil lands; that it was the property of defendants; that they were committing irreparable injury to and waste of the inheritance in cutting and removing the standing timber, and taking the petroleum or mineral oil, which constituted its chief value. They pray that the defendants answer fully; that they may be required to file an account showing the amount of oil taken, sold, and removed from the premises; that an account thereof may be taken before one of the commissioners of the court; that the deed from Engle, commissioner, to Tennent, and from Tennent to J. T. Jones, may be set aside; that the court will direct the payment of the rents, issues, and profits due Eliza Williamson to be made to her, and her interest to William H. Gillespie, etc.; that the court will enjoin and restrain the defendants from further operating for oil or producing the same or removing the same or selling it, etc., and for general relief. The injunction was granted without notice restraining the pipeline companies from paying over or delivering to defendant J. T. Jones and J. C. Tennent, or either of them, any of the proceeds of the sales of oil produced from the Jones tract of 165 acres, etc., until further order.

On motion, on notice, two special receivers were appointed on the 25th day of August, 1893. On the 25th day of September, 1893, plaintiffs filed notice of motion for order of reference, and defendant Joseph T. Jones filed two notices,—one of motion to dissolve the injunction, the other to increase the penalty of the injunction bond,—and the time for hearing these three motions was fixed for the 17th of October; and on first Monday in October, 1893, defendant Jones filed his demurrer, also his separate answer, duly sworn to, to complainants' bill, and certain exhibits. The Eureka Pipe-Line Company filed their answer on the 17th day of October, 1893, exhibiting the state of defendant Jones' oil and oil account from wells on the Jones land. On the 14th day of November, 1893, the judge entered the following order:

"Decree. *Eliza Williamson et al. vs. Joseph T. Jones and Others.* In chancery. This 17th day of October, 1893, at Ritchie Courthouse, W. Va., before the judge of the circuit court of Tyler county, came the parties by their attorneys, and the motion of the plaintiffs for an order of reference herein was heard upon the duly certified copy of the will of Laura Weirich, deceased, and the answer of the defendant Joseph T. Jones, which was filed at October rules, 1893, in the Tyler county circuit court clerk's office (to which the plaintiffs replied generally), the affidavits of Fannie E. Anderson, J. S. Pierpont, A. H. Ong, and F. D. Young, and two affidavits of J. B. Thomas (to the consideration of which affidavits the plaintiffs objected), upon the demurrer of said Jones herein, and upon all the affidavits, pleadings, and papers heretofore read; and said motion was argued by counsel, and taken under advisement by

the judge. Thereupon the motion of the said defendant Joseph T. Jones for a dissolution of the injunction herein, and also his motion for the court to require an increase of the amount of injunction bond in the event that the court refused to dissolve the injunction, were heard upon said affidavits read at the hearing of the motion for the appointment of a special receiver herein (to the reading and consideration of said affidavits the plaintiffs excepted), and upon the other papers and pleadings then read, the said answer and replication thereto, the affidavit of J. T. Jones of October 16, 1893, and the affidavit of John A. Taylor (to which two last-named affidavits the plaintiffs objected); and said motions of said Jones were argued by counsel, and taken under advisement by the judge. And now at this day, to wit, on the 14th day of November, 1893, the undersigned being fully advised as to what order and decree to make herein, it is adjudged, ordered, decreed, and pronounced that the motion of complainants to refer this cause to a commissioner at this time be and the same is hereby overruled. And as to the motions of the defendant J. T. Jones to dissolve wholly the injunction heretofore granted herein, and, in case that should be refused, then to dissolve said injunction as to three tenths of the land in dispute, the court doth overrule said motions, and each of them; the court being of opinion not to read on the hearings of said motions *ex parte* affidavits taken without notice, where objections are made to the reading thereof. And as to the motion of J. T. Jones to require from the plaintiffs an increase in the amount of the injunction bond, it seems to the court that said motion ought to be sustained. Therefore it is ordered and decreed that the complainants, or some of them, or some one for them, do within a reasonable time execute before the clerk of the circuit court of Tyler county, West Virginia, an additional injunction bond herein in the penalty of twelve thousand dollars, with security to be approved by said clerk, conditioned as the law directs in such cases."

We are met at the threshold by the contention on the part of defendant Jones that, no matter who may be the rightful owner of the land, petroleum,—mineral oil,—so far from being a part of the inheritance, something of which waste can be committed, is only capable of the qualified ownership of belonging to him who first appropriates it, no matter where it may be situated. Whatever the earlier decisions in other states may have been, it has never been so held in this state; and the authorities now very generally—universally, as far as I have examined them—hold petroleum to be a mineral, and as much a part of the realty as timber, coal, or iron ore, except that in proper cases its mobility as a subterranean liquid must be taken into consideration, as in the case of salt water, etc. The courts of the state of Pennsylvania have had many cases, some involving property rights of great value, in which the point arose, and have examined the question thoroughly, considered it with great care with reference to its being property where it is found, and its character and nature as prop-

erty in general. "Oil is a mineral, and, being a mineral, is part of the realty. *Punk v. Haldeman* (1866) 53 Pa. 229, 249. In this it is like coal, or any other natural product, which *in situ* forms part of the land. It may become, by severance, personalty, or there may be a right to use or take it, originating in custom or prescription; as the right of a life tenant to work open mines, or to use timber for repairing buildings or fences on a farm, or for firebote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is, in effect, the grant of a part of the corpus of the estate, and not of a mere incorporeal right. Not infrequently the oil forms by far the most valuable part of an estate." *Stoughton's App.* (1878) 88 Pa. 198, 201; *Westmoreland & C. Nat. Gas Co. v. De Witt*, 130 Pa. 335, 5 L. R. A. 731; *Hagus v. Wheeler*, 157 Pa. 324, 22 L. R. A. 141. As to ownership *in situ* of subterranean waters, see *Collins v. Chartiers Valley Gas Co.* (1890) 131 Pa. 143, 6 L. R. A. 280; as to ownership by different ones of the surface, coal, iron ore, oil, gas, etc., see *Chartiers Block Coal Co. v. Mellon* (1893) 152 Pa. 286, 293, 18 L. R. A. 703; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721,—where there is a full note on the subject. "Where percolating water is found, it belongs to the realty where it is found." *Chesmore v. Richards*, 7 H. L. Cas. 349. In *Findlay v. Smith* (1818) 6 Munf. 184, 8 Am. Dec. 733, subterranean salt water is treated as part of the inheritance of which waste could be committed. And for a like or a stronger reason should rock oil be so regarded. *Hail v. Reed*, 15 B. Mon. 479. I do not understand the case of *Wood County Petroleum Co. v. West Virginia Transp. Co.*, 28 W. Va. 210, 57 Am. Rep. 659, to lay down a different doctrine, even as to natural gas, so long as it is confined in the strata where it is found. It is only when it escapes out of the possession of the owner that the right of property is gone. This follows as an inevitable result of its fugitive nature. In that case the lease was for carbon oil at a fixed royalty, and the gas escaped with it, and thus ceased to be a part of the realty, and this was shown to be a natural and inevitable incident to the sinking of all oil wells in that region, as verified by an experience of twenty years; and, while the grant was for the specific purpose of mining and removing carbon oil, still the lease necessarily included the gas which came up with the oil as an inevitable concomitant; that it was essential that the well should be kept open in order to pump the oil, and the gas necessarily from its nature, and by its own force, issued from it. And the court held, under the circumstances of that case, that the lessee could, in any proper manner that he might choose, appropriate and use this escaped, wild gas without accounting therefor. As to oil coming up in a salt well, see *Kier v. Peterson* (1861) 41 Pa. 357. In the case in 28 W. Va. 210, 57 Am. Rep. 659, cited above, the court evidently regarded the oil as part of the realty, if not the gas also, as long as it remained in the earth, and subject to the owner's control, whether such owner be lessor or lessee; but

from its nature the title of such owner is gone when the gas escapes into the land of another, and comes under his control. See Gould, *Waters*, 2d ed. § 291; *People's Gas Co. v. Tyner*, 181 Ind. 277, 16 L. R. A. 443, 81 Am. St. Rep. 453, and cases cited in the note. We take for granted, therefore, that petroleum in place, among the strata of the earth, where it belongs, is a part of the inheritance, and to take it unlawfully would be lasting damage to the disherison of him in remainder.

Defendant Joseph T. Jones admits that he has taken the oil from the land in controversy in large quantities; is still taking it, as he claims he has a right to do; and he justifies by setting up his purchase at the judicial sale already set forth. The plaintiffs claim as life tenants and tenants in remainder under the will of David Hickman, and that defendant Jones has no title; that he is doing irreparable mischief, going to the destruction of the substance of the estate by the cutting down of the timber and the extraction and sale of the oil. This is a sufficient ground for injunction, and it is no answer to say that the title to the premises is in litigation. See *Erhardt v. Boaro*, 113 U. S. 539, 28 L. ed. 1117. If an action of ejectment were pending to recover possession of the land in controversy, the court, under such circumstances, could require the sheriff or other officer to take possession of the land. See Code, chap. 92, § 5. So an injunction may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in equity, against injury from the sale, removal, or concealment of such property. Code, chap. 183, § 1. This, in a proper case, leads to the appointment of a receiver, or managing receiver, as was attempted in this case. Here the bill alleges waste, spoliation of the inheritance, by severing and selling a part of the *corpus*; prays an injunction against future waste, and an account and satisfaction for that already committed. So that the main question is, what title to the land in controversy did defendants Tennent and Jones get by virtue of the purchase at the judicial sale? And while the title to this property with 28 producing oil wells on it was being litigated, it was eminently proper for a court of equity to take hold of it in a proper way, hereinafter indicated. I take for granted that under the will of David Hickman the plaintiff Eliza Williamson took a life estate in the undivided seven tenths of the land in controversy, and her sisters and her sisters' children (representing as a class a deceased sister), at the death of the testator, the remainder in fee, and that such remainder was not contingent, but vested; for "it is not the uncertainty of ever taking effect in possession that makes the remainder contingent, for to that every remainder for life (or in tail) is and must be liable, as the remaindermen may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally

distinguishes a vested remainder from one that is contingent." Fearn, Remainders (Butler's ed.), 215, 216. "It is now clearly settled, after considerable doubt and hesitation, that the existence of a power of appointment will not prevent estates limited to take effect in default of the exercise of the power from vesting, if they are such as, apart from the existence of the power, would be vested estates." Challis, Real Prop. 57; Fearn, Remainders, p. 225, § 9. "Such estates are said to be vested but liable to be divested by an exercise of the power." See Tiedeman, Real Prop. § 897, and under section 401 and notes, page 401, and note 2, page 389. By the Code of West Virginia (see chapter 71) any estate may be made to commence in future by deed, in like manner as by will. No words of limitation are now necessary to create or pass a fee simple. Fee tails may still be created, but they are docked by the statute, and converted into estates in fee simple. But the word "heirs" is still constantly used as a word of limitation. But if the estate is given by deed or will to any one for life expressly, and after his death to his heirs or heirs of his body, the conveyance is construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body. A contingent remainder can no longer fail for want of a particular estate to support it, and the alienation of the particular estate, or the union of such estate with the inheritance by purchase or descent, no longer operates by merger or otherwise to defeat, impair, or otherwise affect such contingent remainder, so that trustees to preserve contingent remainders are no longer in any contingency necessary, as it cannot be destroyed by forfeiture, surrender, merger, or wrongful alienation; but it may be sold by proceeding in equity under the statute. See Code, ed. 1891, p. 635, chap. 71, §§ 20 *et seq.* The suit is in the name of the owner of the particular estate, but all persons then living, who are contingently interested, must be made parties defendant in person. Such living persons cannot be made parties by representation.

Were the debts decreed in the chancery suits of Peden and Russell, under which the land was sold, extinguished by the payment made by and assignment made to Christian Engle as executor? It is contended that it was the duty of the executor to pay off these decrees, because the first clause of the will reads as follows: "I desire that, as soon after my death as possible, that all my debts be paid by my executor, both legal and equitable, including all, if any there are, that I might be in honor bound to pay." I do not regard the Peden and Russell decrees against the estate of John Jones as properly falling within the debts thus mentioned, for they were not debts for which the testator was in any sense liable as principal or surety, in law or in equity; and the payment thereof as his debt could not have been contemplated or intended by him. Still the payment was made by the executor with the funds of the estate, and the assignment was taken to him as executor, for the evident purpose of removing a cloud from the title to this 165

acres, seven tenths of which had been devised by the testator. The decree was for the sale of the whole tract, and such a sale to a stranger would have at least clouded the title of these devisees; and, although Hickman was not a party to the suit, a sale under the decree might have had, in ways that need not be considered, the effect of embarrassing, if not defeating, the title to a part or all of the seven-tenths interest of the testator. The assignment was evidently taken in the interest of the devisees, and for their protection and benefit, as far as was necessary, as he was their trustee under the will, as well as the executor; and, as far as necessary would be construed as inuring to their benefit. But it did not *ipso facto* operate as an extinguishment of the incumbrances. There were obvious reasons why it should be kept alive, for it was a lien on the three tenths undivided, which the testator did not own or claim; and, as a practical way out of the trouble, it might have been prudent to have enforced the decree by a sale of the land, but for some good reason no doubt the executor saw fit to pursue a different course.

It is claimed by plaintiffs that the attorneys-at-law had no right or authority to make these assignments. It is true, no authority expressly appears, but they were made nearly thirty years ago, and are now to be taken as adopted and ratified by the receipt of the money paid by the executor. However that may be, they set up no claim, and strangers cannot now do so for a wholly foreign purpose.

On the 10th day of October, 1863, the executor had the decree of that date entered, whereby he made it appear to the satisfaction of the court that as executor of Hickman he had paid and taken an assignment of the sums decreed against the land by decree of September 23, 1862, and for the payment of which it had been decreed to be sold, unless otherwise paid; that David Hickman, his testator, at his death was the owner of seven undivided tenth parts of said land; that he, the executor, did not desire a sale of the parts of said land owned by the estate of David Hickman, deceased. After this recital the court adjudged and decreed that the commissioner hereinbefore appointed to make sale of said lands sell the outstanding interests, in order to pay their portion of the debts aforesaid, being the debts of Thomas Jones, deceased, and a lien on the whole of said land. What was the effect of this decree? Whatever other effect it may have had, there was and is no reason why it should not have had the effect to free the seven tenths from the incumbrance, and withdraw it from the operation of the previous decree of sale, as it was evidently intended to do. Whether it left three tenths of the land called "outstanding" to be sold to pay three tenths of the sums decreed need not be considered, further than to say that it could only be done after giving the defendants, the heirs of Thomas Jones, deceased, who as such were the respective owners of the three tenths, an opportunity in some way to be heard, which was not done in this case.

The next decree was entered on the 26th day



of December, 1881, on the petition filed of C. Engle, executor and trustee under the will of David Hickman and Eliza Williamson, by B. Engle, attorney, and this again was modified by the decree of April 14, 1882. It is claimed that these decrees were void, because the decree pronounced on the 23d day of September, 1862, was final; "that the latter is a decree disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all parties, and awarding the costs" (*Harvey v. Branson*, 1 Leigh, 108); "that no further action of the court in the cause is necessary to give completely the relief contemplated by the court" (*Cocks v. Gilpin*, 1 Rob. (Va.) 20; "nothing further than those measures or proceedings which are necessary for the execution of the decree which has been pronounced, and which are properly to be regarded as adopted, not in, but beyond, the cause, and as founded on the decree itself or mandate of the court, without respect to the relief to which the party was previously entitled upon the merits of his case." See full discussion of the subject in *Cora v. Strickler*, 24 W. Va. 689. See also *Mower v. Fletcher*, 114 U. S. 127, 29 L. ed. 117. It is certainly not a final decree in the sense of putting the cause to an end and the parties out of court, for the land remained to be sold, the sale to be reported and passed upon; but it would now be an appealable decree, as it requires money to be paid and real estate to be sold. See Code, chap. 185, § 1. Whatever we may call it, and whatever the power to make it as against the heirs of Thomas Jones, deceased, it was made, appointing the commissioner Soper to sell three tenths of the tract of land. It was still standing unexecuted. The commissioner was dead, and now Mrs. Williamson, a *pendente lite* purchaser of the three tenths, by a writing signed with her name asked the court to appoint a new commissioner, and cause it to be sold, which was done, with her approval, and she received the proceeds of the sale. Having thus made her election, she is estopped; and although, as matter of law, both she and the purchaser may be taken to have known the proceeding to have been void or voidable, yet, she having once made her choice to treat it as valid, he had a right to take her at her word, and act accordingly. If the matter complained of was wrong, it had its origin with her, and it is now too late for her to take advantage of it.

We have already seen that the sisters of Mrs. Williamson, as a class, took under the will of their father, David Hickman, a vested remainder in the seven tenths of the land in controversy, subject to the life estate of Mrs. Williamson, and to her power of appointment among them by her will; and that the decree as against their interest in the land had been entered of record in the cause as released or discharged, and it was adjudged that no sale thereof should take place. Their interest being vested, and not contingent, they could not be made parties to any judicial proceeding by representation. Their sister, the life tenant, did not so represent them as to their remainder as to bind them. *Baylor v. Dejermette*, 18 Gratt. 164; *Faulkner v. Davis*, 18 25 L. R. A.

Gratt. 683, 98 Am. Dec. 698. They can only be bound after they have had an opportunity to be heard. They were not parties to the suit, nor to the petition filed by Engle, the executor, and Mrs. Williamson. They had no notice thereof, and are not bound by any of the proceedings or decrees under which defendants Tennent and Joseph T. Jones acquired title. All such proceedings, as to them, were void. They had nothing to do with setting on foot the judicial proceeding which led to the sale. They received none of the purchase money. They were not in possession, as remaindermen. They had nothing to do with delivering the possession to Jones in performance of his contract of purchase; and, as to their standing by and seeing, without complaint or protest, Jones, the purchaser, expend so large a sum in developing the oil, it is a new fact as to them, alleged in the answer to repel and avoid the equity of their bill; and, even if provable by affidavit, taken without notice, and I treat them as in and read it, it is not made to appear otherwise than as an inference to be drawn from the fact that they were residents of the county; and, if they had known it, Jones, the operator, was their co-owner of the inheritance to the extent of an undivided three-tenths part, with the right as tenant of the whole of it during the life of Mrs. Williamson; and therefore he had, as against them, the right to drill wells into the oil strata of the inheritance, and take his share of the oil, provided always that he does not take more than his share. See *MacSwinney, Mines*, p. 110, chap. 6. But he is not entitled to appropriate more than his share of the product. This refers to his share of the net product after deducting all expenses incident to the working. I should think that a co-owner, who has expended so large a sum, entirely at his own risk, but with the knowledge of the other co-owners, in so hazardous an enterprise as developing oil in an unexplored field, ought not to do more than account to them for their proportion of a customary royalty, proper and fair under all the circumstances. See *Id.* p. 112, and cases.

As to the jurisdiction of a court of equity there can be no question. (1) Because it is, as to seven tenths undivided part, a trust property, vested by the testator in the defendant Christian Engle, trustee, to hold for Mrs. Williamson for life, who is still living, with power to her to dispose of the same by will among her sisters or sisters' children, as she may think proper; and, in the event of her death without a will, the said shares to revert to her sisters in equal proportions. How is a court of law, restricted as it still is to such common-law machinery as it has in this state, to take hold of and properly conduct such business? And if the common-law methods have been to some extent advanced and improved, the jurisdiction of courts of equity in such cases has not been superseded or taken away by statute. (2) Because a court of equity, with its power to enjoin waste, appoint receivers and managers, take accounts, etc., is the forum peculiarly appropriate for the remaindermen in such

cases; and, if the remainders were in any sense contingent, as they are claimed to be on behalf of defendant, within the meaning of the rule that permits them to be regarded as parties to a cause by representation; and although a trustee is no longer necessary in any case in this state to preserve contingent remainders, still it was the duty of the trustee in this case and cases like it to see that waste of the inheritance to the disherison of those who might be entitled by way of contingent remainder was restrained, and the waste already committed accounted for, and the property of those ultimately to be entitled was protected and preserved. But, as to Mrs. Williamson, the case, in my view, is wholly different. She was the owner in fee of the undivided three-tenths part, and of the life estate in the remaining seven tenths. She came into court, by her attorney, as such owner, and as the owner of part of the incumbrance, and, with the executor, asked that the land be sold. The decree of sale was pronounced at her instance. The sale was made at a full, fair price,—\$4,000. In her petition, signed with her name, she set forth that she was, under the devise from her father, the owner for life of seven tenths and of two tenths in fee; that Christian Engle had power and authority to enforce the decrees for the benefit of David Hickman's estate, praying that a new commissioner be appointed to make sale of the land. As to these facts, showing her interest, thus represented by her, they were material, and seem to have been true. The purchaser, we must presume, relied upon the facts stated in the petition, and thereby, to that extent, was induced to buy. The land seems to have been sold for the purpose, among others, of making partition, and of converting it into money, so that Mrs. Williamson might get the interest for life on seven tenths of the proceeds and three tenths of the proceeds out and out. Having gone thus far, she must have intended that the purchaser should act upon it as a valid sale. The purchasers had no superior knowledge on the subject. The value of the property could only be determined by the drill at great risk, and with great cost and expense. She did not except to the sale, but it was confirmed, and the land conveyed, and possession delivered, with her consent. After taking out the sum of \$265.52, with interest, three tenths of the residue was directed to be paid to her, and the residue—seven tenths—her trustee was ordered to put at interest for her benefit for life. The cause was ended, and dropped from the docket.

So far as the sale of the interest of Mrs. Williamson is concerned, it matters but little whether the sale be held to be valid or void; and, whether the judicial proceeding be called void or voidable, she is estopped by her conduct from calling it in question, or in any way impeaching its validity—First. By her conduct in inducing such void judicial proceedings to be had, and the sale thereunder to be made; by receiving and keeping the purchase money; causing her possession to be turned over to the purchaser, and a deed to be made to him purporting to convey to him her interest. Second. By

standing by and seeing the purchaser put down twenty-three oil wells, at an outlay of about \$140,000, without opening her mouth against the validity of his title during a period of fourteen months, without discovering any new fact except the one the purchaser's drill had brought to light. Now she asks that he be treated as a trespasser and spoliator, and that the property and the oil produced be taken from him, and turned over to her fresh vendee, who seems to have felt some interest in the result of the experiment. In one of the affidavits read on the hearing of the motion for the appointment of a receiver it is stated that Mrs. Williamson said, among other things, in the course of a conversation, that "she was sorry that the suit had been brought; and I infer from that and other things that her conduct was induced to enable her sisters, as she supposed, to assert their right, rather than for any purpose of her own." But we must, for this purpose, take the facts as they are shown to be by the pleadings and the unquestioned exhibits filed therewith. Mrs. Williamson thus showed that on second thought it would be inequitable for her, as to her own interest, at that stage of the transaction, and under such circumstances, to take advantage of such defect in the purchaser's title; and she expressed her thought in the language of feeling, and in this second thought of hers she stated correctly the equitable doctrine on the subject, deciding the case against herself, and, as we may infer, not against her sisters. A party who causes his land to be sold under a void judicial proceeding for some purpose of his own, and afterwards receives and retains the proceeds of the sale, is not permitted to impeach its validity; and if he afterwards stands by and sees the purchaser expend in good faith large sums in developing oil on the property, he may not then set up such defect in the proceedings. In the one case the court has made the sale as his agent. He has acquiesced and ratified it by causing the possession to be turned over, and the land to be conveyed, and purchase money to be paid. In the other he has received the proceeds of sale, and stood by and seen large sums expended on the faith of the ownership thus acquired from him. "The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can by its operation secure these ends. Like the statute of limitations, it is a conservator, and without it society could not well go on." *Daniels v. Tearney*, 102 U. S. 415, 420, 26 L. ed. 187, 188; *Gallagher v. Cadwell*, 145 U. S. 368, 36 L. ed. 738; *Sherman v. McKeon*, 38 N. Y. 266; *Ferguson v. Landram*, 5 Bush, 230, 96 Am. Dec. 850.

The application of the principle does not depend upon any supposed distinction between a void and voidable sale. "The receipt of the money with the knowledge that the purchaser is paying upon the understanding that he is purchasing a good title touches

the conscience, and therefore binds the right of the party in the one case as well as in the other." *Smith v. Warden*, 19 Pa. 429. It starts with the fact of a defect in the purchaser's title, which has led to the course of conduct which creates the estoppel; but it is the nature and effect of the conduct itself which calls for the application of the doctrine. See *Freeman*, *Void Judicial Sales*, 8d ed. p. 87, § 50, and cases cited, among them *Spragg v. Shriver*, 25 Pa. 282, 64 Am. Dec. 698; *Maple v. Kussart*, 53 Pa. 349, 91 Am. Dec. 214; *Southard v. Perry*, 21 Iowa, 488, 89 Am. Dec. 587; *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460; *Bigelow, Estoppel*, 5th ed. p. 658, chap. 21, §§ 453 et seq.; 2 *Herman, Estoppel*, p. 1195; *Dezell v. Odell*, 8 Hill, 215, 38 Am. Dec. 628, *notes*.

Mrs. Williamson now claims that her attorney had no authority to sign her name to the petition which was filed praying the court to decree a sale of the land, and that the court had no jurisdiction to pronounce the decree; but, as the case now stands, it must be taken that he did have such authority, for there is no evidence of any kind to the contrary, and the allegation is expressly denied; and, as we have already seen, having accepted the benefits of the decree, she cannot now be heard to question the jurisdiction of the court to render it. See *Ellis v. White*, 61 Iowa, 644; *Wandling v. Straw*, 25 W. Va. 692, 708. And her signing the petition is taken as relieving the case of any question under the statute of frauds, so far as it may be considered as involved; for in this case Mrs. Williamson, by her petition asking a sale, invested the court with apparent authority to make the sale. When reported as sold, she saw fit to have it confirmed; treated it as a valid sale, causing her actual possession to be turned over to the purchaser, and a deed to be made. The purchaser paid the \$4,000 purchase money into court on the faith of such apparent power to sell, thus treated as real. The money was in part paid out to her, and she still retains it. Besides that, she stood by, and saw him expend large sums in the hazardous enterprise of developing oil, which, being successful, increased its value an hundredfold. As to estoppel *in pais* in regard to land, in view of the statute of frauds, see *Bigelow, Estoppel*, 5th ed. pp. 665, 712; 2 *Beach, Mod. Eq. Jur.* § 1118; *Dickerson v. Culgrove*, 100 U. S. 578, 25 L. ed. 618; 2 *Herman, Estoppel*, § 1074; 7 *Am. & Eng. Encyclop. Law*, p. 22; *Browne, Stat. Fr.* 4th ed. 457a; *Brookhaven Trustees v. Smith*, 118 N. Y. 634, 7 L. R. A. 755. Upon the subject generally, see the following English cases: *Pickard v. Sears*, 6 Ad. & El. 469; *Cairncross v. Lorimer*, 3 Macq. H. L. Cas. 829; *Carr v. London & N. W. R. Co.* L. R. 10 C. P. 307; *Duchess of Kingston's Case*, 9th Am. from 9th Eng. ed. 3 *Smith, Lead. Cas.* 1998.

There remain to be considered some questions of practice, which, owing to their liability to work serious mischief in a class of cases like this, call for some comment, as defendants protest against it most earnestly. I mean the granting of the injunction without notice. The statute (chap. 183, § 8) 25 L. R. A.

says: "Any court or judge may require that reasonable notice shall be given to the adverse party, or his attorney at law or in fact of the time and place of moving for it, before the injunction is awarded, if in the opinion of the court or judge it be proper that such notice should be given." The very general practice is to require notice, especially where the plaintiff seeks to enjoin and restrain such operations as from their nature are liable to entail serious loss in being unexpectedly stopped; such as collieries, furnaces, oil wells, and works of a like kind. In this instance constant working seems to be necessary to keep control of the accompanying salt water. Such practice is so exceptional in that class of cases that I take it for granted that some good reason for its adoption must in this case have been made to appear, as that the mere act of giving notice might have been of itself productive of some of the mischief apprehended. In such cases the courts, on a proper showing, award injunctions without notice. See 1 *Poster, Fed. Pr.* § 231. In this case, if notice had been given, it is highly probable that it would have resulted in a temporary order for the occasion, satisfactory to both parties; and, if to nothing else, would surely have led to the requirement of an injunction bond in a greater penalty than \$2,000, which is another ground of complaint. After the defendant appeared and moved for it, an additional bond in the penalty of \$12,000 was required, and, I suppose, given, although this record does not show the fact. The order requiring an additional bond should have fixed a time within which it should be given, and, if not given within such time, that after the expiration thereof the injunction should stand dissolved until such bond be given; or some order of like effect that would enforce the giving of the new or additional bond, on pain of having the injunction dissolved. See *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 896, 407.

The defendant also assigns as ground of error the refusal of the circuit court judge in vacation, on the hearing of his motions to dissolve the injunction, to read on his behalf certain *ex parte* affidavits taken without notice, to the reading of which plaintiffs objected. On a motion to dissolve, on filing the answer, the common practice in this state has been to read affidavits taken without notice in support of the equity of the bill, and counter affidavits taken in like manner in support of the denials of the answer; but where the answer sets up new matter to repel or avoid the equity of the bill the court may very properly require that plaintiff shall have an opportunity to be present when such affidavits are taken, otherwise he may be taken by surprise. On this matter, however, the court below must have a considerable latitude of discretion, in order to give a fair hearing on the motion to dissolve, and may require the affidavits in general to be taken on notice. But these affidavits are regarded as read on this hearing, and they do not call for any modification of the present conclusion reached.

This brings us to the important practical question, What order ought the court to have

made on the hearing of defendant's motions to dissolve the injunction? It should have dealt with the case as though the rights of the parties should be finally held to be such as they have been herein shown provisionally to be,—that is to say, defendant Joseph T. Jones should be regarded as the owner in fee of three undivided tenth parts of the land in controversy, and of the freehold in the residue during the life of the plaintiff Eliza Williamson, with a vested remainder in fee simple to the sisters, etc., of Eliza Williamson in the said remaining seven undivided tenth parts, according to and under the will of David Hickman, deceased; that defendant Jones is rightfully in possession according to his rights and the rights of his co-owners in the inheritance, with the right to extract and sell the oil, provided he does not take more than his share, as it appears that he has already occupied the whole property with oil wells to about its full profitable capacity. Such shares might be three tenths of the net proceeds,—that is, after deducting all expenses incident to the working, and making a proper allowance, if any, for what he may be entitled to as the owner of said life estate formerly owned by Eliza Williamson; but

until the final hearing let defendant Jones be charged with seven tenths of the customary royalty in the Sistersville oil field before it was developed, say one eighth of the oil produced, as such customary royalty, delivered into the pipe line; and the order of the 25th day of August, 1893, should be modified accordingly,—that is to say, instead of causing all the product of the wells or the proceeds of its sale to go into the hands of the special receivers, cause them to take control of seven tenths of said royalty, to be sold, etc., and proceeds held to await the final decree of the court, so as to leave to defendant Jones as far as possible, consistently with the right of his co-owners, full possession and control of what has been provisionally determined to be his own; he being shown to be solvent and responsible, and an energetic, experienced, and skillful oil operator; and it being to the interest of all that the wells be kept in operation under skillful and prudent management. And the cause is remanded, with directions to the Circuit Court of Tyler County to so modify its orders in the cause as to make them conform to and carry out, as near as may be, the views herein expressed, and directions here given, until this cause shall be finally heard.

### ALABAMA SUPREME COURT.

NOBLE & WARE, *Appts.*,  
v.

S. M. MITCHELL.

(.....Ala.....)

#### 1. A statute making one acting for an unlicensed foreign company, corpora-

tion, association, or partnership transacting insurance business in the state personally liable for the amount of the policy and imposing a penalty upon him is separable and valid, so far as it applies to the agents of corporations.

#### 2. Compliance with the terms of the policy as to proofs of loss and time for bringing suit is not necessary to authorize re-

**NOTE.**—*Restrictions on insurance by unincorporated associations or individuals; "Lloyds" associations.*

The business of insurance is so generally conducted by corporations that the question of the right of unincorporated associations or individuals to make contracts as insurers has been but little raised. In the main case, *NOBLE v. MITCHELL*, the court considers the association by which the insurance was made to be in fact a corporation, and decides the case on that basis. The question suggested therein as to the constitutionality of a statute which should exclude citizens of other states from carrying on, either as individuals or unincorporated associations, the business of insurance without also restricting citizens of the state in the same way is therefore not decided, but the decision could hardly be doubtful.

The unconstitutionality of discriminations against citizens of other states is illustrated in numerous particulars in the note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579, and the authorities there presented seem to be conclusive against the validity of any statute which should discriminate between citizens of the state and those of other states in respect to the privilege of carrying on insurance business, either as individuals or as unincorporated associations of individuals.

A guaranty and accident Lloyds association, although unincorporated, was ousted from doing business in Ohio by the decision in *State v. Ackerman*, 24 L. R. A. 288, 51 Ohio St. —, but this was done on the theory that the association was at 25 L. R. A.

tempting to act as a corporation contrary to the statutes of the state. The Ohio statutes made it unlawful for any "company, corporation, or association," whether organized in the state or elsewhere, to carry on the business of insurance without complying with the statutory provisions, and as the court regarded the character of this Lloyds association as such that it was within the purview of the statute authorizing an action in quo warranto "against an association of persons who act as a corporation" without being legally incorporated, no discussion of the question of discrimination against partnerships or associations, which were not in fact assuming to act as a corporation, was made.

In Illinois it was held in *Greene v. People* (Ill.) May 18, 1889, that an association of persons who, without becoming incorporated, engaged in the business of insurance and attempted to limit their individual liability to the amount they contribute, and assume to give perpetuity to the business by assignability of membership certificates, is acting as a corporation and may be ousted from such usurpation of a franchise by a proceeding in quo warranto. This association is not shown in the report to have been organized in any other state, but in other respects, so far as the facts appear, it would seem to be almost identical with the Lloyds association involved in the Ohio case of *State v. Ackerman*, *supra*. The nature of the association is substantially the same in both cases, even if the same association is not actually involved in both cases.

covery under a statute making an agent acting for an unlicensed foreign company personally liable for the amount of loss.

3. The fact that insurance solicitors placed a risk through brokers in another state without knowing what company took it will not relieve them from liability under the provisions of a statute authorizing recovery of the loss from persons who act as agents of unlicensed foreign companies.

4. An unwarranted statement by counsel in argument as to the effect of evidence in the case will not cause reversal, if it was made with reference to an immaterial issue in the case.

(December 21, 1898.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action brought to render defendants liable upon a policy of insurance procured through them of a company which was not licensed to do business in the state. *Affirmed.*

The action was to recover \$1,000. The complaint alleged that plaintiff received from the defendants, who were engaged in a general insurance business in the city of Montgomery, an insurance policy purporting

to have been issued by the Fairmount Insurance Association of Philadelphia, Pa., the policy contracting to insure plaintiff, a merchant, from loss by fire of his goods, wares, and merchandise to the amount of \$1,000. Shortly after the receipt of the policy, plaintiff forwarded to the defendants a draft for the premium, and that during the period covered by the policy, the insured property was destroyed. That the Fairmount Insurance Association is a corporation not incorporated under the laws of Alabama, and had procured no license to do business in that state during the time covered by the policy. Defendants demurred: First, because it did not appear that defendants at any time acted as agents for the Fairmount Insurance Association. Second, it did not appear that defendants were in any manner parties to the policy. Third, it did not appear that defendants acted as agents for the Fairmount Insurance Company in respect to the policy sued on. Fourth, it did not appear that defendants, or either of them, had undertaken or promised to pay to the plaintiff the amount of the policy. The demurrer was overruled.

The evidence tended to show that plaintiff authorized defendants to procure \$1,000 of

In the case of *STATE v. STONE* (Mo.) *post*, 243, the statutes of Missouri made the business of insurance unlawful until the "individual, association of individuals, or corporation" has been duly authorized by the insurance department. There was no discrimination against individuals of other states. This was also the case of what is called a Lloyds association composed of about 100 members, whose method of doing business is described with much detail in *State v. Ackerman*, 24 L. R. A. 236, 51 Ohio St. —.

The Missouri statute is clearly comprehensive enough to include an unincorporated association in its provisions. But in several states such associations have been held to be outside of the scope of the statutes regulating insurance.

Thus in Georgia, where the statutes by its terms was explicitly made to regulate insurance companies "incorporated by the laws of this or any other state or foreign country," it was held in the case of *Fort v. State* (Ga.) 23 L. R. A. 88, that a guaranty and accident Lloyds association, being a voluntary unincorporated association consisting of 100 natural persons, had a right to do business in the state unaffected by such statute. At least the provision making it an offense to act as agent for a foreign corporation did not apply to an agency for this association. But the court says: "It is safe to assume that the legislature overlooked the possibility that an unincorporated association would undertake to do insurance business."

Similar to this decision is that in *Com. v. Reinoehl*, *post* 247, in which the supreme court of Pennsylvania decides that the words "insurance company" in the Pennsylvania statutes regulating the business of insurance and making it a misdemeanor to act as agent of any unauthorized insurance company of any other state or government, have no application to a guaranty and accident Lloyds association.

The Pennsylvania and Georgia cases assume that the Lloyds association involved is to be considered a voluntary or unincorporated association, and do not discuss its character in this respect.

A Michigan statute declaring that "it should not be lawful to act as agent for any company, association, or individual not incorporated in this state" was mentioned in the case of *Clay Fire & Marine* 25 L. R. A.

*Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 81 Mich. 848, and the court says: "The law applies to operations within the state and against the representatives of foreign incorporated and unincorporated interests and of domestic unincorporated ones," —but it does not appear that any question about unincorporated associations was actually involved in the case.

In *Union Ins. Co. v. Smart*, 60 N. H. 458, insurance by an unincorporated company of another state was held to be within the prohibition of the New Hampshire statute, but as there was an express provision that the insurance should be valid, although prohibited, it was held that the premium note was also valid. No question in this case as to the constitutionality of the statute or of any provision discriminating against nonresident individuals was raised or decided.

The question whether or not individuals can be prohibited from engaging in insurance business and the whole business confined to corporations is one that has been raised in at least one case. In *Com. v. VROOMAN*, *post*, 250, rev'g 3 Pa. Dist. Rep. 340, the supreme court of Pennsylvania against the dissent of three judges decides that a statute prohibiting insurance against fire or lightning by unincorporated persons, associations, or partnerships is not an unconstitutional abridgment of the right of citizens to make contracts, although no discrimination is made against nonresidents or citizens of other states. The case of *Arrott v. Walker*, 118 Pa. 249, held a broker's contract for insurance void under such a statute, but without touching the question of the constitutionality of the statute.

It is clear that in the absence of any statutory restrictions the business of insuring may be carried on by individuals. The constitutionality of a statute prohibiting such business by individuals and giving it entirely to corporations, which has been upheld against strong dissent in the single case in which it appears to have been questioned (see *Com. v. Vrooman*, *supra*), is by no means free from difficulty and is subject to substantially the same reasons for and against it that apply to statutes prohibiting private banking, as to which see *State v. Sougal* (S. Dak.) 15 L. R. A. 477, and *note*.

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insurance on his goods; that he received a policy through the mail from them issued by the Fairmount Insurance Association, and forwarded to defendants a check for the premium; that the association was not licensed to do business in the state. Defendant's testimony tended to show that they secured for plaintiff a policy in the New Haven Security Company, and that shortly after the receipt of the policy plaintiff sent them through the mail a check for the premium; that when the New Haven company was informed of the issuance of the policy it instructed defendants to cancel it, which instruction was obeyed, and thereupon, at plaintiff's request, they undertook to place the insurance with some other company. That they notified plaintiff that they could not get insurance at Montgomery, but would endeavor to do so in Chicago.

The trial court, among other things, charged the court as follows:

"The plaintiff sued to recover of the defendants 1,000, because he says that the defendants were agents of the Fairmount Insurance Company, a foreign corporation, who did business in this state without having first procured a license as the law requires. Now, a foreign corporation, and any corporation not incorporated under the laws of this state is a foreign corporation within the meaning of this section of the statutes, which requires, before it does business in the state, to procure a license from the auditor of the state; otherwise, its contracts are illegal and void, if the parties seek to take advantage of it; and in addition to that a penalty is imposed upon any person who acts as agent of said company. Now, this agency may arise in either one of two ways. One is where the person acting as agent is such in point of fact, under the rules which usually constitute one person the agent of another. The other way in which he can become an agent is by doing either one of the acts which the statute, imposing a penalty for, says if he does he becomes liable as an agent. Now, this statute says if the defendant transmits a policy of insurance, or a premium of insurance, that he is an agent, although in point of fact he has no connection with the company. So the question under this complaint here for you to decide is whether the defendants in this case transmitted to the plaintiff a policy of insurance of the Fairmount Association of Philadelphia. That is what the plaintiff alleges defendants did. Now, is that true? You are to decide that question in the light of all the evidence, as persons of common sense, using your everyday experience, and see what the evidence establishes. Now, does it establish the proposition that the defendants transmitted to this plaintiff a policy of insurance of the Fairmount Association, or for the Fairmount Association? If they did this, then they are liable therefor for loss, if any was sustained. Further, you must decide as to the amount of loss (and there is no controversy that this store was burned), and that the amount of injury resulting was as much as \$1,000. Plaintiff cannot recover more than a thousand dollars, but anything under that. Now,

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what would constitute a transmitting of the policy by the defendants to the plaintiff? Now, under this statute, I instruct you that if you find from the testimony, and are reasonably satisfied that it is true, that the defendants received of the plaintiff \$32.50, and that he requested them to place insurance for him, and they sent the money to brokers in Chicago for the purpose of having such brokers effect insurance for the plaintiff, and such brokers did effect insurance in the Fairmount Company, and the Fairmount Company sent a policy of insurance directly to the plaintiff, or sent it to the brokers in Chicago and they sent it to the plaintiff, or it was transmitted to the defendants here, and they sent it to the plaintiff, that would be a transmitting of the policy of insurance by the defendants, because the defendants could not escape liability under this statute by sending a premium of insurance to Chicago brokers there, and having those brokers procure insurance and transmit the policy to the plaintiff, although they did not know at the time they sent the money, and did not give directions as to what company the insurance should be placed at. This is a new statute, so far as enforcing it is concerned, and I was inclined to think that it was necessary that the defendants should be placed in the same position as if the company itself were sued, and that the plaintiff would have to make proof of loss and bring suit in the time specified. I have examined it more carefully, in connection with some other cases, and my conclusion is that it is not necessary, and that when the defendants violated the statute by becoming the agents of a foreign insurance company without license to do business in this state, that it was a duty devolving upon them to pay the amount of loss sustained by the plaintiff, and that loss is the amount of the policy, and that it is not necessary for the plaintiff to make proof of it in order to recover against the defendant. This is my charge. So what I have stated to you, I give you as the law of the case. If you find from the testimony, and are reasonably satisfied with its truth, that the defendants received \$32.50, and that they were to procure insurance for the plaintiff, and they, in pursuance thereof, sent the money to brokers in Chicago with directions to effect insurance, and the brokers did effect insurance and transmit the policy, either directly or indirectly, to the plaintiff, or to the defendants here, and the policy went into the hands of the plaintiff, that that would be a transmitting of the policy within the meaning of this statute."

The theory of the case held by defendants is shown by the following requests to charge which were all refused: (1) "If the jury believe from the evidence that the defendants were not the agents of the Fairmount Insurance Company, and that they never received a premium as such agents, and they never remitted any such premium to said company, or to any one with directions to procure a policy in said company, then the plaintiff cannot recover." (2) "If the jury believe from the evidence that the premium received by the defendants was the premium on an-

other and different policy, and that it was sent to Chicago, at the request of plaintiff, to brokers, to be invested in insurance by them, and if they further believe from the evidence that said brokers secured the policy of the Fairmount Insurance Company without the knowledge, direction, or consent of said defendants that it would be invested in a policy in that particular company, then the jury must find for defendants." (8) "If the jury believe from the evidence that the plaintiff requested the defendants to send \$32.50 to brokers in Chicago to pay a premium on a policy of insurance; and if they further believe from the evidence that the defendants gave no instructions to said brokers as to the company in which they should procure the policy; and if they further believe that said premium was invested in payment of a premium to the Fairmount Insurance Company on the policy in evidence, and that such payment was made without authority or direction from defendants; and if the jury further believe from the evidence that said policy in evidence was never received by defendants, or delivered by them or their direction,—then the plaintiff cannot recover, and the verdict must be for defendants." (9) "The fact that the defendants transmitted \$32.50 to Elsworth & Co., Chicago brokers, being the amount necessary to procure an insurance policy, does not, without more, make the defendants the agents of the Fairmount Insurance Association of Philadelphia, unless the jury believe from the evidence that the premium of insurance was remitted, either by themselves or by another with their knowledge and consent, to the Fairmount Insurance Company to procure the policy of insurance offered in evidence. The jury are not authorized to hold, without more, that the defendants are the agents of the Fairmount Insurance Association of Philadelphia."

**Messrs. A. A. Wiley and J. M. Chilton** for appellants.

**Mr. Charles Wilkerson** for appellee.

**Coleman, J.**, delivered the opinion of the court:

The action was instituted by appellee to recover a loss covered by a policy of fire insurance, and arose under section 1206 of the Code of 1886. It is contended by the defendants that the act is unconstitutional, and that this is apparent when section 1206 is considered and construed in connection with sections 1205 and 1207. These three sections are as follows: Section 1205: "Any person, who solicits insurance on behalf of an insurance company, not incorporated by the laws of this state, or who, other than for himself, takes or transmits an application for insurance, a premium of insurance, or a policy of insurance to or from such company, or in any way gives notice that he will receive or transmit the same, or receives or delivers a policy of insurance of such company, or who inspects any risk, or makes or forwards a diagram of any building, or does any other thing in the making of a contract of insurance, for or with such company, other

than for himself, or examines into, adjusts, or aids in examining into or adjusting any loss for such company, whether such acts are done at the instance of such company, or any broker, or other person, shall be held to be the agent of the company for which the act is done, and such company held to be doing business in this state." Section 1206: "Any person, acting as agent of any foreign insurance company which has not received the license from the auditor provided for, or shall so act after its expiration, is liable personally to the holder of any policy of insurance in respect to which he so acted as agent, for any loss covered by it; and shall forfeit, for each offense, the sum of five hundred dollars, to be sued for in the circuit court where the delinquency occurs, by the solicitor, in the name of the state, and paid into the state treasury, less twenty per cent retained by the solicitor for his services." Section 1207: "The term 'insurance company,' as used in this article, includes every company, corporation, association, or partnership, organized for the purpose of transacting the business of insurance."

The Virginia statute, construed in the case of *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, provided "that no insurance company, not incorporated under the laws of the state, should carry on its business within the state without previously obtaining a license for that purpose," etc. This statute was construed as applicable to foreign corporations, and it was held to be constitutional. Section 1205 of the Code is: "Any person, who solicits insurance on behalf of an insurance company not incorporated by the laws of this state," etc. If section 1205 of the Code, *supra*, stood alone, we could put no other construction upon the words, "an insurance company not incorporated by the laws of this state," than as having reference only to foreign corporations; and so, if necessary to sustain the constitutionality of section 1206, *supra*, we would hold that the term "foreign insurance company," as there used, referred only to foreign corporations, resting this construction upon the principle that, when a statute is assailed upon constitutional grounds, it is the duty of the court to adopt, if the statute will admit of it, such a construction as will bring it within the constitutional power of the legislature (*Wilburn v. McCalley*, 63 Ala. 486), but, when construed *in pari passu* with sections 1201 and 1205, and other provisions appearing in the same article of the Code as section 1207, it would appear that such was clearly the legislative intention. It is well settled that the legislature of the state has authority to exclude foreign corporations altogether, and may impose any restrictions it may deem proper as a condition upon which foreign corporations may do business in the state. *Paul v. Virginia*, 75 U. S. 8 Wall. 161, 19 L. ed. 360; *Ware v. Hamilton*, *Brown Shoe Co.* 92 Ala. 149; *Neims v. Edinburg American Land Mortg. Co.* Id. 160, 161. It is contended, however, that by section 1207 of the Code, *supra*, these provisions of the law are made to include "associations" and "partnerships," as well as "corporations," and in

this respect discriminate against citizens of another state who may compose such "partnerships," and in this respect is violative of the constitutional provision which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U. S. Const. art. 4, § 2. We construe section 1207 as amendatory of the sections to which it refers, so as to substitute the words "corporation, association, or partnership," for the words "insurance company." Thus construed, section 1205, *supra*, would read as follows: "Any person who solicits insurance on behalf of a corporation, association, or partnership not incorporated by the laws of this state," etc.; and section 1206, *supra*, would read: "Any person acting as agent of any foreign corporation, association, or partnership which has," etc. By holding that section 1207 is amendatory of the other sections referred to in the manner declared, sections 1205 and 1206 are separable in their provisions, and, so far as they are made to apply to and are enforced against "foreign corporations," they do not contravene any provision of the state constitution or the Constitution of the United States. *Paul v. Virginia, supra; Baldwin v. Franks*, 120 U. S. 678, 80 L. ed. 760; *South & North Ala. R. Co. v. Morris*, 65 Ala. 193; *McCreary v. State*, 78 Ala. 480; *Powell v. State*, 69 Ala. 10; *Vines v. State*, 67 Ala. 78.

The construction of the statute is one of difficulty, and the one given to it is not altogether satisfactory; but we are of opinion the language used in section 1207, considered in connection with other sections to which it refers, admits of the interpretation given to it, and when the statute is attacked upon constitutional grounds it is our duty to avoid such a construction, if it can be done consistently, as will defeat the entire legislation of the state upon questions embraced in these statutes relating to insurance companies.

We are of opinion that plaintiff was not required, in order to maintain his action under section 1206, *supra*, to comply with the provision of the policy, in the matter of making proof of the loss and forwarding the same to the insurance company within sixty days, or the other provision that no suit should be begun within ninety days, and like provisions contained in the policy, which the policy required to be complied with before the institution of a suit against the company itself. The right of action is given against the agent who acts as such for a foreign insurance company which has not received a license from the auditor. It is the acting as agent for such a company that constitutes the "offense" which is the foundation of the suit. The recovery is limited to the loss sustained covered by the policy. The amount which may be recovered does not affect the right of action. It is the "offense" which forfeits to the state \$500, and not the failure to observe the stipulations contained in the policy of insurance. We think there was some evidence tending to show the Fairmount Association of Philadelphia was a foreign corporation. It is fully proven that the policy was procured through brokers living

in Chicago, and that it was sent to plaintiff by mail. The policy itself bears on its face evidence tending to show it was chartered under the laws of Pennsylvania. Its heading is, "The Fairmount Insurance Association of Philadelphia, Pa." The proofs of loss were to be "received at the office of the association in Philadelphia, state of Penn." Other provisions were subject to the orders of the "directors, . . . pursuant to its charter and by-laws, and the laws of the state of Pennsylvania." It was "signed by its president and attested by its secretary at the city of Philadelphia, Penn."

It is further contended by the defendant that there is no evidence to show they acted as agents for the Fairmount Insurance Association. We do not think this contention maintainable. Stated broadly and favorably for the defendants, the facts are that the defendants themselves had no correspondence whatever with the insurance company, had no information that the Fairmount Association Insurance Company had issued to plaintiff a policy, and did not in fact know there was such an insurance company in existence. We give the defendant the benefit of this extreme statement of the facts. On the other hand, the plaintiff received and held through some agency an insurance contract in this insurance company. He had no correspondence with the insurance company, and had no transaction with any other person, directly or indirectly, than the defendants in the procurement of the policy. The defendants solicited from the plaintiff an order to place an insurance risk, and the plaintiff authorized them to place a risk for \$1,000 in some good company on his stock of goods. Not being able to place the risk in Montgomery, the defendants requested an insurance broker in Chicago generally to place the risk. This broker had the policy in question executed and forwarded to the plaintiff. The plaintiff had no notice or information of the correspondence between the defendants and the Chicago broker, or of that of the Chicago broker with the insurance company. The plaintiff sent his check, payable to the defendants, to pay the premium on a policy. The policy bears date of September 25, 1890, and the check for the premium bears date October 18, 1890. This check was cashed to the defendants upon presentation to the drawee, and, as they testify, the proceeds were remitted by them to the broker in Chicago. The first policy obtained was canceled before the application was made to the Fairmount Association Insurance Company, and necessarily before the latter policy was received by plaintiff. When defendants received and retained plaintiff's check for the premium, they knew, necessarily, that the money received by them could not be applied to the canceled policy, and when they remitted the premium to Chicago, they knew it was not for a policy already canceled by them. Certainly, the facts of the defendants, if believed by the jury, are sufficient to constitute them agents within the sweeping provisions of section 1205 of the Code. *supra*. The acts of the Legislature of 1879 (page 26) and of 1884 (sections 16, 17, pp. 19, 20), codified



as section 1205, *supra*, fixed a penalty, and by the latter act, in addition to the penalty, a personal liability upon any person who did any of the acts therein specified for such an insurance company, and we do not doubt that it was the intention of the legislature to subject such a person or agent to the liabilities provided in section 1206, under which the present action was brought. The construction given to the statute by the court, in its instructions to the jury, accords with these conclusions. The charges requested by the defendants were properly refused. The propositions of law contained in them either asserted a contrary doctrine, or were abstract, or argumentative and misleading.

The bill of exceptions states that, in the concluding argument of plaintiff's counsel to the jury, he stated "that the evidence showed that defendants had taken \$32.50 from plaintiff and insured him in an insolvent company." The defendants objected to this statement of counsel, and moved the court to exclude it from the jury. This question is presented in a somewhat different form from that heretofore considered. It will be seen

that the statement is "that the evidence showed," etc. This was not the assertion of a fact as being within the knowledge of counsel, outside of and without reference to the evidence. Where counsel honestly differ as to the facts in evidence, or are honestly mistaken as to correct inference from proven facts, there is not that transgression of the limits of legitimate argument which will cause a reversal of the case. While we think the statement was not warranted by the evidence, and its tendency may have been to prejudice the defendants before the jury, the fact itself, whether true or false, could have no material bearing on the issue. The real issues were whether the company was a foreign corporation doing an insurance business without a license, and whether the defendants acted as agents within the provisions of the statute. The solvency or insolvency of the corporation could exert no influence on these issues, and the verdict should have been the same in either event. *Cross v. State*, 68 Ala. 476; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548. *Affirmed*.

*Affirmed*, 164 U. S. 367, 41 L. ed. 472.

#### MISSOURI SUPREME COURT (In Banc).

STATE of Missouri, *Resp't.*,

v.

Percy STONE, *App't.*,

(118 Mo. 388.)

1. Provisions of a statute imposing a penalty upon one who acts as insurance agent for a principal who has not required a certificate of permission to transact business should not be disregarded so far as they are made to apply to agents of individuals, because the statutes requiring a certificate and regulating the procedure for procuring it apply only to "companies" if such statutes are made by subsequent ones applicable to individuals and all their essential provisions can be complied with by individuals.
2. A penal statute should not be construed strictly for the mere purpose of defeating it when its intent is plain.
3. Persons seeking to transact insurance business may be subjected by the state to reasonable regulations.

(December 4, 1892.)

**A**PPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction convicting him of violating the insurance law in acting for foreign insurers who had not procured a certificate of permission to do business within the state. *Affirmed*.

The facts are stated in the opinion.

*Messrs. Lee, McKeighan, Ellis & Priest*, with *Mr. M. W. Huff*, for appellant: The office of insurance superintendent is one

**NOTE**—The subject of insurance by a Lloyd's association which has not been incorporated is further presented in a note to the preceding case of *Noble & Ware v. Mitchell*, *ante*, 238. Also in the next following case of *Com. v. Reinschl*, *post*, 247. 35 L. R. A.

created by statute, and he can grant a license only to those whom the statute designates, and his license issued to any other is a nullity.

*McCreary v. Rhodes*, 68 Miss. 308; *People v. Davis*, 45 Barb. 494; *State v. Hill*, 52 N. J. L. 326.

"Association of individuals," as used in our statute, is synonymous with corporations, or applies to joint-stock companies having a capital stock divided into shares, and governed by articles of association which describe their objects, and in which the members assume the liability of partners to the creditors of the company.

*Cook, Stock & Stockholders*, § 504; *Rev. Stat. 1889*, § 6570; *Mo. Const. art. 12*, § 11; *Rev. Stat. 1889*, § 2480; *Rev. Stat. 1889*, §§ 5873, 5877.

There is no law in this state authorizing the insurance superintendent to license an individual or several individuals, or an association of individuals, to carry on an insurance business, and hence individuals are not required to take out a license.

*Bishop, Statutory Crimes*, § 220; *State v. Slaughter*, 70 Mo. 484; *Nance v. Hemphill*, 1 Ala. 551.

A state has no right, under the guise of regulating a legitimate business, to impose such restriction and conditions, as to prohibit the business; but the regulations imposed must be reasonable and such as can be complied with, and a state never has the right to interfere with constitutional rights in passing laws in exercise of its police powers.

*Tiedeman, Pol. Powers*, 1886, p. 273; *Cooley, Const. Lim.* p. 746.

An attempt to prohibit an individual from doing an insurance business without a license, and prescribing a penalty for his so doing without first providing a means by which a license

may be obtained, virtually prevents his engaging in this business, and is unconstitutional and void.

*State v. Scougal* (S. Dak.) 15 L. R. A. 477; *Cooley*, Torts, p. 227; *Bertholf v. O'Reilly*, 74 N. Y. 509, 80 Am. Rep. 823; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 387, 52 Am. Rep. 84; *Slaughter-House Cases*, 111 U. S. 746, 28 L. ed. 585; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *State v. Loomis*, 21 L. R. A. 789, 115 Mo. 807; *Com. v. Perry*, 14 L. R. A. 325, 155 Mass. 117; *Godcharles v. Wigeman*, 113 Pa. 481; *State v. Goodwill*, 6 L. R. A. 621, 88 W. Va. 179; *State v. Five Creek Coal & Coke Co.* 6 L. R. A. 359, 88 W. Va. 188; *Fraser v. People*, 16 L. R. A. 492, 141 Ill. 171; *Story*, Const. 5th ed. § 1943; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 468.

**Mr. R. F. Walker, Atty. Gen.,** for respondent:

The word "company" means those united for the same purpose in trade or business.

*Palmer v. Pinkham*, 38 Me. 86.

The simple word "company" includes individuals as well as corporations.

*Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 164.

By the word "association" is meant an organization of persons without a charter, for the transaction of business, the benefit of humanity, the promotion of culture, or other purposes or an unincorporated society or board.

*Lechmere Bank v. Boynton*, 11 Cush. 880.

Agents are criminally responsible for doing business for an unauthorized company.

Rev. Stat. 1889, § 5916; *State v. New York L. Ins. Co.* 81 Mo. 89; *State v. New York L. Ins. Co.* 10 Mo. App. 580; *State v. Charter Oak L. Ins. Co.* 9 Mo. App. 364.

All insurance business in Missouri is subject to the control of the state.

*State v. St. Louis Citizens Ben. Assn.* 6 Mo. App. 168.

The acts for the incorporation and regulation of life insurance companies are general regulations for the protection and security of the citizen, and in no way violating the constitution, either state or federal.

*Price v. St. Louis Mut. L. Ins. Co.* 3 Mo. App. 262.

Rules for the conduct of the most necessary and common occupation may be prescribed and enforced by a state when it is deemed that they afford opportunities for imposition or fraud. The business of insuring lives is in this category.

*Cooley*, Const. Lim. 5th ed. p. 748, and note 1, p. 744; *Lothrop v. Steidman*, 42 Conn. 538; *Ward v. Farwell*, 97 Ill. 598.

One hundred and fifty years ago the British parliament enacted a law placing certain restrictions around those engaged in the insurance business, and since that date, both in England and in this country, the business had been subjected to especial legislative provisions.

*Marshall*, Ins. chap. 2, § 2, p. 45; *State v. St. Louis Citizens Ben. Assn.* *supra*.

Insurance companies, whether composed of individuals or consisting of a company, or existing as a corporation in one state and authorized to carry on business therein, have no natural right to carry on business in any other

state, and permission so to do can only be secured in accordance with the laws of the latter state.

*Tiedeman*, Pol. Powers, p. 281, and cases cited under note 2; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Leavenworth v. Booth*, 15 Kan. 628; *State v. Phipps*, 18 L. R. A. 657, 4 Inters. Com. Rep. 299, 50 Kan. 609.

Generally, a state may regulate the carrying on of any business within its limits.

*Higgins v. Rinker*, 47 Tex. 381.

**Burgess, J.,** delivered the opinion of the court:

This is a suit begun upon an information based upon an affidavit made on April 25, 1898, by C. P. Ellerbe, the then superintendent of the insurance department of the state of Missouri, in which information the defendant is charged with the violation of the second clause of section 5916, Rev. Stat. 1889, by representing, as agent, certain individuals, and writing for them a policy of insurance, by the terms of which they agreed to indemnify one Emmitt Thoroughman against accident, before said individuals had procured a license to do business in Missouri. The defendant was arrested upon a warrant, was arraigned and pleaded not guilty, and upon the hearing of the evidence was fined \$10 and costs. After a motion for a new trial was overruled, and also a motion in arrest, defendant brings the case here by appeal.

The evidence showed that the parties whom defendant represented in procuring this insurance were 100 in number, residing in the state of New York, who were conducting insurance upon the manner of the ancient Lloyds; that they individually signed a power of attorney authorizing certain parties to write insurance for them individually, and that each policy written was in case of loss to be a charge against them individually, and not jointly, in a sum equal to one-hundredth of the amount of the liability incurred. By the terms of the agreement each individual agrees to deposit with an advisory committee the sum of \$1,000, which is to be held for the individual account of such subscriber, and which is to be credited or debited, in case of gain or loss, as an individual account. The "insurance to be effected for and on behalf of each of the individual subscribers hereto" shall be in charge of certain parties "as attorneys in fact of each subscriber hereto." "The attorneys shall keep separate accounts for each of the subscribers to this agreement, and each subscriber shall at all times have access to his individual account." An advisory committee is provided for, who "shall cause to be made up, on the 31st of December in each year, all the accounts of the several subscribers hereto."

"The several subscribers, in case the year's business was profitable, are then to receive such part of the profits credited to their individual accounts as the advisory committee shall determine, and are to receive a certificate for the balance. In case the accounts

show that there has been a loss, then each subscriber is to make his individual account good. Any subscriber may withdraw by giving thirty days' notice, and the advisory committee may, if it is deemed advisable, compel the attorneys to cease acting for any particular individual. In certain conditions a member may assign his individual holding and liability to any other individual, if approved by the advisory committee. Neither of the subscribers shall be made jointly liable with the others, or with either of the others, but each subscriber shall only be made severally and separately liable to the amount authorized by him individually in the power of attorney given by him to the attorneys above mentioned; nor shall any joint liability be created on behalf of the subscribers hereto, in any manner arising out of the business to be carried on under this agreement, but only a several liability on behalf of each individual subscriber. No policy, however, shall be issued on behalf of any individual subscriber hereto, unless each of the individual subscribers insures for a like amount on said policy." There is no limit upon the liability of the several members. His whole property is liable for the payment of any liability incurred by him. The contract also provides that each one of the insurers, "in consideration of the premises and of the execution of this agreement by the others, does hereby severally agree, for himself individually, to and with the others, and with each of them, that he and his representatives and assigns will faithfully abide by and carry out his obligations and covenants hereunder." The policy written provides that "each of the subscribers hereto, as a separate underwriter, does for himself, and not one for the other, hereby insure (subject to the conditions herein) E. B. Thoroughman," etc. It further provides that in case of suit brought for loss under the policy it is to be begun against only one of the underwriters at one time a final decision to be decisive of such claim against each of the underwriters. "Each of the present subscribers, as a separate underwriter, binds himself severally, and not jointly, with any other for the true performance of the premises for the amount expressed to be insured by him."

Section 5916, Rev. Stat. 1889, under which defendant was prosecuted and convicted, reads as follows: "Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance department of this state the certificate authorizing him to act as such agent or solicitor, as required by section 5910, Rev. Stat. of this state, or shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the insurance business before such individual, association of individuals or corporation shall have been duly authorized or licensed by the superintendent of the insurance department of this state to transact business in this state, or

after such license has been suspended, revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than ten, nor more than one hundred dollars for each offense, or imprisonment in the county or city jail for not less than ten days, nor more than six months, or by both such fine and imprisonment." The specific charge against defendant is that he did willfully and unlawfully act as agent and solicitor for certain individuals (whose names are set out) in inducing and procuring one Emmitt Thoroughman to enter into a contract of accident insurance with said individuals before said individuals were duly authorized or licensed to do business of insurance. It is conceded by counsel for defendant that he was an insurance agent, and that he was acting as such at the time charged in the information, as that term is used and defined by section 5916, Rev. Stat., *supra*.

It may be conceded, as is contended by counsel for defendant, that the office of insurance superintendent is one created by statute, and that he can only grant a license to such persons as the statute designates, and a license issued by him to any other would be null and void. *People v. Davis*, 45 Barb. 494; *State v. Hill*, 53 N. J. L. 826; *McGee v. Beall*, 63 Miss. 455. And that, as a general thing, "association of individuals," as used in our statute, is synonymous with corporations, or applies to joint-stock companies having a capital stock divided into shares, and governed by articles of association which describe their objects, and in which the members assume the liability of partners to the creditors of the company, is also well settled law. *Cook, Stock & Stockholders*, § 504. But the word "company" sometimes includes individuals as well as corporations (*Chicago Dock Canal Co. v. Garrity*, 115 Ill. 155), depending on the sense in which it is used, and the intent of the lawmaking power. The use of the word "company" in section 5910, Rev. Stat. 1889, which provides that "no company shall transact in this state any insurance business unless it shall first procure from the superintendent of insurance department of this state a certificate stating that the requirements of the insurance laws of the state have been complied with, authorizing it to do business," we have no doubt was simply because the business of insurance in this state is almost all done by incorporated companies. It should be read in connection with the following section, and as including both companies and associations of individuals. The letter of the section must yield to the evident intent of the legislature as deduced from the whole act in regard to insurance taken together, giving due consideration to the object of the act, and the fact that it is intended to regulate the entire system of insurance within the state. *Perry County v. Jefferson County*, 94 Ill. 214; *St. Louis, J. & C. R. Co. v. Trustees Institute for the Blind*, 48 Ill. 808. Section 5793, Rev. Stat. 1889, provides that "the insurance department shall be charged with the execution of all laws now in force, or which may be hereafter enacted, in relation

to insurance and insurance companies doing business in this state." Section 5801 provides that it shall be the duty of the superintendent of the insurance department "to file in his office and safely keep all books and papers required by law to be filed therein, to issue certificates of authority to transact business in this state to any companies who have fully complied with the laws of this state in the organization of insurance companies, and the transaction of the business of insurance," etc. Section 5803 makes it his duty to furnish to every insurance company doing business in this state blanks on which to make its annual report, while section 5805 provides for an examination by the commissioner of an insurance company incorporated or doing business in this state, and section 5807 provides for the payment of certain fees to be paid by such insurance companies. The whole of article 2, chapter 89, Rev. Stat. 1889, in regard to life and accident insurance, uses the words "company" or "corporation," and in no place does it make use of the word "individual;" and, if taken by itself, it must be conceded that the various provisions herein contained relate to incorporated companies doing an insurance business in this state, and not to individuals or an unincorporated association of individuals. The first section of article 5 of the same chapter, being section 5910 of the Revised Statutes of 1889, is an old section brought down from the Revised Statutes of 1879, and, standing alone, it also relates to and contemplates incorporated companies, and not individuals or an unincorporated association of individuals. But the next section, as amended and carried into the Revised Statutes of 1889, provides that "no individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the state of Missouri unless he or they shall first fully comply with all the provisions of the law of this state governing the law of insurance." This section in express terms makes the provisions of article 2 applicable to an individual or an association of individuals doing an insurance business. The argument that section 5916, upon which this information is founded, should be disregarded, so far as it applies to a person or an unincorporated association of persons, because the law points out no method by which a person or such an association can procure a certificate to do business, is not well taken. The argument is based upon a false assumption, for according to section 5911 an individual or such an association of individuals may, and indeed must, first comply with the laws governing the business of insurance, meaning, in case of life and accident insurance, the provisions of article 2. It is true that some of the provisions of that article can have no application to an individual doing insurance business, as, for instance, those relating to the organization of insurance corporations; and in other instances designated officers of the insurance corporations are required to do certain things. All these things can be done by the individual or the association of individuals proposing to do an insur-

ance business. There is no difficulty whatever in this respect, and the individual or association proposing to do an insurance business can make the required deposits, and do the other things necessary to procure a certificate to do such business.

The evident intent of the legislature, as shown by the sections of the statute quoted, was to regulate and systematize the business of insurance in this state, and that it was never its purpose to require strict observance of its statutory behests by corporations and companies doing business in this state, and to require nothing whatever of individuals engaged in the same business. On the contrary, it is manifest that the intent was to require of them the same compliance with the law that is required of corporations and companies; and if we are correct in this position, while conceding that the offense with which the defendant is charged is penal in its nature, and that in such case a strict construction of the statute is required, as is held in *Com. v. Carrol*, 8 Mass. 490; *State v. Brady*, 9 Humph. 74; *Hamel v. State*, 5 Mo. 260; and *Bishop*, Statutory Crimes, § 220,—yet it is not proper or reasonable to construe it strictly for the mere purpose of defeating it when the intent is plain as in this case. Whether the state has a right to say to an individual or a company of individuals, other than a corporation, that they or it cannot engage in two or more kinds of business, is unnecessary to pass upon in this case, as there is no such question involved in this controversy; nor is the right of the citizen abridged by requiring of him the same duties, and the compliance with the provisions of the statute that are required of a company, composed, as they are, of individuals, engaged in the same business. If, then, we are correct in our position in construing the statute as including and meaning individuals, there is no apparent reason why defendant could not have obtained from and why the insurance commissioner could not have issued to him a valid certificate, under sections 5910 and 5911 of the statute, if defendant had shown to him that those whom he represents had complied with the law in regard to insurance companies doing business in this state.

A further contention on the part of defendant is that the state has no right to regulate the business of insurance as conducted by individuals. That the state may impose conditions on corporations doing business in this state that it cannot impose on an individual is well settled, because they are creatures of the law, and have no power or authority to transact any kind of business save and except that authorized by their charters and the statutes under which they are organized. *Boone, Corp.* § 83; *Home Ins. Co. of New York v. Morse*, 87 U. S. 20 Wall. 445, 23 L. ed. 865; *Doyle v. Continental Ins. Co. of New York*, 94 U. S. 535, 24 L. ed. 148; *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *Tiedeman*, Pol. Powers, p. 281.

But, while this is true, it is also true that the state has, by virtue of its sovereign power, the right to regulate all trades, callings, and professions, but it cannot discrim-

inate between citizens of equal standing and merit. There is no pretense that there is any discrimination in the case at bar between citizens of this or any other state. That the state also has the power to require corporations, companies, and individuals who propose to engage in the insurance business to make deposit with the insurance commissioners of a reasonable amount of money or securities to secure their policy holders against loss, seems but reasonable and just. We do not contend that it would have the right to exact a deposit of exorbitant or unreasonable amounts, the effect of which would be to prevent individuals, as well as companies, from engaging in such business. But the statute in this regard we think not unreasonable, and could have no such an effect. As has been said, section 5911 expressly includes individuals, and subjects them to the same provisions as companies and corporations. Section 5916, under which defendant was convicted, prohibits any one from acting as agent or solicitor for any individual, association of individuals, or corporation in the transaction of insurance business, without such person or persons having first obtained from the superintendent of the insurance department a certificate authorizing him to act as such agent or solicitor, or before such individual, association of individuals, or corporation shall have been duly authorized and licensed by the superintendent of the insurance department to transact business in this state. A violation of this section by the agent or solicitor subjects the offender, upon conviction, to a fine, imprisonment in the county jail, or both. In a recent opinion delivered by the supreme court of Kansas (*State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657, 4 Inters. Com. Rep. 299), the court says: "It is probable that at this writing every state in the Union has passed laws upon this subject, until it may be said that the right of state regulation of the business of insurance is universally recognized and up-

held. . . . The state has power to regulate and control, and to provide penalties for the transgression of its regulating and controlling statutes. If the theory of counsel for appellants ever ripens into authoritative judicial decision, the power of the state to regulate and control the business of insurance within its limits is gone." In *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, the statute of Virginia required that every insurance company not incorporated by that state should, as a condition of carrying on its business there, deposit securities with the state treasurer and obtain a license, and another statute made it a criminal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia without such license. Paul, the defendant, acted as agent without a license, and was convicted and fined. The case therefore arose out of an attempt on the part of Virginia to enforce its penal laws for the regulation of the business of insurance within its borders. The court held that such a statute violated no provision of the constitution of the United States, and affirmed the judgment of conviction. To a like effect are *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029. To allow the defendant to carry on the business of an insurance agent under the circumstances as developed in this case, without complying with the law in regard to insurance, would be simply licensing him, and those whom he represents, to evade the law, while companies and corporations engaged in the same business have complied therewith. If he, and those whom he represents, desire to engage in such business, they should comply with the law, and, while deriving benefits from such business, bear the burdens imposed upon it by statute.

*The judgment is affirmed.*

All concur, except **Barclay, J.**, absent.

## PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania

v.

Augustus F. REINCEHL, *Appt.*

(.....Pa.....)

**Persons writing insurance with individual liability** of each for a certain part of the whole undertaking are not a "company" within the meaning of Act May 1, 1876, § 47, declaring it to be a misdemeanor to act as an agent for a foreign insurance company without a certificate of authority from the state.

(July 12, 1894.)

**A**PPPEAL by defendant from the verdict, judgment, and sentence of the Court of

**NOTE.**—For insurance by unincorporated guaranty Lloyds association, see in connection with this case, the note to *Noble & Ware v. Mitchell*, *ante*, 222; also the cases of *Fort v. State* (Ga.) 23 L. R. A. 86; and *State v. Stone*, *ante*, 243.  
25 L. R. A.

Quarter Sessions for Lancaster County on an indictment charging him with issuing insurance policies as agent of the Guarantee and Accident Lloyds of New York without a license from the state. *Reversed.*

The policy was as follows:

"Classification A.  
"No. 86,257. \$5,000.  
"Guarantee and Accident Lloyds  
New York.  
"Age 43. Weekly Indemnity, \$25.00.  
"In Consideration of.....Dollars paid, and of the warranties and agreements contained in the application for insurance, which application is made a part of this contract, each of the subscribers hereto, as a separate underwriter, does for himself and not one for the other, hereby  
"Insure (subject to the conditions hereon) B. E. Radcliff, of Lancaster, Pa., by occupation a Tobacco Buyer, from 12 o'clock noon of the

5th day of June, 1893, to 12 o'clock noon of the 5th day of September, 1894, and for such further period of time as may be covered by duly authorized renewal receipts (subject to the conditions and provisions expressed therein).

"Against Loss of Life, Eye or Eyes, Loss (separation) of Limb or Limbs, at or above the wrist or ankle, provided such loss occurs within ninety days of the happening of the accident causing the same, also against loss of time while immediately, continuously, and wholly disabled and prevented from transacting any and every kind of business pertaining to the occupation above stated, not to exceed sixty-five consecutive weeks (except when so disabled for life), provided the loss for which any claim is made is not caused or contributed to by any form of disease, but is caused exclusively by bodily injuries leaving external and visible marks of contusion or wounds upon the body, effected by external, violent and accidental means during the continuance of this insurance, in the following sums to wit:

(Here follows the amount of insurance, the nature of the risks, provisions as to loss, proof of loss, how losses are paid, etc., etc.)

"Each of the present subscribers as separate underwriter binds himself severally and not jointly with any other for the true performance of the premises for the amount expressed to be insured by him.

"In witness whereof, the subscribers as separate underwriters do severally subscribe their names at the City of New York, this 5th day of June, 1893.

(Here follow the signatures of one hundred underwriters, the signatures of the attorneys in fact for said underwriters with the power of attorney and conditions not wailable by agents, etc., etc.)

The history of the case is found in the charge of the learned trial judge, BRUBAKER, J.:

"*Gentlemen of the Jury:* The defendant in this case, Augustus F. Reinschl, is charged in the indictment with having unlawfully transacted business within the commonwealth of Pennsylvania as the agent of the Guarantee and Accident Lloyds, New York, an insurance company of the state of New York, without a certificate of authority, as required by the laws of the state of Pennsylvania, and without such authority of law did negotiate contracts of insurance, as agent of the said Guarantee and Accident Lloyds, New York, an insurance company of the state of New York, with Benjamin E. Radcliff and others, and did issue or cause to be issued to said Benjamin E. Radcliff, within the county of Lancaster and state of Pennsylvania, a policy of insurance for five thousand dollars, dated June 5th, 1893, in said Guarantee and Accident Lloyds, New York, and to others within the county of Lancaster and state of Pennsylvania.

"The defendant is indicted under the 47th section of an Act of Assembly passed the 1st day of May, 1876, which reads as follows:

"Any person transacting business within this commonwealth, as the agent of an insurance company of any other state or government, without a certificate of authority, as required by the act to which this is a supplement, shall

be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of five hundred dollars."

"[The evidence offered before you on the part of the commonwealth is uncontradicted. The defense made here by the defendant is that this insurance company is not an incorporated company, and, therefore, does not come within the purview of the act of assembly which I have just read. I charge you that is not necessary. The act of assembly does not say it should be an incorporated company, and, therefore, if you believe this testimony, which is uncontradicted, your verdict should be in favor of the commonwealth, if guilty in manner and form as he stands indicted]. If we are wrong in our judgment in this matter, the counsel for the defendant may make a motion in arrest of judgment which can be heard by the court in full bench. It is a new question, and the counsel are desirous of having the question passed upon by the supreme court. The question of fact is for you."

The Commonwealth asked the court to charge the jury:

"The uncontradicted evidence shows that the defendant, A. F. Reinschl, did, on or about June 1st, 1893, within the jurisdiction of this court, unlawfully transact business within the commonwealth of Pennsylvania as the agent of the Guarantee and Accident Lloyds, New York, an insurance company in the state of New York, without a certificate of authority, as required by the laws of the state of Pennsylvania, and then and there, without such authority of law, did negotiate contracts of insurance, as agent of the said Guarantee and Accident Lloyds, New York, an insurance company of the state of New York, with Benjamin E. Radcliff, and did issue to him a policy of insurance in said company, and the verdict of the jury must be, guilty in manner and form as he stands indicted." *Affirmed.*

The defendant asked the court to charge the jury as follows:

1. "That the testimony of the commonwealth has failed to show that the defendant was acting as the agent of an insurance company of any other state or government without a certificate of authority, as required by the act, to which the Act of May 1, 1876, is a supplement, and that the commonwealth has utterly failed to show that the policy upon which this complaint is based was issued by a company or corporation either of this or any other state, and that the verdict of the jury should be a verdict of not guilty." *Refused.*

2. "That the 47th section of Act of May 1, 1876, entitled a supplement to 'an act to establish an insurance department, approved April 4, 1873, providing for the incorporation and regulation of insurance companies and relating to insurance agents and brokers, and to foreign insurance companies,' which section reads as follows: 'Any person transacting business within this commonwealth as the agent of an insurance company of any other state or government without a certificate of authority, as required by the act to which this is a supplement, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of \$500, is unconstitutional and contrary to section 1, article 1, of the Bill of

Rights of the Constitution of Pennsylvania,' which declares that 'all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring possession and protecting property and reputation, and pursuing their own happiness.'" *Refused.*

3. "That section 47 of Act of May 1, 1876, as fully recited in foregoing point is unconstitutional and in violation of the 14th Amendment of the Constitution of the United States, which provides that no state 'shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States, nor deny to any person within its jurisdiction the equal protection of the laws,' and also in violation of article 4, section 2, of the Constitution of the United States, which ordains 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'" *Refused.*

"The verdict was 'guilty' and sentence was formally passed thereon and on special allocatur an appeal to the supreme court was taken.

"The defendant assigned as error the portion of the charge included in brackets and in refusing to affirm defendant's points for charge and in admitting on behalf of the commonwealth as evidence Policy No. 86,257 of the Guarantee and Accident Lloyds of New York issued to Benjamin E. Radcliff."

*Messrs. R. C. Reinehl and F. Carroll Brewster*, for appellant:

The Act of May 1, 1876 (Pub. Laws, 53) did not contemplate the case of an association of individuals issuing a policy—but only related to incorporated companies.

No evidence was produced to show that the Guarantee and Accident Lloyds was an insurance company.

On the contrary the policy admitted in evidence shows that it was issued by individuals.

The subscriber is merely a separate underwriter. The insurance is by a number but the contract is that of the individual.

The conviction under the indictment is in violation of the Constitution of the United States. The defendant acted as agent of individuals and no law can punish him for exercising that right.

*Com. v. Vrooman*, 8 Pa. Dist. Rep. 840; *Paul v. Virginia*, 75 U. S. 8 Wall. 180, 19 L. ed. 860; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449.

*Messrs. W. U. Hensel, Atty. Gen., W. M. Franklin, Dist. Atty., and James A. Stranahan, Dep. Atty. Gen.*, for the Commonwealth:

It is within the power of the state to restrict insurance to any particular class or bodies corporate.

*Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 1 L. ed. 412.

It is within the discretion of the legislature to determine when a franchise shall be created and to control its enjoyment, and this principle is not obnoxious to the constitution.

*People v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; Spelling, Extraordinary Relief, §§ 1806-1808; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 894; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

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When a company or corporation does business in this state it is subject to its laws.

*Erie R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 492, 22 L. ed. 595; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 857; *Fire Assn. of Philadelphia v. New York*, 119 U. S. 110, 80 L. ed. 342.

The word "company" in the act of assembly does not mean "incorporated company."

*Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.* 31 Mich. 846; *American Ins. Co. v. Stoy*, 41 Mich. 385; *People v. Howard*, 50 Mich. 239; *Greene v. People* (Ill.) May 16, 1889.

The act of assembly under which the indictment was framed is constitutional.

*Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 850; *Burdick v. People*, 24 L. R. A. 152, 149 Ill. 600; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Slaughter-House Cases*, *supra*.

*Green, J.*, delivered the opinion of the court:

There is no question involved in the present contention except the question whether the defendant is liable to indictment and conviction under the forty-seventh section of the Act of May 1, 1876, Pub. Laws, 53. That section reads as follows: "Sec. 47. Any person transacting business within this commonwealth as the agent of an insurance company of any other state or government, without a certificate of authority, as required by the act to which this is a supplement, shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine of five hundred dollars, but this section shall not be held to prevent the insurance commissioner from pursuing the remedies provided in the act aforesaid." The remainder of the section is unimportant. The defendant's contention on the trial was that he is not "the agent of an insurance company of any other state or government," within the meaning of the section, and that the commonwealth had entirely failed to prove that the policy upon which the complaint was based was issued by a company or corporation of this or any other state. The policy in question was undoubtedly a policy executed by 100 individual persons, and contracting for individual liability of all. The point is made in argument that, although the word "company" is used in the act, it must be held to mean "corporation" only, upon the plain reading of the act, and we think this proposition is entirely correct. The Act of 1876 is a supplement to the Act of April 4, 1873 (Pub. Laws, 20), entitled "An act to establish an insurance department," and is itself entitled as follows: "A supplement to an act entitled 'An act to establish an insurance department,' approved the fourth day of April, one thousand eight hundred and seventy-three, providing for the incorporation and regulation of insurance companies, and relating to insurance agents and brokers and to foreign insurance companies." The first section of the act provides "that any ten or more persons, citizens of this commonwealth, may associate in accordance with the provisions of this act and form an incorporated company for any of the fol-

lowing purposes," enumerating four different purposes. The second section provides that the persons associating themselves together shall do so "by articles of agreement in writing for the purpose of forming an insurance company, which agreement shall specify the name by which the corporation shall be known," etc. Then follow numerous provisions regulating the details of the organization and government of companies formed under the act, including joint-stock companies, and in which the companies formed are constantly described or referred to as "incorporated under this act." Section 34 provides that "companies incorporated under this act must be organized upon the joint stock or the mutual plan, and the power to insure upon both plans shall not exist in the corporation except temporarily," etc. Section 35: "If any corporation created under this act does not commence to issue policies within one year from the date of its letters-patent, its corporate powers and existence shall cease." Section 39: "The charters for incorporations named in this act may be perpetual or limited in time," etc. Section 40: "That no fire, marine, or fire and marine, insurance company, incorporated by any other state or government shall be authorized to transact business in this state unless," etc. Section 42: "That every insurance company of this state, incorporated or organized after" April 4, 1878, "which has failed to file with the insurance commissioner a certified copy of its charter, shall file such copy within ninety days," etc.; "and every company hereafter organized shall file a copy of its charter with the commissioner within ninety days from the date of said charter," etc. The forty-third and forty-fourth sections describe the organizations as "companies," evidently meaning "corporations;" as, for instance, in the forty-fourth, the words occur "with the agents of any insurance company not incorporated in this commonwealth." The forty-sixth section imposes a penalty upon persons transacting business as insurance brokers without a certificate of authority as aforesaid. Then comes the forty-seventh section, which imposes penalties upon persons acting as agents for insurance companies of any other state or government. It is perfectly clear that the word "companies" is here used, as it is throughout the act, as the equivalent of the word "corporations." They are indiscriminately and constantly employed as synonyms in all the sections of the act in which they appear; and as this view is consistent with the subject of the legislation as described in the title, and in the chief enacting section,—the first,—which authorizes only the formation of incorporated companies, we do not feel at liberty to diverge from that construction in considering the forty-seventh section. Moreover, the offense with which the defendant is charged is the transaction of business within this commonwealth as the agent of a foreign insurance company, without having obtained a certificate of authority, as required by the Act of 1878. The eleventh section of that act is the one which prohibits the transaction of business by agents until they have procured from the insurance commissioner a

certificate that the company they represent has complied with the requirements of the Act of 1878. A reading of that section convinces us that the companies referred to in the eleventh, as also in the tenth, section are incorporated companies. The eleventh section refers to the tenth in designating the kind of companies which shall obtain certificates, and those companies are described in the tenth section,—“any insurance company of another state or foreign government.” It can scarcely be considered that this description was intended to include any other than regularly incorporated companies. Whatever may be the other responsibilities of the defendant for acting without a certificate, we are of opinion that he is not amenable to the penal consequences of the forty-seventh section of the Act of 1878, and therefore the judgment of the court below must be reversed.

*The judgment of the court below is reversed, and it is ordered that the defendant go without day.*

COMMONWEALTH of Pennsylvania, *Appt.*,

v.

Samuel B. VROOMAN.

(.....Pa.....)

**The legislature may lawfully confine insurance business to corporations.**

(*Dean and Green, JJ., and Sierrett, Ch. J., dissent.*)

(October 1, 1894.)

**A**PPEAL by the State from a judgment of the Court of Quarter Sessions for Philadelphia County in favor of defendant upon an indictment charging him with unlawfully issuing a policy of fire insurance. *Reversed.*

The facts sufficiently appear in the special verdict which was found by the jury as follows:

The defendant acting for himself and as attorney-in-fact for J. K. Cuming, R. H. Foerderer, B. J. Woodward, C. A. Furbush, and J. Gibson McIlvain did sign and issue on the 12th day of March, Anno Domini one thousand eight hundred and ninety-four (1894), a certain policy of insurance and contract of guaranty against loss by fire in the sum of one thousand dollars on the household furniture of James G. Kimball, located and being in the county of Philadelphia and state of Pennsylvania, without authority expressly conferred by a charter of incorporation given according to law April 12, 1894.

*Messrs. George S. Graham, W. U. Hensel, Atty. Gen., and James A. Stranahan, Dep. Atty. Gen., for appellant:*

The Act of February 4, 1870 (Pub. Laws, '14) to prohibit persons, partnerships, or associations issuing fire insurance policies without authority expressly conferred by charter of in-

**NOTE.**—This seems to be a pioneer case on the question of the constitutionality of a statute denying the right of unincorporated persons to do insurance business. For somewhat similar cases, see note to *Noble & Ware v. Mitchell*, ante, 238.



corporation given according to law, is constitutional.

In England where underwriting is a science the great bulk of the business of insurance is carried on by companies, most of which are incorporated.

1 Biddle, Ins. p. 80; Porter, Ins. 361.

The act made the business of insurance in Pennsylvania a franchise.

A franchise is "a right, privilege, or power, of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security."

*California v. Central Pac. R. Co.* 127 U. S. 40, 32 L. ed. 157.

In that case the supreme judicial authority of the land placed the ultimate right of declaring what shall and what shall not be deemed a franchise in the hands of the legislature.

Rights which at common law may have been held with perfect propriety by the individual in the more complex order of the state and of society, are to-day reserved to the commonwealth.

*Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 1 L. ed. 413; *People v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; Spelling, Extraordinary Relief, § 1806.

If incorporation carries with it advantages to the incorporators, and presumably some to the public, why may not the state declare that a business of universal concern shall be conducted only under the restrictions and with the advantages to the public which result from the obligations of companies chartered by the commonwealth?

*Burdick v. People*, 24 L. R. A. 152, 149 Ill. 600, declared a law to be constitutional forbidding persons from selling railroad and steamboat tickets unless they had certificates of authority from the companies issuing them, and except that the person offering the ticket for sale had bought it from a certified agent with a bona fide intention of traveling upon the same.

Upon the authority of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; Cooley, Const. Lim. 5th ed. p. 435, and other authorities the court held that the disposition of property might be limited and regulated when the interests of the public so required, and the phrase "due process of law" means "in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights."

*Mr. John G. Johnson*, for appellee:

If this appeal be sustained it will be impossible hereafter for any individual in the state of Pennsylvania to agree with an owner, to insure his property, and for any owner, desirous of securing himself against loss to his property by fire, to enter into a contract with an individual, for such security.

"Property," within the meaning of the constitution, includes contracts necessary for its enjoyment, protection, use, and disposition, Protection of property includes within it,

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necessarily, protection of its owner in all the incidents of his ownership.

*Braceville Coal Co. v. People*, 22 L. R. A. 340, 147 Ill. 66; *Fraser v. People*, 16 L. R. A. 492, 141 Ill. 171; *Peel Splint Coal Co. v. State*, 17 L. R. A. 885, 36 W. Va. 802; *Com. v. Perry*, 14 L. R. A. 325, 155 Mass. 117; *Hare, Const. Law*, 357; *People v. Gillson*, 109 N. Y. 389.

The Act of 1870 is not a valid exercise of the police power of the legislature.

Blackstone in his Commentaries, Vol. 4, p. 162, defines the police power to include: "The due regulation and domestic order of the kingdom; whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighborhood, good manners, and to be decent, industrious, and inoffensive in their respective stations."

Cooley says (Const. Lim. 6th ed. 704): "The police of a state, in a comprehensive sense, embraces its system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as it is reasonably consistent with a like enjoyment of rights by others."

The Supreme Court of the United States, in *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, said: It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state.

If any liberty or franchise is expressly protected by any constitutional provision it cannot be destroyed by any valid exercise by the legislature or the executive of the police power.

*People v. Gillson*, 109 N. Y. 389; *Re Jacobs*, 98 N. Y. 107, 50 Am. Rep. 636; *Powell v. Com.* 114 Pa. 272, 60 Am. Rep. 350; *Powell v. Pennsylvania*, 127 U. S. 684, 32 L. ed. 256; *Slaughter-House Cases*, 83 U. S. 16 Wall. 62, 21 L. ed. 404.

In *State v. Loomis*, 31 L. R. A. 789, 115 Mo. 307, it was held that a statute prohibiting mining or manufacturing concerns from issuing for the payment of wages any order or other evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same is negotiable and redeemable without discount in cash or in supplies at the option of the holder, is void as depriving persons of liberty without due process of law.

In *Godcharles v. Wigeman*, 113 Pa. 437, it was held by this court: The first, second, third, and fourth sections of the Act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts.

In *State v. Goodwill*, 6 L. R. A. 621, 33 W. Va. 179, it was held that an act prohibiting the payment by miners and manufacturers of their employés in orders, or other paper, unless redeemable in thirty days in lawful money, was unconstitutional.

In *State v. Fire Creek Coal & Coke Co.* 6 L. R. A. 359, 33 W. Va. 188, an act prohibiting miners and manufacturers from selling merchandise and supplies to employes at a greater per cent of profit than they sold at to others, was held void as class legislation, and an unjust interference with private contracts and business.

In *Re Kuback*, 9 L. R. A. 482, 85 Cal. 274, an ordinance of the city of Los Angeles, making it a misdemeanor for a contractor to employ any person to work more than eight hours a day or to employ Chinese labor, was held not a valid exercise of the police power, and unconstitutional and void.

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, a law requiring mine owners to keep scales and pay their miners by weight was held void, the court deciding that there was nothing in the business of mining which disqualified parties engaging in it from contracting as they might deem proper in regard to it.

See also *People v. Gillson*, 109 N. Y. 389; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

In *Com. v. Perry*, 14 L. R. A. 325, 155 Mass. 122, a law forbidding the withholding of wages to cover imperfections of weaving was held unconstitutional.

In *Ramsey v. People*, 17 L. R. A. 853, 142 Ill. 280, a law requiring the operators and owners of coal mines, where the miner was paid on the basis of coal mined by him, to weigh the coal screened on cars before it was stored, and to complete the compensation upon the weight of unscreened coal, was held unconstitutional.

In *Frorer v. People*, 16 L. R. A. 492, 141 Ill. 171, an act declaring that it should be unlawful for any person, corporation, etc., engaged in any mining or manufacturing business in the state to engage in, or to be interested, directly or indirectly, in keeping a truck store, for the furnishing of supplies to his, its, or their employes whilst so engaged in mining or manufacturing, was held unconstitutional.

The business of fire insurance is hardly one "affected by a public interest," within the meaning of the elevator cases of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 528, 36 L. ed. 250; *People v. Budd*, 5 L. R. A. 559, 117 N. Y. 1; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Prentice*, Pol. Powers, 42; *Cooley*, Const. Lim. 6th ed. 744.

**Williams, J.**, delivered the opinion of the court:

This case raises a question of constitutional law that does not seem to have been decided by the courts of this state. The facts are that in 1870 the legislature passed and the governor approved an act entitled "An act to prevent the issue of unauthorized policies of insurance." Section first made it unlawful for any person, partnership, or association, to issue any policy of insurance against fire without authority to do so expressly conferred by a charter of incorporation given according to law; and declared all policies issued without such authority to be void. The second section made it a misdemeanor to issue a policy of insurance against loss by fire without the authority re-

quired by the first section. The special verdict rendered in this case finds that the defendant did violate the Act of 1870 by making and issuing for himself and others a policy against loss by fire in the year 1894, without having obtained a charter of incorporation authorizing the making of such insurance.

Upon this verdict the learned judge of the court below entered a judgment in favor of the defendant, holding that the Act of 1870 was void because in violation of the Constitution of the United States and of this state. The commonwealth appeals. A single question is thus presented, viz.: Does the Act of 1870 violate the Constitution of either the United States or this state? The learned judge held that the Fourteenth Amendment to the Constitution of the United States was infringed by the Act of 1870. This amendment declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any within its jurisdiction the equal protection of the laws." The purpose and effect of this amendment have been discussed and declared by the United States courts in many cases, and there ought to be no doubt upon the subject at this time. It was aimed at discriminations made or attempted by the laws of any of the states against persons upon whom the laws of the United States conferred the rights and privileges of citizenship. Such discriminations whether directed against persons of a particular race or color resident within the state, or against persons resident in other states, are forbidden by the Fourteenth Amendment. But the proper exercise of the police power by the several states is not within the intent or the letter of the amendment. *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253. On the other hand its purpose was declared in the *Slaughter-House Cases*, 83 U. S. 16 Wall, 36, 21 L. ed. 894, to be to protect "against the hostile legislation of the states, and privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the states." The Act of 1870 strikes at no privilege of citizenship of the United States as distinguished from the privileges of citizenship of Pennsylvania. It does not attempt to draw a line between citizens of this state and citizens of other states. It is therefore in no sense a violation of the Fourteenth Amendment of the Constitution of the United States, and this branch of the discussion may be properly dropped at this point, and our attention confined to the other, viz.: Is the Act of 1870 a violation of the first section of the bill of rights in the constitution of this state? That section affirms that "all men are born equally free and independent, and have certain inherent and inalienable rights among which are those of . . . acquiring, possessing and protecting property and reputation." The methods by which this right to acquire property is asserted and exercised are, however, and have been since organized government began among men, subject to regulation by law. The power of government thus brought into service is known as

the police power. If the Act of 1870 is a valid exercise of the police power then no constitutional right is invaded, but the mode in which the right guaranteed by the first section of the bill of rights may be exercised consistently with the best good of the greatest number is regulated and prescribed. The general character of the police power is well understood although neither the textbooks nor decided cases have yet given us an adequate definition of it. Little more has been attempted by the courts of this country than to determine that a particular subject does or does not fall within the range of this power. An illustration is afforded by *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989, in which this language was used: "However difficult it may be to render a satisfactory definition of it (the police power) there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." Blackstone in his Commentaries, vol. 4, p. 162, describes this power as the power of "public police and economy," by which the internal regulation and good order of the state is secured, and individual citizens, like the members of a well-ordered family, are made to conform their conduct to the rules of propriety, good neighborhood and good manners. It is therefore a power inherent in all forms of government. Its exercise may be limited by the frame or constitution of a particular government, but its natural limitations, in the absence of a written constitution, are found in the situation and necessities of the state, and these must be judged of in the first instance by the government itself. It corresponds to the right of self preservation in the individual. When the dangers that threaten the state come from without, the right of self preservation is exercised in gathering armies and the means of public defence. When the dangers arise within the state, self preservation requires their suppression. This is accomplished by the exercise of the police power which deals with all forms of disorder, and provides for the public welfare, and the protection of citizens against the violence and the fraudulent conduct of each other. Now the question whether any particular subject is so related to the public good as to justify the exercise of this power in its control, is one for the determination, in the first instance, of the lawmaking branch of the government. In disposing of it the legislature is subject to no limitations except such as the constitution of the state may impose. Within the lines set by constitutional provisions the power of the legislature is practically absolute; but if it is alleged that a given police regulation violates the fundamental law a question is raised for the determination of the courts whose duty it is to apply the constitutional tests and adjudge the law to be void if it is in conflict with them. In this case we are to apply the first section of the bill of rights to the Act of 1870 in order to determine whether it can be enforced. If the act denies the inherent and inalienable right of the citizen to acquire, possess, and pro-

tect property, which is asserted by this section of the bill of rights, then the judgment of the court below was right and this appeal should be dismissed; but if this right is not denied, and the effect of the Act of 1870 is merely to regulate its exercise, then the judgment should be reversed and the defendant should suffer the penalty of the law he has disregarded. Before entering upon this question three preliminary observations should be made: First, we must remember that the legal presumption is in favor of the constitutionality of the act because it expresses the judgment of the legislative branch of the government upon that question. The legislature has considered the question and passed upon it and this makes a prima facie case in favor of the law. We observe in the next place, that this question is to be considered upon the state of the law as it is when the question is raised. Since 1870 the constitution of the state has been remodeled and many of its new provisions have been enforced by suitable legislation. Our question is not, therefore, whether the Act of 1870 was valid under the constitution as it then stood, but whether it was valid when its provisions were invoked against the defendant in 1894. Our third observation is that the question is not controlled by common-law maxims. The police power must necessarily enlarge its range as business expands and society develops. The proper office of statutes is to remedy the defects and modify the operation of common-law rules to meet changed conditions in society and increased volume and improved methods in business. We come now to inquire whether the business of insurance against loss by fire is at the present time a proper subject for the exercise of the police power of the state. In examining this question it is important to know something about the magnitude of the business. The report of the insurance commissioner, appointed under the laws of the state, covering the transactions of the year 1892, shows that risks were written in Pennsylvania during that year as follows:

By Stock Companies of Pennsylvania amounting to.....	\$ 286,584,023
By Stock Companies of other states.....	412,480,251
By U. S. Branches Foreign Companies.....	248,407,450
By Mutual Companies of Pennsylvania.....	137,328,820
	<b>\$1,084,800,544</b>

—making the enormous total of one billion and nearly eighty-five millions of dollars.

The losses paid in the same year as shown by the same report amounted to nearly seven and one quarter millions of dollars. The total capital employed in the business of fire insurance in this state during the year was nearly two hundred sixteen and one half millions of dollars. The premiums paid by the insured fell a little short of twelve millions of dollars.

Let us consider next the nature of the business. It is not like the sale of commodities for a present equivalent in value, but it is the purchase of indemnity against the risk of loss by fire that may happen at any time, and may not happen at all. The conditions

necessary to the business of insurance are: *a*, the existence of a known danger to which all property owners are exposed, and against which they cannot effectually protect themselves; *b*, the strong probability that loss from this danger will fall upon but few of those who are exposed to it; *c*, the certainty that when the loss happens it will fall so heavily on those to whom it comes as to make pecuniary indemnity a matter of great importance; *d*, some knowledge of the relative value of the property annually destroyed by fire to serve as a basis for calculating the risk assumed by the insurer, and the amount of premium required to enable the insurer to meet losses and expenses and secure a fair return for the capital employed. In view of the magnitude and the nature of the insurance business it is apparent that the public is largely interested in all that relates to it. The security of policy holders requires, first, permanency in the custodian of the funds gathered from them, and on which their indemnity in case of loss depends; second, an honest and competent administration of these funds; third, restraint against the division of the profits of the business whenever such division would injuriously affect the security of policy holders. How are these safeguards to be obtained? There is but one way in which they can be obtained and that is by means of general laws regulating the insurance business. Corporations derive their existence from the state, and hold their franchises subject to legislative control. They are subject to the visitatorial power of the commonwealth, and they may be, and are in fact, required to lay open before the several departments of state government, and before the public, the character and extent of their business, the profits realized, the dividends declared, and the investments made. The legality and business value of the methods, the economy, and financial strength of the management, and the value of the security provided for the holders of policies in any given company, are therefore subjects upon which the proper state officers may be thoroughly informed, and which the public may investigate at will. Private individuals are not subject to the same visitatorial power. They cannot ordinarily be compelled to disclose their business methods, their financial condition, or the character of their investments. They cannot be restricted in the use of either their capital or their profits as corporations may be. Those who deal with them must trust more to their personal integrity than the common experience shows to be safe. The state can compel a fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations.

In the next place it is important to consider what may be described as the trend of modern legislation on this subject. The states of the Union have severally entered upon legislation regulating insurance. In each an insurance department of the state government has been organized. A general supervision and control of insurance com-

panies has been assumed by the states, and exercised through the insurance department. In our state this system of legislation began as early as 1810 and it has grown in bulk and importance with the growth of business and the development of the resources of the state. It fixes the minimum of actual capital necessary to the organization of a corporation for insurance against fire, on the stock plan, at one hundred thousand dollars. It provides for a reserve fund for the security of policy holders. It prohibits the division of profits in dividends to the injury of the reserve fund. It regulates the form of policy and requires the application to be attached to, or made part of, the policy. It requires each company to submit detailed statements of the business done, of its assets and liabilities, and to show its financial condition. It requires companies organized under the laws of other states or countries to make certain deposits in this state to secure those who are insured by them, and to appoint some suitable agent on whom process may be served in actions brought against them. These regulations have been made from time to time as their importance has been felt by the public. They are all easy of enforcement against corporations. Some of them cannot be enforced against private persons or partnerships. As matter of fact the business has for many years been left to the corporations and regulations made to affect corporations have therefore met fully the public need. At this time, however, private capital is seeking employment in this field and it signalizes its entry upon the field by a denial of the power of the state over it. The question has been raised by the corporations of other states but I recall no case in which it has been raised by individuals. In *Doyle v. Continental Ins. Co. of New York*, 94 U. S. 535, 24 L. ed. 148, the Supreme Court of the United States stated the general rule thus, "A state has the right to impose conditions not in conflict with the Constitution of the United States on the doing of insurance business within its territory by an insurance company chartered by another state, or to exclude it altogether."

It would seem to follow logically that the state might require all persons desiring to enter upon the business to comply with the same conditions and, if necessary, to obtain a charter of incorporation in order to such compliance. An effort is made to distinguish between regulation and prohibition and to hold that the Act of 1870 is a prohibition operating upon all natural persons for the benefit of corporations who are thus given an oppressive monopoly of the business of insurance against fire. But the prohibition is only such as is necessary to give effect to the regulation which the act prescribes. The act implies a declaration by the legislature that the business of insurance against fire affects so many persons, and involves such large sums of money, as to make it necessary for the public protection that it be subjected to the supervision and control of the government; that the supervision required is such as private persons cannot be compelled to submit their business conduct to; and then

expressly declares that all persons desiring to embark in the business must procure a charter of incorporation for that purpose because corporations are subject to the supervision and control of the state that creates them. This is regulative. It directs the business into the only channel that admits the necessary measure of control and it necessarily prohibits the business outside that channel.

The traffic in intoxicating drinks is regulated by law; but the regulation prohibits absolutely all persons from engaging in it unless they have first secured the permission of the state by obtaining a license under the law. Here, as in the Act of 1870, we find permission to those who comply with the regulation, and prohibition to those who do not. The practice of medicine, the sale of drugs, and many other sorts of business are regulated by law; but the regulation would be without effect if it did not include a prohibition directed against those not qualified, and enforce it with suitable penalties. The police power of a state may be exerted for the complete or the partial control of a given business. It may prohibit it absolutely to all persons for the purpose of suppression. It may permit it to some persons and under certain restrictions in order to secure control over it and hold it within proper bounds. *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079. The Sunday laws, the laws against gambling, against lotteries, against disorderly houses, the sale of liquors, the sale of oleomargarine, the sale of drugs and many similar laws afford instances of the exercise of the police power for the complete suppression of a given line of employment, or for its restriction and control.

The Act of 1870 belongs to the latter class. It does not prohibit the business of insurance but regulates it. It says to all persons interested: "If you wish to embark in this business you must secure a charter of incorporation so as to subject your business to the visitatorial power of the state. If you will not do this you must not engage in insurance against fire at all." This is not prohibition of the business, for the business is distinctly authorized. It is an effort to bring it under state supervision and control, by requiring all who wish to enter the business to put themselves in a position where the insurance legislation of the state will reach them, and the insurance department of the state can supervise their business, and compel observance of the law.

Without going further into the discussion we may now state our conclusions applicable to the case before us.

1. The business of insurance against loss by fire is by reason of its magnitude, its importance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the state.

2. The Act of 1870 is a valid exercise of the police power. It does not prohibit but regulates the business. It excludes no one from engaging in it, but prescribes the preliminary qualification necessary for all alike, to entitle them to enter the business.

3. The qualification is reasonable. It is

open to all under general laws. It is not burdensome. Its only effect is to secure adequate capital at the beginning, and state supervision during the continuance of the business.

4. Upon the special verdict judgment should have been entered in favor of the commonwealth and sentence should have been pronounced under the Act of 1870.

That this may now be done *the judgment is reversed, the record remitted, and a procedendo awarded.*

**Dean, J.**, dissenting:

The Act of the 4th of February, 1870, declares it to be a misdemeanor for any person to issue a policy of insurance against loss by fire or lightning, without authority being expressly conferred so to do, by a charter of incorporation issued according to law.

The defendant, on the 12th of March, 1894, issued a policy to James G. Kimball in the sum of \$1,000, indemnifying him against loss by fire on his household furniture contained in his dwelling house in Philadelphia, without authority expressly conferred by an act of incorporation. For so doing, he was indicted and tried March 20, 1894. There was no dispute as to the facts, and the jury, in a special verdict, found them as stated. The court, being of opinion the act was unconstitutional, entered judgment on the verdict for defendant, and thereupon the commonwealth appealed.

Unquestionably, the legislature has the authority to enact any law not in conflict with the constitution of the state or of the United States. The right to limit the transaction of the business of fire insurance to incorporated associations is not, in express terms, forbidden. But the right of natural persons to make contracts of indemnity against loss by fire or shipwreck was, for centuries, before the adoption of the constitution, a common-law right. All the authorities, without a single exception, hold, that under the constitutional right to acquire, possess, and protect property, there is necessarily included the right to make reasonable contracts concerning it, which contracts are protected by the constitution.

In this, all agree. And all agree, further, that the legislature may, in the exercise of its police power, absolutely forbid contracts which are inimical to public interests; and, second, may adopt suitable regulations of contracts for the protection of the public.

The business of fire insurance being one which, from its nature, involves contracts with large numbers of persons in all parts of the commonwealth, who have not the opportunities of gaining the information necessary to intelligent bargaining, for their better security, the legislature may make such regulations, as will protect them against fraud or imposition. It may require that all who desire to transact business with the public shall take out a license, shall make frequent reports of their financial condition, have fixed places of business where service of process can be had on them; that they shall deposit with the treasurer or other officer of the commonwealth bonds or other

securities, in sufficient amount to guarantee those with whom they contract, against loss; and generally, may make all reasonable rules for the regulation of such business. But can the legislature absolutely forbid the making of such a contract by individuals, and confer on corporations a monopoly of such business?

Is the business of fire-insurance deleterious to the public? If so, the legislature may absolutely prohibit it. But no one contends that it is. On the contrary, it is admitted it is to the advantage of the public. The legislature admits this by expressly authorizing artificial persons to conduct it. If such contracts be not injurious to the public, and may not be altogether prohibited, then where is the authority to prohibit one class, natural persons, from entering into them, and specially empowering another and numerically a very much smaller class, artificial persons, to make them? In so doing, the state grants a monopoly in a particular business to a particular class.

As is said in substance in the *Slaughter-House Cases*, 83 U. S. 16 Wall. 102, 21 L. ed. 417; *Alger v. Thacher*, 19 Pick. 54, 81 Am. Dec. 119; *Taylor v. Blanchard*, 18 Allen, 372, 90 Am. Dec. 203, and many other cases, "all such grants relating to any known trade have been held by all the judges of England, . . . to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it in the power of the grantees to enhance the price of commodities."

A contract of indemnity against loss by fire, being a common-law right, it cannot, by legislative grant, be monopolized by a small class, unless it has become of such public concern as requires its exercise by the state or by a corporation to whom the state's power is immediately delegated. It may be admitted that the business of constructing and operating public highways for the carriage of goods and travelers is exclusively in the state, and is of such immediate public interest that it can be transacted only by the state and such corporations as the state may specially authorize. But, to carry on this business at all, involves a right of eminent domain, which the state alone can exercise or grant, and therefore it ought not to be exercised by private individuals. There is not, and never was, a right in the individual to take private property for the construction and operation of a public highway, on which to conduct for profit the business of transportation; but there never was a time that the individual had not the right to make a contract to indemnify his fellow against loss by fire. This act is not obnoxious to the constitution, because it authorizes corporations to insure against fire, but because it prohibits individuals doing a like business. It grants a monopoly of a particular business to a particular class; prohibits all others from engaging in it. This the legislature may, in the exercise of its police power, in some cases do. It may declare that females shall not be employed in some avocations; that children under a certain

age shall not be employed in mines or factories; that none but men of good repute shall sell liquor by retail; and the wisdom of such legislation is not a question which the courts can consider, for it is adopted to promote the health, morals, and good order of the public.

That in some of the states, the legislature has restricted the business of banking to corporations, has no analogy to the case in hand. The banking intended to be restricted by the New York act was issuing of notes, receiving of deposits and discounting. In *People v. Utica Ins. Co.*, 15 Johns. 358, 8 Am. Dec. 248, and *Bristol v. Barker*, 14 Johns. 205, it was held that the act was only a restraining and regulating act, applying to associations of individuals; that as to them, to do a banking business they must have corporate authority. That an individual was not prohibited from doing a banking business, except as to issuing bank notes. It has always been held to be within the police power of the legislature to restrict the issuing of notes intended to pass as money, to corporations. It is a matter of which concerns the entire public, who have no opportunity in the hurry of every-day business transactions of life, to ascertain the value of the promise which is tendered as money. But in a contract of indemnity, why should not the citizen make his contract when and where the price and security suits him best? Why should the legislature take from the whole people their common-law right of contract for insurance, and grant it to a particular class? Where is there the semblance of the constitutional exercise of the police power in this? Under the Corporation Act of 1874, and supplements, corporations for almost every business are authorized, such as supplying ice, printing and publishing, conducting hotels, drove-yards, livery-stables, lumbering, quarrying, mining, brewing, distilling, improvement and sale of real estate. In fact, almost every kind of business can be transacted by incorporated companies. All concern the public. If this act be constitutional, the legislature can prohibit the transaction of any business, if not conducted by corporations under the Act of 1874, and under the pain of imprisonment forbid the individual engaging in any business whatever.

It is paternalism to assume that citizens are incapable of prudently contracting with reference to their property without an express grant of the state in the shape of corporate franchise, to one of the contracting parties. It is an assumption that the citizen is a child, needing the tutelage and protection of the legislature in the ordinary affairs of business life or else it is a species of tyranny in government like that of Turkey, where the rights to produce, manufacture, and trade, are all the subject of grant from the sultan.

If the exercise of the right of contract to indemnify be injurious to the public then it ought to be prohibited; if beneficial, it ought not to be monopolized by a few.

The rule to be deduced from *Budd v. New York*, 143 U. S. 523, 36 L. ed. 250, the *Elevator Cases*; the *Sinking-Fund Cases*, 99 U. S. 700, 25 L. ed. 496, and all the cases where

the police power of the state is discussed, is, that while a business affected by a public interest may be regulated, yet when not inimical to the health, morals, or safety of the people, it cannot be prohibited. I do not think an exclusive grant to a class is

regulation; that is prohibition of all others, and is therefore unconstitutional.

The judgment in my opinion should be affirmed, and the appeal dismissed.

**Sterrett, Ch. J., and Green J.,** concur in this dissent.

## MINNESOTA SUPREME COURT

Rufus C. JEFFERSON *et al.*, *Appls.*,

v.

Carl ASCH *et al.*

(53 Minn. 443.)

**\*A stranger to a contract between others,** in which one of the parties promises to do

\*Headnote by GILFILLAN, Ch. J.

something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, cannot recover upon it.

(June 8, 1893.)

**A** PPEAL by plaintiffs from an order of the District Court for Ramsay County sustaining a demurrer to the complaint in an ac-

**NOTE.**—*Right of a third party to sue upon a contract made for his benefit.*

- I. *The doctrine of consideration.*
- II. *The question of privity.*
- III. *General rules as to party to sue.*
- IV. *Grounds upholding action.*
  - a. *In general.*
  - b. *Money had and received.*
  - c. *Implied promise.*
  - d. *There must be an actual benefit.*
- V. *The statute of frauds.*
- VI. *Limitation of the rule.*
- VII. *Designation of such party.*
- VIII. *Parol evidence to prove party.*
- IX. *Necessity of delivery.*
- X. *Necessity of assent and knowledge.*
- XI. *Effect of assent.*
- XII. *Election of remedies.*
- XIII. *Release of the promise.*
- XIV. *As a defense to an action.*
- XV. *Action maintainable by either party.*
- XVI. *State doctrines.*
- XVII. *Not maintainable.*
- XVIII. *Contracts under seal.*
- XIX. *Insurance contracts.*
- XX. *Partnership transactions.*
- XXI. *Purchase subject to a lien, debt, or mortgage.*
- XXII. *State statutes.*
- XXIII. *The English doctrine.*

The decision in the principal case in which the plaintiff sought to take advantage of the defendant's bond, an instrument under seal, is in keeping with the doctrines established by the courts, the general rule in favor of such actions being, that in order to entitle a third party to sue upon a contract made for his benefit, there must be a valid and binding contract entered into, upon a sufficient consideration, between the promisor and the promisee, with the express intention of benefitting the third party, to whom the promisee is under some legal obligation.

The mere fact, however, that the party to be benefited is not named, has no prior knowledge of the promise, makes no difference provided he subsequently assents to or takes advantage of the transaction, the contract or promise thereby becoming irrevocable, parol evidence being admissible to prove his identity. See heads VII., VIII., X., and XI.

Moreover it is not necessary that the contract should be delivered to him. Head IX.

The principles upon which the right has been founded are in many cases those applicable to the action of money had and received by one party for the use of another, and such as are established by

law upon the ground of an implied promise. Head IV.

It has been repeatedly held that in order to entitle the plaintiff to succeed, the case must come within the limits fixed by the rule which will not be extended beyond the theory fixed and declared by the authorities supporting it. Head VI.

Upon the question whether or not the doctrine applies to contracts under seal, the authorities are divided in their opinion, but there would seem to be an inclination in the later ones to apply the rule in such cases. Head XVIII.

With reference to the provisions of the statute of frauds applying, the decisions would seem to be almost unanimous in their holding that the ordinary case of a promise made to a debtor, upon a sufficient new consideration, to pay the debt owing by him to his creditor does not come within the statute, and that the creditor can sue thereon in his own name. Head V.

A large number of the cases in which the doctrine has been applied have been those of a purchase of property subject to a debt, lien, or mortgage, wherein the purchaser has undertaken to pay and discharge such incumbrance, the court applying the doctrine in such cases where there has been a debt enforceable against the vendor of which the purchaser has assumed the responsibility. Head XXI.

The doctrine has also been applied in insurance cases and in partnership transactions. Heads XIX., XX.

It will be found that its application has been greatly assisted by the provisions of the state statutes and codes, under which the right of action is vested in "the real party in interest." Head XXII.

The English theory which has been opposed to such actions would also seem, by the more recent decisions, to be conforming more nearly to the rule in equity, and this, owing to the fact that since the passing of the judicature act in that country, the rules of law and equity are blended, the acts providing that wherever there is a conflict between them the rules of equity shall prevail. The case of *Gandy v. Gandy*, *infra*, decided since the passing of such acts, would seem to bear out this contention. Head XXIII.

### I. *The doctrine of consideration.*

As a general rule, all that the law requires with reference to the consideration is, that it be of some value, however slight that may be, provided there is no fraud in the transaction. *Spangler v.*

tion brought to enforce a bond given by a contractor to hold harmless the owner of certain premises which the contractor had undertaken to repair. *Affirmed.*

The facts are stated in the opinion.

*Mr. Owen Morris*, for appellants:

The party for whose sole benefit a contract is evidently made, may sue thereon in his own

name, although the engagement be not directly to or with him.

*Allen v. Thomas*, 8 Met. (Ky.) 198, 72 Am. Dec. 169.

When one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act,

Springer, 22 Pa. 454; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102.

A consideration is sufficient if it arises from any act of the plaintiff, from which the defendant or a stranger derives any benefit, however small, if such act is performed by the plaintiff with the assent, express or implied, of the defendant, or by reason of any damage, or any suspension or forbearance of the plaintiff's right at law or in equity, or any possibility of loss occasioned to the plaintiff by the promise of another, although no actual benefit accrues to the party undertaking it. *Ealing v. Zant-singer*, 13 Pa. 50; *Hind v. Holdship*, 2 Watts, 104.

It is not material that any actual benefit should accrue to the party undertaking it. *Cabot v. Haskins*, 8 Pick. 92.

The consideration need not be a benefit to the defendant, any loss or disadvantage to the plaintiff, by giving up some right against a third person, or agreeing to abandon or delay enforcing some right against him, being sufficient. *Ellis v. Clark*, 110 Mass. 889, 14 Am. Rep. 609.

It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is in a legal sense injured. *St. Mark's Church in Newcastle v. Teed*, 120 N. Y. 583.

The injury may consist in a compromise of a disputed claim, or the forbearance to exercise a legal right, the alteration of position being regarded as a detriment that forms a consideration independent of the actual value of the right forborne. *St. Mark's Church in Newcastle v. Teed*, 120 N. Y. 583.

The consideration must be sufficient in order to change the position of the parties. *Robinson v. Gilman*, 43 N. H. 491; *Carnahan v. Tousey*, 98 Ind. 561; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Worley v. Sipe*, 111 Ind. 238; *Pope v. Porter*, 33 Fed. Rep. 7; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 523, 23 Am. Rep. 238.

A promise made in consideration of another promise is sufficient. *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 670; *Helms v. Kearns*, 40 Ind. 124.

There must be a legal foundation for a promise, either an actual damage or a suspension or forbearance of a right, or a possibility of loss occasioned to the one to whom the promise is made, to give it validity. *Cabot v. Haskins*, 8 Pick. 92.

Where a contract creates a duty or relation in the nature of a trust, the action is maintainable, the consideration retained being regarded as held in the nature of a trust for the persons indicated by the contract. *Follansbee v. Johnson*, 28 Minn. 811.

And it is not necessary that there should be any consideration passing from the third person, it being sufficient that the promise was made by the promisor upon a sufficient consideration, as between himself and his immediate promisee; the third person, adopting the act of the promisee by obtaining the promise for his benefit, brings himself into privity with the promisor and entitles him to enforce the promise as if made directly to him. *Thorp v. Keokuk Coal Co. of New York*, 48 N. Y. 253.

The consideration need not move from such third party. *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467.

It is not necessary that the consideration should move from the plaintiff, it is sufficient that the promise is made upon a valid consideration mov-

ing from such third party. *Judson v. Gray*, 17 How. Pr. 208; *Williamson Stewart Paper Co. v. Seaman*, 29 Ill. App. 68.

In all such cases the consideration of the promise is the same as that for any other stipulation of the contract. *Grant v. Diebold Safe & Lock Co.* 37 Wis. 72.

The consideration of the contract between the two parties for the benefit of a third is the consideration for the promise to the third. *Ibid.*

Yet neither at law nor in equity is a bare recipient a party to the contract, no consideration moving from him to support one, and though he is the representative of the beneficiary to receive the promise, he is not necessarily his representative to enforce it. *Edmundson v. Penny*, 1 Pa. 384, 44 Am. Dec. 137.

Before such an action can be maintained, it must be shown that there was a consideration for the promise moving to the defendant, either from the plaintiff, or the other party, the promisee. *Wyman v. Smith*, 2 Sandf. 381, 387.

In such cases, the controlling circumstance, in general, is the question whether the money or property has been received by the defendant for the plaintiff's use. *Ibid.*

The placing of money in the hands of the promisor under his promise to pay it over is a sufficient consideration. *Perry v. Swasey*, 12 Cush. 36.

Where the agreement consists of something beneficial to and received by the promisor, to render the promise valid when not in writing, it must be founded upon a consideration, and arise out of a transaction, by the terms, or by force of which, the promisor becomes substantially the debtor of the promisee, in respect to the same, and to the amount which he agrees to pay, so that making payment according to the terms of the promise will be a satisfaction of his own debt, and the discharge of an obligation resting upon him as a principal. *State Bank at New Brunswick v. Mettler*, 3 Bosw. 302, 398.

The receipt of the money is a sufficient consideration for the promise to pay. *Kollock v. Parcher*, 52 Wis. 393; *Lucas v. Chamberlain*, 8 B. Mon. 276.

The true rule is that the new "original consideration" spoken of must be such as to shift the actual indebtedness to the new promisor, so that as between him and the original debtor he must be bound to pay the debt as his own, the latter standing to him in the relation of surety. *Kingsley v. Balcome*, 4 Barb. 139.

The promisor becoming the custodian and trustee of a fund actually belonging to the beneficiary in the one instance, while he undertakes to pay the money, or do some act in consideration of a benefit conferred upon himself in the other. *Guthrie v. Kerr*, 85 Pa. 303.

The consideration and promise making it plainly the defendant's duty to pay the plaintiff, and implying a promise equal to a trust, the right of action being equal in the one case as in the other, that is to say, in the case of such promise, as in that of a trust. *Lawrence v. Fox*, 20 N. Y. 203.

The consideration or motive of the promise must be known to the promisor. *Ellis v. Clark*, 110 Mass. 339, 14 Am. Rep. 609.

In *Machias Hotel Co. v. Coyle*, 35 Me. 405, 58 Am. Dec. 712, it was held that a party for whose benefit



may maintain an action for the breach of such engagement.

This principle extends beyond mere simple contracts, and is applicable to contracts under seal.

*Kimball v. Noyes*, 17 Wis. 695; *Keeler v. Niagara F. Ins. Co.* 16 Wis. 523, 84 Am. Dec. 714; *Carnegie v. Morrison*, 2 Met. 381; *Brewer*

*v. Dyer*, 7 Cush. 337; *McDowell v. Laev*, 85 Wis. 175; *Kimball v. Noyes and Brewer v. Dyer*, *supra*.

*Mr. F. W. Zollman*, for respondents:

The common-law rule is that only parties in privity of contract and parties to the consideration can sue, and this rule still prevails in most of the New England states

a contract was made, might sue thereon in his own name, without reference to the manner in which he acted at the time of the formation of the contract, if the consideration be derived from a party to the suit. *Robbins v. Ayers*, 10 Mo. 533, 47 Am. Dec. 125.

The question as to the sufficiency of the consideration, was raised in *St. Mark's Church in Newcastle v. Teed*, 120 N. Y. 553, but the court followed the doctrine laid down in *Todd v. Weber*, 95 N. Y. 181, 194, 47 Am. Rep. 20, holding that a party for whose benefit a promise is made, may sue thereon in assumpsit, even if the consideration arose between the promisor and a third person.

It has been held that in all these cases, founded on a new and original consideration of benefit to the defendant, or harm to the plaintiff moving to the party making the promise, either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery. *Farley v. Cleveland*, 4 Cow. 432, 15 Am. Dec. 387; *Cleveland v. Farley*, 9 Cow. 639.

In *Lawrence v. Fox*, 20 N. Y. 263, the court held that the above case had never been doubted as sound authority, and put at rest the objection that the defendant's promise was void for want of consideration.

Where a debtor engaged the defendant to pay her debt, and put money into his hands for that purpose, and he promised to perform the action and the promise was made known to the plaintiff, the court held this raised a good implied promise to pay the plaintiff, and that the money received by the defendant from the debtor for the payment of her debt was a consideration for his promise to pay; the law created the privity and enabled the party to be benefited by the promise to treat it as a consideration moving from him. *Perry v. Swasey*, 13 Cush. 33.

But the courts have stated that the plaintiff must be the person from whom the consideration moved, and that therefore a stranger cannot sue upon such contract. *Mellen v. Whipple*, 1 Gray, 317.

Where the purchaser of goods gave the vendor an order to deliver them to a third party, which the latter accepted, it was held that such third party could not maintain an action upon such agreement without showing a consideration between the parties to the action. *Cottage Street M. E. Church v. Kendall*, 121 Mass. 523, 23 Am. Rep. 296.

So where a testator gave a certain legacy by his will, which he afterwards revoked by codicil and gave the same to another, upon the latter's promise to pay the former intended legatee, the court held that no consideration moved from the first legatee to the testator, and that the case came within the general rule prohibiting such actions. *Linneman v. Moross' Estate*, 98 Mich. 173.

Again, where a debtor requested a debtor of his to place the amount to the credit of his creditor, which act was done, it was held in an action by the creditor to recover the amount so deposited and placed to his credit, that the action would not lie as he was a stranger to the consideration and to the contract, there being nothing in the instrument to prevent an attack upon it for fraud or mistake, the plaintiff parting with nothing as a consideration, never having possession of the certificate, the defendants being entitled to withdraw the credit

before the plaintiff was involved in a loss by their doing so, which they did and so informed the plaintiff. *Robertson v. Reed*, 47 Pa. 113.

And again, in *Fairchild v. Feltman*, 32 Hun, 393, a debtor promised his creditor to pay the debt owing to him to the creditor of the latter. It was held that no action would lie against the debtor as upon a contract made for the benefit of a third person, the consideration being past and not sufficient. *Kelly v. Roberts*, 40 N. Y. 432, to the same effect.

## II. The question of privity.

The general rule is, that there must be privity of contract between the parties. *Second Nat. Bank of St. Louis v. Grand Lodge of Free and Accepted Masons of Missouri*, 96 U. S. 123, 25 L. ed. 75.

It is an essential element in all contracts. *Mellen v. Whipple*, 1 Gray, 317.

And therefore strangers to the contract cannot sue thereon. *Davis v. Clinton Water Works Co.* 54 Iowa, 59, 37 Am. Rep. 185; *Blymire v. Boistie*, 6 Watts, 132, 31 Am. Dec. 453; *Mellen v. Whipple*, *supra*.

It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract, nor to the consideration. *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541.

While at law strict privity of contract is essential, in equity the rule is different, the latter courts holding such a promise enforceable in an action brought in such parties' name. *Carnahan v. Tousey*, 93 Ind. 561; *Rodenbarger v. Bramblett*, 73 Ind. 218; *Worley v. Sipe*, 111 Ind. 233.

A third person for whose benefit a contract is made, does not in all cases have a right of action; to entitle him thereto there must be some privity between him and the promisee, some obligation or duty owing from the latter to him, giving him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 435.

A legal obligation or duty owing from the promisee to him, the plaintiff, will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration with the promisee, the obligation of the promisee furnishing an evidence of the interest of the latter to benefit him and creating a privity by substitution with the promisor. *Ibid.*; *Vrooman v. Turner*, 69 N. Y. 234, 25 Am. Rep. 195.

The legal right of a party to assert that the performance of a contract made between two others for his benefit cannot be revoked or modified without his consent rests in the nature of an express promise on the part of the person whom he seeks to charge, and thus raises a privity of contract. *Frank v. New York, L. E. & W. R. Co.* 7 N. Y. S. R. 814.

In such a case there is a privity of contract arising out of such express promise, the consideration between the promisor and promisee being sufficient to support it. *Ealing v. Zantlinger*, 13 Pa. 30.

And when it is proved that the defendant has received the money, the law creates the privity and implies the promise. *Hall v. Marston*, 17 Mass. 575; *Perry v. Swasey*, 13 Cush. 33; *Frost v. Gage*, 1 Allen, 262.

*Exchange Bank of St. Louis v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Ellis v. Clark*, 110 Mass. 389, 14 Am. Rep. 609.

As also in some classes of cases in the state of Illinois.

*Neubrecht v. Santmeyer*, 50 Ill. 74.

While it is true that the rule has been relaxed in many states, yet it has always been strict in the case of sealed instruments.

And enables the party to be benefited to treat it as a consideration moving from him. *Perry v. Swasey*, *supra*; *Markle v. Western U. Teleg. Co.* 19 Mo. App. 80; *Hall v. Marston*, *supra*; *Jones v. Higgin*, 80 Ky. 409.

The rule upholding such actions does not depend upon the ground of any actual or supposed relationship between the parties, nor upon the reason that the defendant impliedly contracts as agent of the principal, but it rests upon the broader basis of privity of contract established by the law owing to the parties' actions, upon which the promise and obligation were founded. *Brewer v. Dyer*, 7 Cush. 387.

And where one contracts for value by simple contract to pay money, or do some other act for the benefit of a third person, the latter for whose benefit it is made, may recover, the only objection to his recovery being the want of privity. *Bohanan v. Pope*, 42 Me. 93.

In the case of an action brought against a water company for the non-supply of water for the purposes of extinguishing a fire, by reason of which the plaintiff sustained damage, the plaintiff claiming the benefit of the contract between the defendant and the town, the court held the plaintiff could not maintain an action against the water company under its contract with the town, there being no privity of contract between the plaintiff and the defendant company. *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 425; *Davis v. Clinton Water Works Co.* 54 Iowa, 59, 37 Am. Rep. 185.

As to the right of a party to sue a water company for loss occasioned by an inadequate water supply under a contract made with a municipality, see *Howsmom v. Trenton Water Co. (Mo.)* 23 L. R. A. 145, and note thereto.

Where, in order to become a member of an association, a party signed a by-law by which members were liable "in their individual as well as their collective capacity" for all monies loaned to the association, it was held that he was not personally liable for money subsequently lent, in the absence of evidence that it was lent on the faith and credit of the by-law, there being no privity between the plaintiff and the defendant, or consideration for a demand between them. *Flint v. Pierce*, 99 Mass. 63, 96 Am. Dec. 691.

### III. General rules as to party to sue.

It is a fundamental rule, that no person can maintain an action respecting a subject-matter in respect to which he has no interest, right, or duty, either personal or fiduciary. *Baxter v. Baxter*, 43 N. J. Eq. 82.

No action can be brought upon a contract, except by a party to it. *Bohanan v. Pope*, 42 Me. 93.

The parties to a contract being the persons in whom the legal interest in the subject-matter is deemed to be vested. *Treat v. Stanton*, 14 Conn. 445.

Therefore a promise made by one person to another for the benefit of a third person, a stranger to the consideration, will not support an action by the latter. *Rogers v. Union Stone Co.* 130 Mass. 581, 39 Am. Rep. 478, following *Exchange Bank of St. Louis v. Rice*, 107 Mass. 37, 9 Am. Rep. 1.

It is an inflexible rule of the common law that a 25 L. R. A.

*Story*, Cont. § 573, p. 525, and note 2; *Parsons*, Cont. p. 468 (bottom paging 498).

The decisions have not relaxed the rule so far as to hold that a covenant may be sued upon by the person for whose benefit it is made, if he is not a party to the deed.

*Moore v. House*, 64 Ill. 163.

The rule in *Bennett v. McGrade*, 15 Minn. 132, and *Slosson v. Ferguson*, 81 Minn. 448, is

right of action on a contract to warrant any recovery must arise upon a contract made by the party to the record. *Litchfield v. Garratt*, 10 Mich. 423.

A mere stranger cannot intervene and claim, by action, the benefit of a contract between other parties. *Vrooman v. Turner*, 69 N. Y. 230, 25 Am. Rep. 136; *Marston v. Bigelow*, 5 L. R. A. 43, 150 Mass. 45; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225.

In general, the action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract is vested. *Treat v. Stanton*, *supra*; *Miller v. Kingsbury*, 28 Ill. App. 532; *Wynn v. Wood*, 97 Pa. 216.

Although the exclusive interest or benefit to be derived from the contract or subject-matter of litigation be in another. *Violett v. Powell*, 10 B. Mon. 347, 53 Am. Dec. 543.

The action should be in the name of the party whose legal interest has been affected. *Crocker v. Higgins*, 7 Conn. 347.

Or in other words, who has a legal interest in the cause of action, since it is of legal rights alone that courts of law take cognizance, and that only, in favor of those who are recognized as having those rights. *Treat v. Stanton*, 14 Conn. 445.

In *Edmundson v. Penny*, 1 Pa. 334, 44 Am. Dec. 137, it was held that a parol promise to one for the benefit of another could support an action on it only by him from whom the consideration moved, or who was the meritorious cause of it.

Nobody can sue upon a covenant, except he who was a party thereto and entitled to its benefit. *De Bolle v. Pennsylvania Ins. Co.* 4 Whart. 63, 33 Am. Dec. 38.

In chancery the plaintiff must have an interest in the subject of the suit, or a right to the thing demanded. *Crocker v. Higgins*, *supra*.

In that jurisdiction the real party in interest must sue. *Thompson v. Cartwright*, 1 Tex. 87, 46 Am. Dec. 95.

Where the action was brought for payment of coupons, attached in the first instance to bonds issued by a certain masonic association, on which the defendant by resolution adopted the payment under certain conditions as to the issuance of stock to such assumption of payment, the court held that, the debt already existing between the plaintiff and the association, a promise by a third person to pay it being primarily for the benefit of such debtor, and for his relief, he had a right of action for his own indemnity, and that if the original creditor could also sue, two actions would be maintainable and the rule was therefore against such action. *Second Nat. Bank of St. Louis v. Grand Lodge of Free & Accepted Masons of Missouri*, 98 U. S. 123, 25 L. ed. 76. See also *Blymire v. Boistle*, 6 Watts, 182, 31 Am. Dec. 458; *Morrison v. Beckey*, 6 Watts, 349.

The principles established by the Supreme Court of the United States in *Second Nat. Bank of St. Louis v. Grand Lodge of Free & Accepted Masons of Missouri*, *supra*, were followed and approved of by the court in *Cragin v. Lovell*, 109 U. S. 194, 27 L. ed. 903, where the plaintiff relied upon article 1890 of the Louisiana Civil Code, and article 35 of the Code of Practice of that state, the court holding that neither applied to the case in point.

not applicable here, because the bonds were statutory bonds, and further than that, the reason for the decisions is found in the statutes.

The right to sue inures to the third person, when it is intended that he should be benefited by the contract. He must be the person intended to be benefited. The fact that a benefit would inure to him from the performance is not sufficient. No right of action arises where

he is neither privy to the contract nor to the consideration.

*Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Simson v. Brown*, 68 N. Y. 355.

Neither is the promisor liable upon an agreement to pay a debt, for which the promisee is not himself personally liable, or under some obligation in respect thereto.

*King v. Whitely*, 10 Paige, 465, 4 L. ed. 1052.

In the above case the only allegation touching the relation of the defendant was that in an action by him against such third person the defendant claimed that the party acted as his agent, but the court found that no promise to the plaintiff was to be construed therefrom. *Cragin v. Lovell*, *supra*.

The cases of *Second Nat. Bank of St. Louis v. Grand Lodge of Free & Accepted Masons of Missouri* and *Cragin v. Lovell*, *supra*, were relied upon by the defense in a subsequent case, as showing a want of privity, but were rejected by the court, there being no contract shown by them except such as was executory upon which a third person cannot sue. *Pope v. Porter*, 33 Fed. Rep. 7.

In *Owings v. Owings*, 1 Harr. & G. 484, the court held that the mere promise of a debtor to his creditor to pay the latter's debt to his creditor will not support an action by the latter creditor against such debtor.

Where a contract was made by a father for the support of his infant daughter, founded upon a valuable consideration, it was contended that an action for the breach could be maintained by the daughter in her own name, as being a contract made for her benefit, but the court held in an action by the father for breach, that he being bound by law to support the daughter, and the contract being with him, the action was maintainable by the father. *Vancleave v. Clark*, 3 L. R. A. 512, 118 Ind. 61.

#### IV. Grounds upholding action.

##### a. In general.

There must be a meeting and agreement of the minds of the parties upon the terms of the whole contract, including the promise on the one side and the consideration for it on the other. *Ellis v. Clark*, 110 Mass. 389, 14 Am. Rep. 609.

There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement. *Vrooman v. Turner*, 60 N. Y. 280, 25 Am. Rep. 195.

In order to maintain the action, it has been held that in general there must be some trust, or the defendant must have become charged as for money which *ex equo et bono*, belonged to the plaintiff and the privity of contract has been spelled out. *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 214.

The grounds of distinction are those stated by the court in *Blymire v. Boistle*, 6 Watts, 182, 31 Am. Dec. 458, where one person contracts with another to pay money to a third person, or to deliver over some valuable thing, and such third person is thus the only party in interest, and ought to possess the right to release the demand or receive it by action; but where the debt already exists from one person to another, a promise by a third person to pay such debt being for the benefit of the original debtor, and to relieve him from liability, he ought to have a right of action against the promisor for his own indemnity, and if the promisor were also liable to the original creditor, he would be liable to two separate actions at the same time for the same debt, which would be inconvenient and might lead to injustice. *Morrison v. Beckey*, 6 Watts, 340, to the same effect.

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A third party may maintain an action on a promise made to another in many cases, as, where one delivers money or personal property to another, under the promise of the latter to deliver it over to a third party who has a beneficial interest therein, or to convert it into money and pay him the proceeds, the third person may maintain an action therefor against the promisor. *Wynn v. Wood*, 97 Pa. 216; *Hind v. Holdship*, 2 Watts, 104, 28 Am. Dec. 107; *Justice v. Tallman*, 86 Pa. 147; *Vincent v. Watson*, 18 Pa. 36; *Beers v. Robinson*, 9 Pa. 223; *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 438; *Bellas v. Fasely*, 19 Pa. 273; *Torrens v. Campbell*, 74 Pa. 470; *Kountz v. Holthouse*, 85 Pa. 235.

Where there was no indication that the property was to be delivered over, nor that it was to be converted into money, and the proceeds paid over, or any inference that the avails and proceeds were to pay and discharge the debt due to the plaintiff, the court held that to entitle a third party to sustain such action, money or property must have been placed in the hands of the defendant for his use, or he must have been a party to the new agreement. *Torrens v. Campbell*, *Blymire v. Boistle*, and *Kountz v. Holthouse*, *supra*; *Zell's App.* 111 Pa. 537.

There must be a contract, either express or implied, by which the funds in the hands of the promisor become the property of the creditor, the debtor or promisee releasing all control over them. *Seaman v. Whitney*, 24 Wend. 284, 35 Am. Dec. 618. In such cases the right of the third party to sue is based upon the extinguishment or release of the claim of the promisee against such promisor, and also upon the express contract entered into by the promisor. *Esling v. Zantlinger*, 13 Pa. 60.

But this rule will not apply where the creditor is himself a party to the contract of deposit. *Seaman v. Whitney*, *supra*.

In *Lake v. Albert*, 37 Minn. 453, it was held that a person with whom, or in whose name a contract is made for the benefit of another was a trustee of an express trust within the meaning of section 29 of chapter 66 of the Minnesota General Statutes of 1878.

Such a promise invests the person, for whose use it is made, with an immediate interest and right, as though the promise were made to him. *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209.

In such cases there is a difference, where the promise is to be performed to one not interested in the cause, and when he has an interest, the party to whom the promise is made having a right of action in the first and not the party in whose favor it is to be proven. *Blymire v. Boistle*, 6 Watts, 182, 31 Am. Dec. 458; *Hadves v. Levit*, Het. 178.

No such promise is available to a third person, unless it be by an agreement in the form of a simple contract. *Robb v. Mudge*, 14 Gray, 534.

If the contract is valid as between the parties thereto, it can be enforced by the party for whose benefit it is made, although it might have been void had it been made with the latter, as being within the statute of frauds. *Helms v. Karns*, 40 Ind. 124.

Where the promise is void, either for want of consideration or through fraud, the third party cannot maintain an action thereon. *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617.

In a suit brought by the obligee, upon a bond with similar conditions, though not the statutory bond against mechanics liens, this court has said: "Irrespective of the alleged purpose for which the bond was executed, it seems apparent from the bond itself that it was executed for the protection of the plaintiff, and not for the benefit of subcontractors."

*Price v. Doyle*, 84 Minn. 400.

Such action does not rest upon the ground of an actual or supposed relationship between the parties, nor upon the reason that the defendant, by entering into such an agreement, has impliedly made himself liable as agent of the plaintiff, but upon the broader and more satisfactory basis, that the law operating on the acts of the parties, creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded. *Brewer v. Dyer*, 7 Cush. 337; *Carnegie v. Morrison*, 2 Met. 381.

The rule was considered as founded upon good sense because it avoided circuitry of action, and also because there was no necessity that one, who was only the mere recipient of a promise, should sue on it as a trustee, when there was no trust and when the person beneficially entitled was able to sue for himself. *Edmundson v. Penny*, 1 Pa. 334, 44 Am. Dec. 137.

The court in *Wood v. Moriarty*, 15 R. I. 518, followed the doctrine established in *Urquhart v. Brayton*, 12 R. I. 100, as being not only just and convenient, but consonant for the purposes of the parties as according the remedy to the party, who in most instances was chiefly interested to enforce the promise, thereby avoiding multiplicity of suits.

It has been yielded to with reluctance. *Ætina Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Turk v. Ridge*, 41 N. Y. 201; *Hutchings v. Miner*, 46 N. Y. 454, 7 Am. Rep. 309; *Merrill v. Green*, 55 N. Y. 270; *Simson v. Brown*, 63 N. Y. 356.

It has, however, been held that where the person for whose benefit the contract is made, has himself or by his privy in estate made a contract inconsistent with the one in question, he cannot repudiate such prior contract and claim the benefit of the second simply because it is his interest to do so. *Constable v. National S. S. Co.* 154 U. S. 51, 38 L. ed. 903.

#### b. Money had and received.

An exception to the general rule therefore exists where the plaintiff is the beneficiary solely interested in the promise, as in the case of a promise or contract to pay money, or deliver some valuable thing to another. *Second Nat. Bank of St. Louis v. Grand Lodge of Free and Accepted Masons of Missouri*, 98 U. S. 123, 25 L. ed. 75.

In *Hall v. Marston*, 17 Mass. 575, it was held that the principle in favor of the doctrine was reasonable and consistent with the character of the action of assumpsit for money had and received.

*Indebitatus assumpsit* for money had and received can be maintained in various instances, as where there is no actual privity of contract between the plaintiff and defendant, and when the consideration does not move from the plaintiff, such actions being allowed where the promise was to a third person for the plaintiff's benefit, the action being equitable, supportable by showing that the debtor has in his hands money which in equity and good conscience belongs to the plaintiff, without showing a direct consideration moving from him, or privity of contract between him and the defendant. *Mellen v. Whipple*, 1 Gray, 317. To the same effect, *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Owings v. Owings*, 1 Harr. & G. 484; *Hall v.* 25 L. R. A.

It does not necessarily follow that such beneficiaries may maintain an action on the bond in their own names.

*State Bank of Duluth v. Heney*, 40 Minn. 145.

The fatal objection, however, to the complaint, is that it appears from the bond and complaint that the bond was not executed for the appellants' protection or benefit.

*Brown v. Stillman*, 43 Minn. 126; *Vrooman*

*Marston, supra*; *Warren v. Batchelder*, 16 N. H. 530; *Peacock v. Williams*, 38 N. C. 324; *Hall v. Robinson*, 30 N. C. 55; *Draughan v. Bunting*, 31 N. C. 10; *Blymire v. Boetle*, 6 Watts, 133, 31 Am. Dec. 453; *Wynn v. Wood*, 97 Pa. 216; *Hind v. Holdship*, 2 Watts, 104, 26 Am. Dec. 107; *Justice v. Tallman*, 86 Pa. 147; *Vincent v. Watson*, 13 Pa. 93; *Beers v. Robinson*, 9 Pa. 220; *Townsend v. Long*, 77 Pa. 143, 13 Am. Rep. 433; *Bellas v. Fagely*, 19 Pa. 273; *Torrens v. Campbell*, 74 Pa. 470; *Kountz v. Holthouse*, 88 Pa. 236; *Zell's App.* 111 Pa. 537; *Monroe v. Buchanan*, 27 Tex. 247.

There must, however, be an express promise in order to entitle the creditor or third party to sue for money had and received of the defendant. *Bigelow v. Davis*, 16 Barb. 561.

Where, by agreement, an employer kept back part of the wages of his employees for the purpose of paying their accounts, it was held that the parties to whom such accounts were owing might sue for money had and received. *Donkersley v. Levy*, 38 Mich. 55.

So where a debtor remitted money to a third person with a direction to pay it to his creditor, and the latter upon being informed of it called upon the remitter, who promised to pay, there is a valid promise and such remitter is the depository of the creditor's money, holding it for his use and liable to him for it. *Wyman v. Smith*, 2 Sandf. 331, 337.

But in *Moore v. Moore*, 127 Mass. 22, the defendant received money from the executor of defendant's intestate as her own, and paid it away under a misapprehension of the testator's intentions. It was held, in an action by the parties entitled to such money, that she was not liable as for money had and received to their use, the money not having been paid to her in whole or in part for the benefit of the plaintiffs as due them from the executor, the court distinguishing the case from *Mellen v. Whipple*, 1 Gray, 317, upon these grounds.

And where the defendants were the holders of a note secured by mortgage and policies of insurance obtained by the mortgagor, and the equity of redemption having been assigned with the consent of the insurers, the policy being also assigned to the trustees as security for the same debt, with an agreement that any surplus should be paid over to the defendant or his assigns, the action being brought against the trustees to recover the amount of insurance received by them, upon the ground that they had in their hands money belonging to the plaintiff, the court held the action would not lie; there being no privity of contract, and the money not being deposited in their hands for the purpose of paying the debts, the case did not come within the principles laid down in *Mellen v. Whipple, supra*; *Field v. Crawford*, 6 Gray, 116.

In *Thorpe v. Dillingham*, 1 Denio, 254, where the action was brought by husband and wife, the facts showing that before the wife's marriage money had been paid by a third party to the defendant's testator, to be enjoyed by him for life and then to be paid to her, it was held that the plaintiff could not recover on a count for money had and received, but must declare specially, the money not having been received by the testator to her use, only being advanced to him as his own property, and he only binding himself to pay a like sum to the wife.

*v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Litchfield v. Flint*, 104 N. Y. 549; *Wilbur v. Warren*, 104 N. Y. 193; *Comley v. Dazian*, 114 N. Y. 161; *Lorillard v. Clyde*, 10 L. R. A. 118, 132 N. Y. 498.

*Gillilan, Ch. J.*, delivered the opinion of the court:

The Boston Northwest Real-Estate Com-

pany owned a lot on Sixth street, St. Paul, with two buildings standing on it, and let it to George Benz for the term of five years from May 1, 1889, and about a year thereafter he sublet it for the remainder of his term to Smith & Co. Afterwards Smith & Co. entered into a contract with the defendant Leithauser to make certain alterations and repairs and the defendants Leithauser as prin-

#### c. Implied promise.

An exception also exists in cases where under a contract between two persons, assets have come into the promisor's hands, or under his control, which in equity belonged to a third person, the latter being allowed to sue in his own name. Second Nat. Bank of St. Louis v. Grand Lodge of Free & Accepted Masons of Missouri, 98 U. S. 123, 25 L. ed. 75.

The suit in such a case is founded, rather upon the implied undertaking raised by law than upon any express promise. *Ibid.*; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Davis v. Clinton Water Works Co.* 54 Iowa, 59, 37 Am. Rep. 185; *Jones v. Higgins*, 80 Ky. 409; *Bobanan v. Pope*, 42 Me. 93; *Urquhart v. Brayton*, 12 R. I. 169; *Wood v. Moriarty*, 15 R. I. 518; *Merriman v. Social Mfg. Co.* 12 R. I. 175; *Perry v. Swasey*, 12 Cush. 36; *Hall v. Marston*, 17 Mass. 575; *Frost v. Gage*, 1 Allen, 262; *Markle v. Western U. Telegr. Co.* 19 Mo. App. 80; *Brewer v. Dyer*, 7 Cush. 337.

Such a person has a legal right or title arising out of the promise. *Crocker v. Higgins*, 7 Conn. 347.

#### d. There must be an actual benefit.

Even though the party may not have known of the transaction, yet if the contract was wholly for his own benefit, or if the party acted or assumed to act as the agent of such third person, by receiving the property in such a manner that the ownership vested in such third party, the action is maintainable. *Hoetter v. Hollinger*, 117 Pa. 606.

The same principles were upheld in *Grim v. Thomas Iron Co.*, 115 Pa. 611, although in that case the contract was conditional, and the defendant was therefore not liable.

There must be a distinct promise, and also proof of consent that the third party is to be benefited. *Pennsylvania R. Co. v. Flanagan*, 112 Pa. 558.

In cases where the promise is for the payment of the debtor's debt to a third person, founded upon valuable consideration, the agreement or promise must show a clear intent and purpose upon the part of both the promisor and promisee, the mere fact that the creditor might be benefited, being not sufficient to constitute the promisor his debtor, or to authorize the creditor to sue upon the promise; and it must be shown that the creditor was intended to be benefited directly and primarily by the contract. *Wright v. Terry*, 23 Fla. 160; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Eddy v. Roberts*, 17 Ill. 506; *Beasley v. Webster*, 64 Ill. 458; *Brown v. Straff*, 19 Ill. 88; *Bristow v. Lane*, 21 Ill. 194; *Rabbermann v. Wiskamp*, 54 Ill. 179; *Pruitt v. Pruitt*, 91 Ind. 595; *Mumper v. Kelley*, 43 Kan. 256, where the purchaser of property assumed the obligation of the vendor in respect to such property, and agreed to pay the same and to settle the plaintiff's claims against such vendor; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361; *Jordan v. White*, 40 Minn. 61; *Sanders v. Clason*, 13 Minn. 379; *Maxfield v. Schwartz*, 48 Minn. 221; *Rogers v. Gosnell*, 51 Mo. 466; *Sobushier v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 290; *Mosman v. Bender*, 80 Mo. 579; *Markle v. Western U. Telegr. Co.* 19 Mo. App. 80; *State Bank at New Brunswick v. Mettler*, 2 Bosw. 392, 398; *Astor v. L'Amoureux*, 4 Sandf. 524; *Ellwood v. Monk*, 5 Wend. 285; *Sally v. Cleveland*, 10 Wend. 156; *Glen* 25 L. R. A.

*v. Hope Mut. L. Ins. Co.* 55 N. Y. 379, 381; *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541; *Simson v. Brown*, 68 N. Y. 355; *Lawrence v. Fox*, 20 N. Y. 298; *Farley v. Cleveland*, 4 Cow. 432, 15 Am. Dec. 337; *Willis v. Smyth*, 91 N. Y. 298; *Carter v. Holaban*, 92 N. Y. 498; *Cleveland v. Farley*, 9 Cow. 639.

It must have been entered into for his benefit, or such benefit must be the direct result of performance and so within the contemplation of the parties, and in addition, the grantor must have a legal interest that the covenant be performed in favor of the party claiming performance. *Durnherr v. Rau*, 135 N. Y. 219.

So where promises have been made to a father or uncle for the benefit of a child or nephew, the action has been allowed. *Mellen v. Whipple*, 1 Gray, 317.

In *Austin v. Seligman*, 18 Fed. Rep. 519, the court admitting a conflict in the decisions, upheld the doctrine as the better law, wherever it was shown that by the agreement it was the intention that the contract should be made for the third party's benefit.

The rule in favor of such actions applies only to cases where the third party is the person solely and exclusively benefited by the contract, and is therefore invested with the legal interest. *Treat v. Stanton*, 14 Conn. 445.

The mere assumption of a debt by the terms of the deed is not sufficient. *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225.

So the fact that a benefit may accrue is not enough. *Ibid.*

A mere incidental operation in that direction is not sufficient. *Chung Kee v. Davidson*, 73 Cal. 523; *Wright v. Terry*, 23 Fla. 160; *Markle v. Western U. Telegr. Co.* 19 Mo. App. 80; *Lake Ontario Shore R. Co. v. Curtis*, 80 N. Y. 222.

The rule will not be enforced where the contract is a mere gratuity, the motive of love and affection. *Gates v. Hames*, 23 N. Y. S. R. 313.

Nor will it be extended to give a right of action to a creditor, for whose benefit the promise might, or might not, have been made. *Wheat v. Rice*, 97 N. Y. 296.

It is not sufficient that the performance of the covenant may benefit a third person to entitle him to sue for its enforcement. *Durnherr v. Rau*, 135 N. Y. 219.

Neither is it sufficient to show that a benefit would have inured to him from the performance of it. *Simson v. Brown*, 68 N. Y. 355.

Where the instrument did not show that either the plaintiff, or any other stranger to it, was intended to be benefited, it was held that the mere fact that one, not a party to an agreement, may be benefited by its performance, did not bring him into contractual relations with the promisor, in the agreement that such party must be the one intended to be benefited by the promise, and that there must have existed at the time such an obligation on the part of the promisor towards the third person as would give him an equitable right to the benefits of the promise. *Parlin v. Hall*, 9 N. Dak. 473.

So where a collector of customs placed revenue in the hands of a third person to be paid to the marshal, the action was refused, the plaintiff hav-

cipal, and Asch and Boldthen as sureties, executed a bond, in which they acknowledged themselves to be indebted to George Benz, "for the use of the Boston Northwest Real-Estate Company," "and all persons who may do work or furnish material" pursuant to said contract, to be paid to the said George Benz, his executors, administrators, or assigns, for the said use," and which was conditioned to

be void if Leithauser should pay "all just claims for all work done and to be done and all materials furnished and to be furnished pursuant to said contract and in the execution of the work therein provided for, as they shall become due, and shall indemnify and save harmless said George Benz and said Boston Northwest Real-Estate Company from all mechanics' liens," etc., and "indemnify and

ing no exclusive interest in the subject-matter. *Sally v. Cleveland*, 10 Wend. 154.

#### v. The statute of frauds.

In cases where the contract or promise has been made by one party to another to pay the latter's debt to a third person, the question has been raised whether or not such a contract is within the statute of frauds as being a contract to answer for the debt, default, or miscarriage of another. *Wood v. Moriarty*, 15 R. I. 518; *Urquhart v. Brayton*, 12 R. I. 169; *Merriman v. Social Mfg. Co.* Id. 175.

With regard to this subject, however, the courts are nearly unanimous in their opinions, which show that the statute does not apply.

In order to bring a promise within the statute of frauds, it must be collateral, and not an original liability. *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 438.

To take the case out of the statute of frauds, the verbal promise of a third person made to a debtor of the plaintiff to pay to the latter the debt which the promisee owes him, must find its consideration in a purchase of property from the promisee so that the amount which is promised to be paid is to be paid in discharge of the promisor of the transaction, and the promise must be such, that, making the promised payment to the plaintiff as creditor of the promisee, will operate incidentally as a satisfaction of the debt of the latter, and primarily as payment of the debt of the promisee. *State Bank at New Brunswick v. Mettler*, 2 Bosw. 392, 398; *Farley v. Cleveland*, 4 Cow. 432, 15 Am. Dec. 387; *Cleveland v. Farley*, 9 Cow. 689; *Ellwood v. Monk*, 5 Wend. 235; *Johnson v. Gilbert*, 4 Hill, 178; *Barker v. Bucklin*, 2 Denio, 15, 43 Am. Dec. 736.

The reasons assigned by the courts for holding such a contract not within the terms of the statute are that:

The party making the promise holds the funds of the debtor for the purpose of paying the debt, and although the original debtor still remains liable, he is liable rather as surety than as principal, the fund being held in trust under a duty to pay, the contract thereby becoming an original one and not within the statute. *Fullam v. Adams*, 37 Vt. 397; *Dearborn v. Parks*, 5 Me. 81, 17 Am. Dec. 206.

Such promise is upon a new consideration moving the promisor. *Steinhart v. Doellner*, 2 Jones & S. 221; *Wolf v. Koppell*, 5 Hill, 460; *Barker v. Bucklin*, 2 Denio, 60, 43 Am. Dec. 736; *Dearborn v. Parks*, *supra*.

The statute applies only to promisees made to the person to whom another is answerable. *Green v. Brookings*, 23 Mich. 43, 53, 9 Am. Rep. 74.

The promise is not merely for the debt of another, although in effect the undertaking be to answer for another person. *Dearborn v. Parks*, *supra*.

In cases of this description, although the promisor undertakes to pay the debt of another, yet he thereby pays his own debt and that constitutes the operative mode and inducement by which he is actuated. *Ibid.*; *Burrows v. Robertson*, 7 Iowa, 101; *State Bank at New Brunswick v. Mettler*, *Farley v. Cleveland*, *Ellwood v. Monk*, *Johnson v. Gilbert*, and *Barker v. Bucklin*, *supra*.

Such a contract is therefore original. *Besshears* 25 L. R. A.

*v. Rowe*, 46 Mo. 503; *Starha v. Greenwood*, 23 Minn. 521; *Stiwell v. Otis*, 7 Abb. Fr. 432.

The agreement is merely to pay in a particular way. *Cotterill v. Stevens*, 10 Wis. 423; *Cook v. Barrett*, 15 Wis. 567.

A simple contract made by a party for the benefit of a third is enforceable by the latter and is not within the statute of frauds. *Mason v. Hall*, 30 Ala. 599; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293; *Green v. Richardson*, 4 Colo. 58; *Green v. Morrison*, 5 Colo. 18; *Pratt v. Humphrey*, 22 Conn. 825; *Eddy v. Roberts*, 17 Ill. 505; *Boals v. Nixon*, 28 Ill. App. 517; *Runde v. Runde*, 59 Ill. 102; *Helms v. Kearns*, 40 Ind. 124; *Haggerty v. Johnston*, 48 Ind. 44; *Carter v. Zenblin*, 68 Ind. 430; *Dearborn v. Parks*, 5 Me. 81, 17 Am. Dec. 206; *Green v. Brookings*, 23 Mich. 43, 53, 9 Am. Rep. 74; *Starha v. Greenwood*, 23 Minn. 521; *Besshears v. Rowe*, 46 Mo. 503; *Price v. Reed*, 38 Mo. App. 489; *Rubling v. Hackett*, 1 Nev. 380; *Proprietors of the Upper Locks v. Abbott*, 14 N. H. 157, 40 Am. Dec. 184; *Robinson v. Gilman*, 43 N. H. 491; *Lang v. Henry*, 54 N. H. 63; *Hetfield v. Dow*, 27 N. J. L. 440; *Phillips v. Gray*, 3 E. D. Smith, 69; *Stiwell v. Otis*, 7 Abb. Fr. 432; *Steinhart v. Doellner*, 4 Jones & S. 221; *Wolf v. Koppell*, 5 Hill, 460; *Barker v. Bucklin*, 2 Denio, 60, 43 Am. Dec. 726; *Therasson v. McSpedon*, 2 Hill, 3; *Wyman v. Smith*, 2 Sandf. 331, 337; *Riunt v. Boyd*, 3 Barb. 209; *Ellwood v. Monk*, 5 Wend. 235; *Westfall v. Parsons*, 16 Barb. 649; *Seaman v. Haabrouck*, 35 Barb. 155; *Mallory v. Gillett*, 21 N. Y. 412, 427; *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 438; *Wynn v. Wood*, 27 Pa. 216; *Urquhart v. Brayton*, 12 R. I. 169; *Wood v. Moriarty*, 15 R. I. 518, 578; *Merriman v. Social Mfg. Co.* 12 R. I. 175; *Moore v. Stovall*, 2 Lea, 543; *Fullam v. Adams*, 37 Vt. 397; *Putney v. Farnham*, 27 Wis. 187; *Cotterill v. Stevens*, 10 Wis. 423; *Cook v. Barrett*, 15 Wis. 567.

Where a promise was made by a debtor to pay money, which he owed, to a creditor of his creditor, with the assent of the latter, and in discharge of his own pre-existing liability, it was held the case was not within the statute of frauds. *Phillips v. Gray*, 3 E. D. Smith, 69.

Other courts, however, have held that such a parol contract or promise is void if not in writing under the statute of frauds, thus:

In *Clapp v. Lawton*, 31 Conn. 95, the defendant promised to pay the debt due to plaintiffs from the latter's debtors, the action being in assumpsit with a general count for money had and received, the facts showing that the debtors had sold out to the defendants who undertook to pay the debts. The court held the contract within the statute; and further, that no promise was made to the plaintiffs or for their benefit.

So in *Packer v. Benton*, 35 Conn. 343, 95 Am. Dec. 246, the court followed the same doctrine.

The same was the decision of the court in the earlier Tennessee decisions, as shown in *Campbell v. Findley*, 8 Humph. 330, and *McAlister v. Marberry*, 4 Humph. 426.

In a later case, however, decided in that state, the court held that the principles established in *Campbell v. Findley*, *supra*, and *Erwin v. Wagoman*, 1 Cooke (Tenn.) 401, were not sound, and overruled them. *Moore v. Stovall*, 2 Lea, 543.

Where a son promised to pay his father's note in

save harmless the said George-Benz from all claims of whatever description which may arise from, in, or about said work, alterations, and repairs." The plaintiffs, having furnished materials to the contractor for the purposes of the contract, bring this action on the bond to recover the price thereof. The court below sustained a demurrer to the complaint.

From the seals to this bond there arises the presumption of a sufficient consideration to sustain it between the parties to it. The cases in which one not a party to a contract may sue upon a promise in it for his benefit were at one time limited to contracts not under seal, and this court, in stating the law on the subject, in *Hollansbee v. Johnson*, 28 Minn. 811, expressed that limitation; but the

consideration of the promisees discontinuing an action thereon, it was held no action would lie on such promise, unless in writing under the statute of frauds. *Nelson v. Boynton*, 8 Met. 306, 37 Am. Dec. 148.

If two persons jointly promise to pay for goods delivered to one, they are considered joint original debtors, the promise not being to pay the debt of another, and therefore not within the statute. *Hetfield v. Dow*, 27 N. J. L. 440.

#### VI. Limitation of the rule.

The principle should be limited to cases having the same essential facts. *Lorillard v. Clyde*, 10 L. R. A. 113, 122 N. Y. 498.

The courts are disinclined to extend the rule beyond the principles adopted in *Lawrence v. Fox*, 20 N. Y. 238; *Pulver v. Skinner*, 42 Hun. 322; *Pardee v. Treat*, 82 N. Y. 385; *Durnberr v. Rau*, 135 N. Y. 219; *Wheat v. Rice*, 97 N. Y. 296; *Mellen v. Whipple*, 1 Gray, 317.

The doctrine will not be extended to new or doubtful cases. *Ætna Nat. Bank v. Fourth Nat. Bank*, 45 N. Y. 82, 7 Am. Rep. 314.

In cases outside of the class mentioned in *Mellen v. Whipple*, *supra*, the courts will adhere to the general rule of the common law, that the plaintiff in an action on a simple contract must be the person from whom the consideration of the contract actually moves, and that a stranger to the consideration cannot maintain an action on it. *Dow v. Clark*, 7 Gray, 198.

And the same is the ruling of the court in *Colburn v. Phillips*, 13 Gray, 64, the court holding that the doctrine in favor of such actions would not be applied, except under certain peculiar and limited conditions.

No action can be maintained by such third party, unless he can bring his case within some of the recognized exceptions to the general rule against such actions. *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 601.

The exceptions to the rule as recognized in Massachusetts will not be extended further, than as shown in *Mellen v. Whipple*, *supra*. *College Street M. E. Church v. Kendall*, 121 Mass. 523, 23 Am. Rep. 262.

#### VII. Designation of such party.

The name of the person intended to be benefited need not be given, provided he is otherwise sufficiently described or designated. *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541; *Chung Kee v. Davidson*, 73 Cal. 522; *Emmitt v. Brophy*, 42 Ohio St. 82.

Where the engagement was to pay the debts of the promisee, the creditor was not named and the court held it sufficient for the creditor to show that the debt was due from the promisee. *Williamson Stewart Paper Co. v. Seaman*, 29 Ill. App. 68.

Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has a right. *Hall v. Marston*, 17 Mass. 575.

But a promise, by one party to another to pay an unspecified sum of money to various persons not named but described as a class, has been held not to be sufficient to entitle the class to bring the action. *Morrill v. Lane*, 136 Mass. 93.  
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#### VIII. Parol evidence to prove party.

Parol evidence is admissible to prove the real parties in interest. *Burrows v. Turner*, 24 Wend. 276, 25 Am. Dec. 622, where a policy was issued on account of ———.

The true party in interest may be ascertained by extrinsic evidence, under the rule *id certum est quod reddit potest*. *Pitney v. Glens Falls Ins. Co.* 65 N. Y. 14; *Clinton v. Hope Ins. Co.* 45 N. Y. 461.

#### IX. Necessity of delivery.

In order to enable the party to maintain such action, it is not necessary that the contract should have been delivered to him. *Copeland v. Summers* (Ind.) Nov. 27, 1893.

The delivery to the promisee is sufficient. *Ibid.*; *Henry v. Anderson*, 77 Ind. 361; *West v. Cavina*, 74 Ind. 265; *Waltz v. Waltz*, 84 Ind. 403.

#### X. Necessity of assent and knowledge.

The rescission of the contract prior to the plaintiff's assent to it would be a good defense to an action brought thereon by the party for whose benefit it was made. *Emmitt v. Brophy*, 42 Ohio St. 82; *Trimble v. Strother*, 25 Ohio St. 878; *Brewer v. Maurer*, 38 Ohio St. 554, 43 Am. Rep. 436; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650.

The courts have never held that the express assent of the beneficiary is essential, nor that it is necessary that he should discharge the original debtor and accept the new promisor. *Bay v. Williams*, 112 Ill. 91.

Such assent will be presumed. *Williamson Stewart Paper Co. v. Seaman*, 29 Ill. App. 68; *Flemming v. Marine Ins. Co.* 4 Whart. 59, 33 Am. Dec. 33; *Baker v. Eglin*, 11 Or. 333; *Rogers v. Gosnell*, 54 Mo. 690.

In *Ridge v. Olmstead*, 73 Mo. 578, however, it was held that where money was placed in the hands of the promisor for payment to the creditor, the title to such money did not pass to the creditor until he was notified of the deposit and assented, and that therefore if before such notification and assent it was garnished by other creditors of the depositor, the remedy was lost.

Other cases show that the third party must have become a party to, or have adopted the new agreement. *Kountz v. Holthouse*, 85 Pa. 235; *Meyer v. Lowell*, 44 Mo. 323; *Lawrence v. Fox*, 20 N. Y. 268; *Wheat v. Rice*, 97 N. Y. 296; *Serviss v. McDonnell*, 107 N. Y. 260.

A demand of performance is necessary. *Durham v. Bischof*, 47 Ind. 211.

In *Strayhorn v. Webb*, 47 N. C. 199, it was held that until the creditor, for whose use the deposit was made, does some act ratifying the receipt so as to extinguish the debt and make the money his own, he cannot maintain an action against the receiver of such money. *White v. Hunt*, 64 N. C. 496, to the same effect.

It was held not necessary where the plaintiff was a minor that he should have accepted the promise, it being for his benefit, the law accepting it for him. *Copeland v. Summers* (Ind.) Nov. 27, 1893; *Nolte v. Libbert*, 34 Ind. 163; *Guard v. Bradley*, 7 Ind. 600; *Pruitt v. Pruitt*, 91 Ind. 595, to the same effect.

It is not necessary that the person for whose

distinction in this respect between contracts by specialty and simple contracts has not in the later authorities been adhered to, and may now be regarded as abandoned. If there ever was any reason for the distinction, it could only have been a technical one, which no longer has any merit to commend it, and we do not think we ought to recognize it. Though this seems intended as a mere bond

to indemnify and save the obligee named harmless, that, and not any incidental benefit that might accrue to others not parties to it, being the primary purpose of its stipulations and promises, we will treat it, because on both sides it is so presented here, as though such primary purpose were to secure payment to the persons doing work or furnishing material under the contract men-

benefit the promisee is made should be aware of the promise at the time it is made, it being sufficient that such person accepts the promise and acts upon it when informed. *Miller v. Billingsly*, 41 Ind. 489; *Hostetter v. Hollinger*, 117 Pa. 606.

A promise on a sufficient consideration, made by one person to another for the benefit of a third person, may be enforced by the latter, and the fact that at the time the promise was made the third party is not aware of it makes no difference under the decisions of the Indiana courts. *Waterman v. Morgan*, 114 Ind. 237; *Harrison v. Wright*, 100 Ind. 515, 58 Am. Rep. 805; *Bodenbarger v. Bramblett*, 78 Ind. 218; *Henderson v. McDonald*, 84 Ind. 149; *Hale v. Boardman*, 27 Barb. 85.

#### XI. Effect of assent.

The promise is not revokable after the assent of the party to be benefited. *Bassett v. Hughes*, 43 Wis. 519.

And after notice of the promise and assent thereto, it cannot be revoked by the promisee. *Putney v. Farnham*, 27 Wis. 187.

If the third party elects to affirm such contract, he may maintain an action for its breach. *Boals v. Nixon*, 23 Ill. App. 517.

By the acceptance of such a promise, the third party manifests, as between himself and the promisee, his acceptance by resorting to prepared remedies. *Carver v. Eads*, 65 Ala. 190; *Henry v. Murphy*, 54 Ala. 245, to the same effect.

The assent being sufficiently proved by the bringing of an action on the contract. *Arnold v. Lyman*, 17 Mass. 400, 9 Am. Dec. 154.

The money, having, however, been deposited with the defendant for the purpose of paying the plaintiff, the plaintiff's assent to the arrangement, and his acceptance of the provision made for the payment to him, whether such assent and acceptance be contemporaneous with the acts of the other parties or subsequent, must operate to discharge the debt for which it was designed to provide, unless the provision can from any case be held collateral. *Warren v. Batchelder*, 16 N. H. 580; *Clough v. Giles*, 64 N. H. 73; *Beit v. McLaughlin*, 12 Mo. 423.

But until the acceptance of the promise, the parties to the agreement have the right to rescind. *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 670.

#### XII. Election of remedies.

The release of the principal by the bringing of suit against the promisor has been upheld upon the ground that while the law does this in favor of such third person for whose benefit it was made, it does not confine such person to the remedy so provided, it being at his election. *Bohanan v. Pope*, 43 Me. 98.

If the party elects to bring action against the person primarily liable upon the contract, he can do so, and in such case the principal debtor may recover over against such party. *Ibid.*

An adoption of the former remedy is a release of the latter. *Ibid.*

The following cases uphold these principles: *Todd v. Tobey*, 29 Me. 219; *Motley v. Manufacturing Ins. Co.*, 20 Me. 387, 80 Am. Dec. 591; *Johnson v. Collins*, 14 Iowa, 68; *Thompson v. Bertram*, 14 Iowa, 25 L. R. A.

476; *Scott v. Gill*, 19 Iowa, 187; *Phillips v. Van Schaick*, 37 Iowa, 229; *Roberts v. Corbin*, 26 Iowa, 315, 96 Am. Dec. 146.

#### XIII. Release of the promise.

Such a promise may be released, changed, or abandoned before being accepted by the third party. *Gilbert v. Sanderson*, 56 Iowa, 349, 41 Am. Rep. 108; *Jones v. Higgins*, 80 Ky. 409; *Trimble v. Strother*, 25 Ohio St. 378.

Such a contract must be enforced before the parties thereto rescind it. *Parlin v. Hall*, 2 N. Dak. 473.

#### XIV. As a defense to an action.

It may be pleaded by way of set-off. *Green v. Richardson*, 4 Colo. 584; *Green v. Morrison*, 5 Colo. 18.

#### XV. Action maintainable by either party.

In *Steele v. Aylesworth*, 18 Conn. 244, it was held that the suit was maintainable by either the promisee or the beneficiary.

A contract made with a party for the benefit of another may be sued upon by either. *Mosman v. Bender*, 80 Mo. 579; *Rogers v. Gosnell*, 51 Mo. 466.

#### XVI. State doctrines.

In Alabama the law is stated as follows:

Where one, for a sufficient consideration moving from another indebted to a third person, promises him so indebted to pay his creditor, a failure to comply with the contract gives a right of action over to the promisee or to the person for whose benefit the promise was made. *Shotwell v. Gilkey*, 81 Ala. 724; *Mason v. Hall*, 30 Ala. 599; *Huokabee v. May*, 14 Ala. 263.

Such promise, however, must be specially declared upon, except where an action for money had and received would lie. *Mason v. Hall*, *supra*.

The action was upheld in *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293, a case of a contract by a married woman to pay a debt as part of the consideration of a purchase.

Such actions are upheld in Colorado, the court stating that it accorded the remedy to the party who in most instances was chiefly interested to enforce the promise, and avoided multiplicity of suits, without causing injustice to either party. *Lehow v. Simonton*, 8 Colo. 346.

Where supported by a valuable consideration. *Green v. Richardson*, 4 Colo. 584; *Green v. Morrison*, 5 Colo. 18.

In Connecticut it is taken as now established that even in a court of law a third person may maintain a suit on a parol promise made for his benefit, although he is not a party to the contract. *Crocker v. Higgins*, 7 Conn. 847; *Meech v. Ensign*, 49 Conn. 191, 14 Am. Rep. 225.

The same is the rule in Florida, provided there is a clear intention and purpose to benefit the third person strictly and primarily. *Hunter v. Wilson*, 21 Fla. 250; *Wright v. Terry*, 23 Fla. 160.

It is stated as well settled in Illinois that where one person, for a valuable consideration engages with another by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of the engagement. *Williamson Stewart Paper Co. v. Seaman*, 29 Ill. App. 62; *Hume v.*



tioned in it. In considering the question presented we must lay aside, as having no bearing upon it, the cases of official or statutory bonds required or authorized for the benefit or security of persons not named as obligee, a nominal obligee being named, and where the statute expressly or by implication authorizes such persons to sue upon them. Instances of such are sheriffs' bonds, probate

bonds, bonds authorized by the Mechanic's Lien Law in Gen. Stat. 1878, and such as were considered in *St. Paul v. Butler*, 30 Minn. 459, and *Morton v. Power*, 33 Minn. 521. As, so far as appears by the complaint Benz could not be liable to pay for the work done and materials furnished in fulfilling the contract to repair, and, as, under the law then in force, his interest in the property

*Brower*, 25 Ill. App. 120; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Eddy v. Roberts*, 17 Ill. 506; *Beasley v. Webster*, 64 Ill. 458; *Brown v. Straif*, 19 Ill. 88; *Bristow v. Lane*, 21 Ill. 194; *Rabbermann v. Wiskamp*, 64 Ill. 179.

And upon such an agreement to pay all the debts of one, any creditor may sue. *Hume v. Brower*, *supra*; *Shober Lithographing Co. v. Kerting*, 107 Ill. 244; *Snell v. Ives*, 65 Ill. 279; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 497, to the same effect.

The earlier Indiana cases upheld the principle that the third party was not entitled to sue at law upon such contract, there being no privity between the promisor and such third party. *Salmon v. Brown*, 6 Blackf. 347; *Farlow v. Kemp*, 7 Blackf. 544; *Britzell v. Fryberger*, 2 Ind. 178; *Conklin v. Smith*, 7 Ind. 107, 63 Am. Dec. 416.

In equity, however, such a suit is always maintainable. *Cross v. Truesdale*, 28 Ind. 44.

The party making the promise is treated as a trustee for the person for whose benefit it is made. *Miller v. Billingsly*, 41 Ind. 459.

In the Indiana code of procedure, the plaintiff is entitled, on bringing his action, to whatever relief either the law or equity would have afforded him on the case made before the distinction between them in practice was abolished. The two systems, being blended by the code and other legal or equitable rights, are now enforceable in the civil action provided for by the code. *Ibid.*; *Potter v. Smith*, 36 Ind. 221; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62.

The complaint under the code being regarded as a bill in chancery under the old practice. *Davis v. Calloway*, 30 Ind. 112, 36 Am. Dec. 670; *Bird v. Lanoue*, 7 Ind. 615; *Day v. Patterson*, 18 Ind. 114.

In actions at law privity of contract is essential, but the rule is and always has been different in equity, and the rule should be regarded as settled in Indiana that a party, not known as a contracting party for whose benefit the contract was made, may maintain a suit upon it in equity. *Miller v. Billingsly*, *supra*; *Ball v. Silver*, 17 Ind. 539; *Cloud v. Moorman*, 18 Ind. 40; *Day v. Patterson*, *supra*; *Lamb v. Donovan*, 19 Ind. 40; *Shucraft v. Davidson*, Id. 98; *Elliott v. Scott*, Id. 290; *Beals v. Beals*, 30 Ind. 168; *Devol v. McIntosh*, 23 Ind. 529; *Cross v. Truesdale*, and *Davis v. Calloway*, *supra*; *Marlett v. Wilson*, 30 Ind. 240; *Mathews v. Ritenour*, 31 Ind. 81; *Jaqua v. Montgomery*, 33 Ind. 36, 5 Am. Rep. 168; *Ritenour v. Mathews*, 34 Ind. 279; *Haggerty v. Johnston*, 48 Ind. 44; *South Side Planing Mill Asso. v. Cutler & Savidge Lumber Co.* 64 Ind. 566; *Rodenbarger v. Bramblett*, 78 Ind. 212; *Worley v. Sipe*, 111 Ind. 238; *Pruitt v. Pruitt*, 91 Ind. 598; *Redelsheimer v. Miller*, 107 Ind. 485, where the action was upon an agreement with a principal debtor, based upon a consideration to pay his debt to the creditor; *Stevens v. Flannagan*, 31 Ind. 122; *Carnahan v. Tousey*, 38 Ind. 561; *Leake v. Ball*, 116 Ind. 214.

In *Copeland v. Summers* (Ind.) Nov. 27, 1893, it was held that the rule was too familiar to require the citation of authority.

Where an action was brought by an administrator for the recovery of property, and was compromised by the defendants undertaking to pay all valid claims against the intestate's estate in consideration of the withdrawal of the suit, which was dis-

missed, it was held that a third party could sue upon such agreement. *Cross v. Truesdale*, *supra*.

Under the Iowa code, the party holding the legal title to a cause of action, though a mere agent or trustee with no beneficial interest therein, may sue thereon in his own name. *Cassidy v. Woodward*, 77 Iowa, 354; *Cottle v. Cole*, 20 Iowa, 481; *Rice v. Savery*, 22 Iowa, 470; *Pearson v. Cummings*, 23 Iowa, 344; *Knadler v. Sharp*, 36 Iowa, 232; *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 514; *Burrows v. Robertson*, 7 Iowa, 101.

The law in Iowa is that an action can be maintained upon a promise made for the benefit of a third person, if there is a sufficient consideration. *Pope v. Porter*, 33 Fed. Rep. 7.

In a case where a contract was made with the father of an infant for the benefit of the infant, and the question of emancipation did not arise, it was held that an action could be brought by the infant upon such contract, even though made with the father. *Gooden v. Rayl*, 85 Iowa, 522.

The rule is said to be well established in Kansas that a third person, not a party or privy to a contract, may sue thereon for his own benefit. *Anthony v. Herman*, 14 Kan. 494; *Strong v. Marcy*, 33 Kan. 109; *Brenner v. Luth*, 28 Kan. 583; *Burton v. Larkin*, 36 Kan. 245, 59 Am. Rep. 541; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361; *Mumper v. Kelley*, 43 Kan. 256.

It would also seem to be well established in Kentucky, where it has been held that section 21 of the Revised Code, ed. 1888, does not take away the right from the real party in interest to bring suit in his name. *Smith v. Smith*, 5 Bush, 625; *Allen v. Thomas*, 3 Met. (Ky.) 198, 77 Am. Dec. 169; *Lucas v. Chamberlain*, 5 B. Mon. 276.

That a party for whose benefit a promise is made to another may maintain an action upon such promise against the party who has made it, though not made to the plaintiff, is a proposition too well established by this court to require a citation of cases to support it. *Dodge v. Moss*, 82 Ky. 441.

The action was sustained in *Paducah Lumber Co. v. Paducah Water Supply Co.* 7 L. R. A. 77, 99 Ky. 840, upon a contract made by the city for the supply of water for the benefit of the inhabitants, by reason of a breach of which contract the company sustained damage, the courts holding the plaintiff to be the real party in interest within the provisions of the civil code.

The same is the law in Louisiana. *Ferguson's Succession*, 17 La. Ann. 255; *New Orleans St. Joseph's Asso. v. Magnier*, 16 La. Ann. 338.

In *Asby v. Asby*, 39 La. Ann. 105, it was held that an action could only be brought by one having a real or actual interest which he pursues under the Code of Practice, article 15.

The Maine courts upheld the same doctrine.

If one makes a promise to another for the benefit of a third person the latter may maintain an action upon it. *Dearborn v. Parks*, 5 Me. 81, 17 Am. Dec. 208; *Hinkley v. Fowler*, 15 Me. 235.

Where money has been paid by one party to another for the benefit of a third, the latter may maintain an action for the money. *Bohanan v. Pope*, 43 Me. 93.

The principle was upheld in *Carr v. Bartlett*, 73

could not be subject to a lien therefor, it was legally a matter of indifference to him whether the work and materials were paid for or not. He had no duty in respect to it. And the question comes to this: Where, in a contract between two persons one promises the other to do something for the benefit of a stranger to the contract, and the promisee has no relation to the thing to be done nor to

the stranger to be benefited, can such stranger bring an action to enforce the promise? In some of the text-books and decisions it is stated generally "that, where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." But we do not think there is a case to be found in which such an action was sustained upon a bare promise,

Me. 120, a case of a subscription contract, the mutual promise being a sufficient consideration.

The doctrine in favor of the right to sue is also upheld by the Maryland courts. *Coates v. Pennsylvania F. Ins. Co. of Philadelphia*, 58 Md. 172, 42 Am. Rep. 827.

So if one has money in hand belonging to a party and promises to pay it to another. *Owings v. Owings*, 1 Harr. & G. 484.

The earlier Massachusetts decisions follow the doctrine favoring such actions, considering its principles as reasonable and consistent with the character of an action of assumpsit for money had and received. *Hall v. Marston*, 17 Mass. 675.

In *Brewer v. Dyer*, 7 Cush. 387, the court also upheld the doctrine, as resting upon a broad and satisfactory basis, the law operating upon the act of the parties creating a duty, establishing a privity and implying a promise and obligation.

In *Cabot v. Haskins*, 3 Pick. 92, the court held there was no doubt that, in the case of an advance of money by one person to another, with a promise at the request of the party advancing the money to pay the same to a third person, such third person may maintain an action upon the promise.

Where the promise was to the father for the child's benefit when of age, it was held that the child might sue the father having his interests in view when he entered into the transaction, even though the contract was in the father's name. *Felton v. Dickinson*, 10 Mass. 237. See, however, *Marston v. Bigelow*, 5 L. R. A. 43, 150 Mass. 45, *infra*, head "Not maintainable."

The principles established in *Hall v. Marston*, *supra*, are followed by the court in *Carnegie v. Morrison*, 2 Met. 381, an action of assumpsit founded on a letter of credit given by the defendants by their general agent in Boston, in favor of the plaintiffs, and for the purpose of paying in part a debt due from a debtor to the plaintiffs.

The contrary doctrine would, however, seem to be established by the later cases in that state, the general rule being declared to be that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and therefore a promise made by one person to another for the benefit of a third, who is a stranger to the consideration, will not support an action by the latter. *Exchange Bank of St. Louis v. Rice*, 107 Mass. 37, 9 Am. Rep. 1.

In the above case the court stated that the cases of *Carnegie v. Morrison*, and *Brewer v. Dyer*, *supra*, were qualified by the later cases where the limits of the doctrine were defined and a disinclination repeatedly expressed to admit new exceptions to the general rule. *Mellen v. Whipple*, 1 Gray, 317; *Millard v. Baldwin*, 3 Gray, 484; *Field v. Crawford*, 6 Gray, 116; *Dow v. Clark*, 7 Gray, 108, settling the law in that state; *Colburn v. Phillips*, 13 Gray, 64; *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691.

The doctrine will not be extended to cases outside of the class mentioned in *Mellen v. Whipple*, *supra*; head IV. b, *supra*; so held in *Dow v. Clark*, *supra*, where the defendants by agreement not under seal, for a certain consideration, promised to pay the debts of a railroad company, including certain bonds owned by the plaintiff.

In *Millard v. Baldwin*, *supra*, the principle was 95 L. R. A.

confined exclusively to parol contracts; a case of an agreement founded upon an award under submission to arbitration.

The court in the later case of *Exchange Bank of St. Louis v. Rice*, *supra*, looked upon the expressions of opinion in *Carnegie v. Morrison* and *Brewer v. Dyer*, *supra*, as unguarded.

The doctrine established in *Exchange Bank of St. Louis v. Rice*, *supra*, was followed in the later cases of *Gamwell v. Pomeroy*, 121 Mass. 207; *Prentice v. Brimhall*, 123 Mass. 281; *Carr v. National Security Bank*, 107 Mass. 45, 9 Am. Dec. 6; *Hogers v. Union Stone Co.* 130 Mass. 581, 39 Am. Rep. 473; *Morrill v. Lane*, 136 Mass. 98; *Marston v. Bigelow*, 5 L. R. A. 43, 150 Mass. 45.

The exceptions noticed in *Mellen v. Whipple*, *supra*, were not, however, overruled by the above cases. *Exchange Bank of St. Louis v. Rice*, *supra*.

In Michigan, the rule is that a promise made by one person to another, for the benefit of a third, a stranger to the consideration, will not support an action by the latter. *Linneman v. Moros*, 98 Mich. 173.

In the case of *Pipp v. Reynolds*, 20 Mich. 88, where, as between the third party and the plaintiff, the former had undertaken to do the work, and as between the defendant and such party the defendant was alleged to have promised to carry out that agreement, thus making the performance on such third party's part one of the objects of the second agreement, the court held there was no contract relation between them so far as the latter agreement was concerned, such as would entitle the plaintiff to recover damages for a breach thereof.

The same principle is recognized in *Brown v. Hazen*, 11 Mich. 219, where the plaintiff sued the defendant in assumpsit upon a promise to pay a note of a debtor of the plaintiff, made by the defendant to such debtor.

The same doctrine is upheld in *Halsted v. Francis*, 81 Mich. 113, where the only contract proved was between defendant and a third party to pay the latter's note to the plaintiff who was no party to the contract, and gave no consideration and was in no way bound by it, the only consideration being that paid by the third party who was the only one injured by the breach. The case of *Brown v. Hazen*, *supra*, is to the same effect.

And again in *Turner v. McCarty*, 22 Mich. 265; *Wheeler v. Stewart*, 94 Mich. 445; *Hunt v. Strew*, 39 Mich. 368; *Hidden v. Chappel*, 43 Mich. 527; *Hicks v. McGarry*, 88 Mich. 667; *Edwards v. Clement*, 81 Mich. 618.

These cases are all distinguished from the case of *Osborn v. Osborn*, 86 Mich. 48, upon the ground that in that case the promise was made to the plaintiff herself, and there was evidence of her acceptance of the new debtors in place of the old ones, the plaintiff giving up her claim against the original debtor.

And again in *Toohey v. Comstock*, 45 Mich. 603, a case in which the promise was held to be made directly to such third party, and not to another for his benefit.

It is the law in Minnesota, that a person for whose benefit a promise is made may enforce it, although a stranger to the contract and to the consideration.

with no other circumstances to justify an exception to the general rule that an action upon contract can be maintained only where there is privity of contract between the parties. In *Lawrence v. Fox*, 20 N. Y. 268,—the most conspicuous and most thoroughly reasoned case in New York, sustaining an action by a stranger to a contract,—the promisee owed the debt which the promisor agreed

to pay, and loaned him the money, which he agreed to pay to the promisee's creditor. *Thorp v. Keokuk Coal Co. of New York*, 48 N. Y. 253, was a case where the grantee in a conveyance of real estate assumed to pay a mortgage resting on it to secure a debt of the grantor. In the syllabus to the case it is stated that it overrules *King v. Whitely*, 10 Paige, 465, 4 L. ed. 1053, but, as we read

*Starba v. Greenwood*, 28 Minn. 521; *Maxfield v. Schwartz*, 43 Minn. 221.

In *Follansbee v. Johnson*, 28 Minn. 311, it was stated that the weight of authority was to the effect that with regard to contracts not by specialty, the person for whose benefit the promise was made might enforce it, though a stranger to the contract and to the consideration.

To the same effect, *Jordan v. White*, 20 Minn. 91; *Sanders v. Clason*, 13 Minn. 379.

In *Weish v. First Div. St. Paul & P. R. Co.*, 25 Minn. 514, it was held that the company were liable under the agreement of organization, as sanctioned by the legislature to third parties, in respect to the liabilities assumed by it thereunder.

In the action of a contractor's bond given to a city, it was held that the indemnified party might maintain an action upon such bond in his own name, without joining the city or the board. *St. Paul v. Butler*, 30 Minn. 459; *Morton v. Power*, 33 Minn. 521.

The cases of *St. Paul v. Butler*, and *Morton v. Power*, *supra*, were distinguished in *State Bank of Duluth v. Heney*, 40 Minn. 145, the latter case giving the city the right of action upon the bonds.

In *Murphie v. Scovell*, 44 Minn. 530, it was held that the action might be prosecuted by the party in whose name the contract was made. *Cremers v. Wimmer*, 40 Minn. 511, to the same effect.

Where the action was upon a penal bond executed to the plaintiff by the defendant as principal, and by other defendants as sureties, defendant had entered into a contract with the plaintiff to perform work, and to furnish labor and materials, the bond being given to secure the plaintiff from liens upon the premises for labor done, or materials furnished to the defendant in the performance of his contract; it was held that the plaintiff was not entitled to recover a voluntary payment of a debt of the defendant paid by him, but that for payments necessarily made by the plaintiff the defendant would be liable. *Price v. Doyle*, 34 Minn. 400.

So in Mississippi where the agreement is adopted by the stranger, or he has a benefit in the transaction. *Sweatman v. Parker*, 49 Miss. 19; *Bonner v. Marx*, 51 Miss. 141.

The Missouri courts follow the same doctrine, it being stated as the prevailing doctrine that an action lies on the promise made by a defendant upon a valid consideration to a third person for the benefit of a plaintiff, even though the latter was not privy thereto. *Rogers v. Gosnell*, 53 Mo. 559; *Robbins v. Ayers*, 10 Mo. 512, 47 Am. Dec. 125; *Markle v. Western U. Tele. Co.* 19 Mo. App. 80; *State v. Laclede Gaslight Co.* 103 Mo. 472; *Bank of Missouri v. Benoit*, 10 Mo. 521; *Ellis v. Harrison*, 104 Mo. 270; *Fitzgerald v. Barker*, 70 Mo. 635; *Schuster v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 290; *Mosman v. Bender*, 80 Mo. 579.

The principle in favor of such actions is upheld in *Meyer v. Lowell*, 44 Mo. 323, where a firm of debtors sold out to the defendants, part of the consideration being the assumption of the debt due to the plaintiff. It was held the plaintiffs were entitled to recovery, and that the plaintiff was not a stranger to the consideration so as to prevent his suing in his own name.

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In construing the sections 1990, 1991, of the Missouri Revised Statutes, ed. of 1899, the court took it to be clearly implied that the beneficiary in such a contract was to be regarded as a real party in interest, and that as such he might sue thereon in his own name, while, on the other hand, the contracting party (as trustee of an express trust within the statutory definition), might likewise maintain action on the same contract. *Ellis v. Harrison*, *supra*; *Snider v. Adams Exp. Co.* 77 Mo. 523.

The provisions of the Missouri code allowing a trustee to sue in his own name, upon a contract made for the benefit of the *cæstui que trust*, was held not to affect the right of the beneficiary to sue in his own name, as it existed prior to the code. *Rogers v. Gosnell*, 51 Mo. 465.

The code has not changed the rule. *Ibid*.

It was sought to apply the doctrine to the case of damages occasioned by fire owing to an inadequate water supply in an action against the water company under its contract with the municipality brought by a citizen who claimed that the action was made for his benefit and that he had therefore a right to sue, but the court, while upholding the doctrine as the law in that state, held that the case did not come within its limits. *Howsman v. Trenton Water Co. (Mo.)* 23 L. R. A. 146.

In a note to the above case in 23 L. R. A. 146, the cases upon the question of the right to sue a water company are collected.

Where the promise was made to an administrator to pay the estate of the deceased one half the sum due to such estate upon a demand, in consideration of his releasing a levy of execution, it was held that the administrator could maintain an action against such third person for the benefit of the estate, the estate of the deceased being the real party in interest. *Mosman v. Bender*, 80 Mo. 579.

And in Nebraska it has been held that where one makes a promise to another for the benefit of a third person, the latter may maintain an action upon the promise, even though the consideration did not move from him. *Shamp v. Meyer*, 20 Neb. 223.

So in Nevada, the court stating that 'besides the statute, which provides that every action shall be prosecuted in the name of the real party in interest, the beneficiary named in the contract may maintain an action thereon in his own name. *Millani v. Tornini*, 19 Nev. 133; *Ruhling v. Hackett*, 1 Nev. 360; *Alcala v. Morales*, 8 Nev. 132; *Bishop v. Stewart*, 13 Nev. 25, to the same effect.

In New Hampshire the courts seem to require a novation. *Warren v. Batchelder*, 16 N. H. 530; *Clough v. Giles*, 64 N. H. 73, both *supra*.

Such actions were upheld in *Jackson v. Smith*, 52 N. H. 11.

It would seem to be the rule in New Jersey that such contract cannot be sued upon so far as damages for a breach of duty arising therefrom are concerned. *Marvin Safe Co. v. Ward*, 46 N. J. L. 19.

But a different rule would seem to exist upon simple contracts. *Crowell v. Currier*, 27 N. J. Eq. 153.

On a simple contract, an action may be maintained on a promise made by the defendant to a third person for the plaintiff's benefit, without any consideration moving from the plaintiff. *Crowell*

the opinion, it goes no further than to question the reason given by the chancellor in the latter case for sustaining an action in such a case when it can be sustained. The case in 10 Paige was one where the grantee in a conveyance assumed to pay a mortgage on real estate for which the grantor was not personally liable. It was held that the creditor could not recover of the grantee. The chan-

cellor stated as the principle upon which a creditor can recover from a grantee so assuming to pay a debt of the grantor that a creditor is entitled to be subrogated to securities for the debts held by a surety, and that between the grantor and the grantee in such case the latter becomes the principal debtor and the former surety. Another and simpler reason might have been given, to wit, that where

v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Joslin v. New Jersey Car Spring Co. 36 N. J. L. 141; Cocks v. Varney, 45 N. J. Eq. 72.

The New York doctrine was thus stated in *Vrooman v. Turner*, 69 N. Y. 230, 25 Am. Rep. 195; to give a third party, who may derive a benefit from the performance of the promise an action, there must be first, an interest by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally. To the same effect: *St. Marks Church in Newcastle v. Teed*, 150 N. Y. 688; *Lawrence v. Fox*, 20 N. Y. 238; *Farley v. Cleveland*, 4 Cow. 432, 15 Am. Dec. 387; *Cleveland v. Farley*, 9 Cow. 639; *State Bank at New Brunswick v. Mettler*, 2 Bosw. 392, 398; *Astor v. L'Amoureux*, 4 Sandf. 524; *Ellwood v. Monk*, 5 Wend. 226; *Sailly v. Cleveland*, 10 Wend. 159; *Glen v. Hope Mut. L. Ins. Co. of New York*, 56 N. Y. 879; *Simson v. Brown*, 68 N. Y. 355; *Carter v. Holahan*, 92 N. Y. 498; *Durnherr v. Rau*, 136 N. Y. 219.

So in *Willis v. Smyth*, 91 N. Y. 298, where money was deposited in a bank for a debtor's benefit.

In *Todd v. Weber*, 96 N. Y. 181, 47 Am. Rep. 20, the court looked upon the doctrine upholding such actions, as the prevailing one and as well settled. To the same effect: *Duke of Cumberland v. Codrington*, 3 Johns. Ch. 229, 254, 1 L. ed. 601, 610; *Butts v. Perkins*, 41 Barb. 518; *Barker v. Bradley*, 42 N. Y. 816, 1 Am. Rep. 621; *Schemmerhorn v. Vanderheyden*, 1 Johns. 139, 8 Am. Dec. 304; *Knowles v. Erwin*, 43 Hun, 150, where suit was brought by a child upon a contract made with her father for her benefit.

The same principle is upheld in *Barker v. Bucklin*, 2 Denio, 45, 48 Am. Dec. 728, even though the consideration move from a third party.

Although the consideration does not move from him. *Delaware & H. Canal Co. v. Westchester County Bank*, 4 Denio, 97.

*Lawrence v. Fox*, *supra*, was recognized in *Litchfield v. Flint*, 104 N. Y. 543, where the payee of a note had transferred it upon a promise of valuable consideration to pay it.

The principles upholding such action, upon the ground that the special promise was for the plaintiff's benefit, were recognized in *Dolph v. White*, 12 N. Y. 300.

In the case of *Lawrence v. Fox*, *supra*, a dissenting opinion was filed by Comstock, J., who upheld the doctrine established in the English case of *Tweddle v. Atkinson*, and distinguished the case from *Mellen v. Whipple*, *supra*, upon the ground that it and like cases were cases of trusts.

Some of the judges, however, held the action maintainable upon the principle of agency, the act of the agent being ratified when ascertained. *Lawrence v. Fox*, 20 N. Y. 238.

The case of *Christ v. Sobell*, 81 Fed. Rep. 550, sustains the doctrine under the New York code of civil procedure, under which suits must be brought by the parties in interest, causes of action which accrued to one firm being recoverable by another firm which has succeeded to its right.

Where persons indebted to the plaintiff placed a bill of exchange in the hands of defendants for

collection, and the latter upon the consideration thereof undertook to collect it and to pay the amount to plaintiffs in satisfaction of their debt against the party making the deposit, it was held that the defendants, having collected the bill, were liable in an action at the suit of the plaintiff upon such promise. *Delaware & H. Canal Co. v. Westchester County Bank*, *supra*.

In *Lorillard v. Clyde*, 10 L. R. A. 113, 122 N. Y. 496, it did not appear that the plaintiff made any agreement with defendant to pay its debt, or that the defendant made any promise to the plaintiff, or to the company, to pay the debt, or that either the plaintiff or the other company had any knowledge of the agreement or of the pretended obligation arising from it; until long after the agreement was made and had been in process of performance in other respects, and the court therefore distinguished the case from the principles laid down in *Lawrence v. Fox*, *supra*, and held the action not maintainable.

The doctrine in favor of such actions is well established in North Carolina.

In *Draughan v. Bunting*, 81 N. C. 10, the doctrine in favor of such action was taken as well settled, and it was further recognized in *Peacock v. Williams*, 98 N. C. 324; *Hall v. Robinson*, 30 N. C. 54, in the form of an action for money had and received.

Where the right of action rested entirely upon the undertaking on the part of the defendant to surrender property to the owner, the court held the defendant incurred no personal liability enforceable by the plaintiff in an action *ex contractu* the agreement being one of indemnity to the owner against any one asserting a lien, and was solely between the parties to it with whom the plaintiff was not in privity, there being no promise to pay plaintiff and the defendant having no funds, only holding a note secured from the party by which funds might be derived. *Peacock v. Williams*, *supra*.

In the earlier Ohio cases the court would seem to have recognized the right of action in a stranger, but the rule must now be understood and applied with its proper qualifications. *Thompson v. Thompson*, 4 Ohio St. 333; *Crumbaugh v. Kugler*, 3 Ohio St. 549; *Bazaley v. Waters*, 7 Ohio St. 359; *Müller v. Florer*, 15 Ohio St. 151; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Emmitt v. Brophy*, 42 Ohio St. 82; *Trimble v. Strother*, 25 Ohio St. 378.

Such actions are maintainable under the Oregon code. *Baker v. Eglin*, 11 Or. 338; *Holladay v. Davis*, 5 Or. 48.

The principles were further supported by *Hughes v. Oregon R. & Nav. Co.* 11 Or. 437, a third party being the real party in interest under the general laws of the state.

In *Schnelder v. White*, 12 Or. 508, the doctrine was considered as too well settled to require authority to support it.

In Pennsylvania it is held that if one party pay money to another for the use of a third person, or, having money belonging to another, agrees with that other to pay it to a third, an action will lie by the person beneficially interested. *Blymire v. Boistle*, 6 Watts, 182, 31 Am. Dec. 458.

He for whose benefit a promise is made, may maintain an action upon it, even though no consideration passed from him, nor any promise was

one delivers to or leaves in the hands of another a fund with which to satisfy an obligation of the former, a duty in the nature of a trust is thereby created. The decision in 10 Paige was followed in *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137, and approved in *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440. In *Vrooman v. Turner*, 69 N. Y. 260, 25 Am. Rep. 195, similar in its facts

to the case in 10 Paige, the court go over the whole ground, recognize the decision in *Lawrence v. Fox*, and hold the two decisions consistent, and follow that in 10 Paige. It lays down this rule: "To give a third party who may derive a benefit from the performance of the promise an action there must be—First, an intent by the promisee to secure some benefit to the third party; and, second,

made direct to him. *Hostetter v. Hollinger*, 117 Pa. 603; *Hind v. Holdship*, 2 Watts, 104, 26 Am. Dec. 107; *Justice v. Tallman*, 86 Pa. 147; *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 438; *Beers v. Robinson*, 9 Pa. 223; *Grim v. Thomas Iron Co.* 115 Pa. 611; *Beling v. Zantlinger*, 13 Pa. 50, where a landlord gave his tenant an order to pay the rent to a creditor of such landlords, the order being accepted by the tenant; *Campbell v. Lacock*, 40 Pa. 448; *Merriman v. Moore*, 90 Pa. 78; *Wynn v. Wood*, 97 Pa. 216; *Cummings v. Klapp*, 5 Watts & S. 511; *Commercial Bank of Cincinnati v. Wood*, 7 Watts & S. 89, where a bank took a draft in payment of a note in their hands and agreed to pay the note, the holder of the note assenting to the arrangement, and he was held entitled to sue the bank; *Vincent v. Watson*, 18 Pa. 93, where the lessees of a debtor undertook to pay certain debts and assume certain liabilities for which they were to be allowed in the rent account, the lessees publicly assuming the claims.

The doctrine is thus stated in *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 438, where there is a transfer of a fund to the promisor for the payment of a debt, he is liable to the creditor on his verbal promise made to the owner of the fund, or for property charged with the payment of the debt by transfer to him, on his promise to the vendor to pay the debt, he is liable to an action by the creditor.

The action is looked upon as not simply to pay the debt of another, but to hand over funds appropriated by the debtor himself to the creditor, for whose benefit they were deposited, the creditor being the party to be benefited becoming the owner of the fund impressed with a trust in his favor, *Justice v. Tallman*, 86 Pa. 147.

In *Ramsdale v. Horton*, 3 Pa. 330, the action was to recover from the defendant money borrowed of the plaintiff by another party, which the defendant had promised such party to pay to the plaintiff in discharge of his debt. It was held that the plaintiff's action could not be maintained, unless he accepted the defendant as his debtor in the place of the original debtor, and that on no other foundation could the right to sue stand.

Where a debtor promised a constable, having an execution in his hands, to pay the same, it was held that such promise could only be enforced by the constable and not by the creditor, the plaintiff in the action, as it was made to the constable for his own use, being not only to pay the debt but the costs to which the plaintiff had no claim. *Cummings v. Klapp*, 5 Watts & S. 511.

In Rhode Island such an action is generally upheld, the contract being considered as not within the statute of frauds. *Wood v. Moriarty*, 15 R. I. 518; *Urquhart v. Brayton*, 12 R. I. 169; *Merriman v. Social Mfg. Co.* 12 R. I. 175.

In South Carolina the action is maintainable by the third party. *Brown v. O'Brien*, 1 Rich. L. 268, 44 Am. Dec. 254, where notes had been placed in defendant's hands upon his promise to hand them to plaintiff; *Thompson v. Gordon*, 3 Strobb. L. 196, a case of a promise by a son to his father for the payment of certain moneys to his sisters upon the father's death.

In Tennessee the right of such third party is looked upon and enforced upon the principle of the 35 L. R. A.

equitable doctrine, which allows a vendor to proceed, either against the estate sold, or against the purchase money in the hands of a sub-purchaser for damages for breach of contract, likening the action of assumpsit to an equitable one, investing the party with a right to recover what in equity belongs to him. *Moore v. Stovall*, 2 Lea, 543.

In Texas the real party in interest must sue. *Thompson v. Cartwright*, 1 Tex. 37, 46 Am. Dec. 95; *Monroe v. Buchanan*, 27 Tex. 247.

In *Thompson v. Cartwright*, *supra*, the party appearing to be the holder of a note was allowed to sue in his own name.

In Vermont, the doctrine in favor of such actions prevails. *Arlington v. Hinds*, 1 D. Chip. 431, 12 Am. Dec. 704; *Rutland & B. R. Co. v. Cole*, 24 Vt. 33, a case of an action of assumpsit upon a promissory note, to which cases the court extended the doctrine.

The action may be brought in the name of those in interest, without joining those in whose name the contract was made, and the suit may always be brought in the name of the contracting parties. *Lapham v. Green*, 9 Vt. 407.

The legal interest in a contract is in the person to whom the promise is made and from whom the consideration passes, and he is the person who must bring the action, and a person claiming to come within the exception to the rule must bring himself strictly within the exceptions. *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332.

In the ordinary case of the receipt of property or money by one party, with an undertaking to pay a debt due to a third party, such third party is entitled to the action in his own name. Where, however, the contract is special, the party with whom it is made can alone sue, the courts holding that after the money is realized it belongs absolutely to the third person, and the law implies the promise to pay. *Phelps v. Conant*, 30 Vt. 277; *Crampton v. Ballard*, 10 Vt. 231.

In *United States Nat. Bank v. Burton*, 58 Vt. 426, it is said to be settled in that state, contrary to the general rule of commercial law, that an action upon a promissory note might be maintained in the name of the party beneficially interested, where the note was in terms made payable to his agent, the treasurer or cashier. *Rutland & B. R. Co. v. Cole*, 24 Vt. 33, to the same effect.

In Virginia the doctrine that a party for whose benefit a contract is made may sue thereon, is upheld, the court stating that such a rule was in accordance with sound principles, and also with well established principles of law, it being the justice of the action to enforce a solemn contract of a party based upon a valuable consideration, received and enjoyed by him. *Moore v. Stovall*, 2 Lea, 543.

The doctrine was recognized in *Ross v. Milne*, 12 Leigh, 204, 37 Am. Dec. 646, where there was an executed gift and a valuable consideration. See *Osborne v. Cabell*, 77 Va. 462.

In *Johnson v. McClung*, 26 W. Va. 659, the court construed the second section of chapter 71 of the West Virginia Code, as follows: If a covenant or promise be made for the sole benefit of a person with whom it is not made, or (if a covenant or promise made for the sole benefit of a person) with

some privity between the two,—the promisee and the party to be benefited,—and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." "There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has a legal

interest in the performance of the agreement;" and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." In some cases, near relationship, as of father and daughter, or uncle and nephew, has been held to supply the place of a strictly legal right in the third party. *Dutton v. Pool*, 1 Vent. 818; *Felton*

whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.

In Wisconsin, the case of *Kimball v. Noyes*, 17 Wis. 606, confirms the doctrine in favor of such actions, and suggests that they exist, even in the case of bonds and other specialties.

The doctrine is declared settled in *Putney v. Farnham*, 27 Wis. 187, even though the consideration did not move from such party. *Kollock v. Purcher*, 52 Wis. 398; *Jones v. Foster*, 67 Wis. 296; *Grant v. Diebold Safe & Lock Co.* 87 Wis. 72; *McDowell v. Laev*, 36 Wis. 175; *Keeler v. Niagara F. Ins. Co.* 16 Wis. 523, 84 Am. Dec. 714.

See also "State statutes" *infra*, *note*.

#### XVII. Not maintainable.

In *Weller v. Goble*, 66 Iowa, 118, it was sought to apply the principles in favor of such actions to a guarantee of a contract with the owner of property in favor of materialmen but it was not intended for their benefit so as to give them a right to sue.

In an action upon a breach of contract for the advance of money, it was held that persons not parties, with whom there was no undertaking to advance, and therefore no privity, had no right of action. *Cardwell v. Atwater*, 15 Ky. L. Rep. 570.

In *Marston v. Bigelow*, 5 L. R. A. 43, 150 Mass. 45, it was held that a promise, made by one person to another for the benefit of a third, a stranger to the consideration, would not support an action by the latter, and that a person not a party to a contract could not sue upon it.

Where one of the parties had contracted to sell the property in question to the other defendant, and the latter defendant had contracted with the plaintiff for the sale of the same property to him, the plaintiff being ready and willing to perform the contract, but the last-named defendant had refused to complete his contract with the other defendant, the court held the plaintiff was not a party to the first contract, which was still executory, and that neither party could be compelled to specifically perform the same. *McCarthy v. Couch*, 37 Minn. 124.

Where the plaintiff sought to show that his debtor had put demands into the hands of the defendant for collection, which the latter agreed to collect and to pay the proceeds to certain creditors, but there was no evidence to show the amount of the demands to be collected, or the demands to be paid, or that the defendant had paid any of the other demands which he had agreed to pay, or that either of those demands was entitled to priority, it was held that an instruction to the jury that the plaintiff could not succeed unless the money was received under the agreement to appropriate it specifically to pay the plaintiff's debt, or unless the defendant had collected sufficient to pay all the demands which he had assumed to pay, was correct. *Fitch v. Chandler*, 4 Cub. 256.

In *Marston v. Bigelow*, *supra*, the court stated that the case of *Felton v. Dickinson*, 10 Mass. 287, could not be fairly regarded as establishing a general rule, that a son may sue upon a promise made

for his benefit to his father, although the nearness of the relation might be evidence that the promise was made to the father as acting on behalf of and as agent for the son, and there was a promise to the son; but that when the promise was not made to the son and the consideration did not move from him, there was no reason why the nearness of the relation should change the general rule, that a man cannot sue upon a contract to which he is not a party or privy.

In *Anderson v. Fitzgerald*, 21 Fed. Rep. 294, it was attempted to apply the doctrine to the case of a contract by the defendant, with a railroad company for the construction of a certain part of the company's road, which stipulated among other things that the defendant would pay all claims against him or against any sub-contractor under him, for services and labor or materials furnished, and to pay all claims growing out of the work, whether against him or any sub-contractor, for trespass and injury to lands, fences, timber, the use of land for waste and all claims for provisions and supplies, and bills for the board of men, the teams engaged upon the work and similar claims, the damages to be estimated and paid as specified in the contract, the contract providing that in case of damage to the lands or property in the vicinity of the work, the resident engineer should estimate the damage and pay the same to the owner, deducting on his first estimate the amount paid for the value of the work done under the contract; and it was further provided that in all cases the claims for labor and material should be deducted and retained and paid to such claimants, or held till such dues were paid or settled; under which contract the defendant sublet the work, the agreement with the sub-contractor providing that the defendant shall have the same right to pay claims against the sub-contractor which the company had reserved to themselves, and the petition alleged that the sub-contractor gave orders to the plaintiffs for supplies and labor, which the plaintiffs paid and sought to recover by the action, and the court held that under the above facts the doctrine did not apply.

In a recent case, *Constable v. National R. S. Co.*, 154 U. S. 51, 38 L. ed. 903, where an agreement had been entered into between a carrier and the collector of customs to pay the consignee the value of the goods burned, made as a condition to the collector's permit for the goods to remain upon the wharf forty-eight hours, the court held it was not an agreement upon which the owners could sue as adding to the obligation of their contract with the carrier, the bill of lading stating that the goods should be at the consignee's risk.

In this case the first contract was made by the defendant in full contemplation of the fact that it would be obliged to enter into the second and for the special purpose of providing against it, and the court considered it an absurdity to hold that having entered into one contract, knowing that a second would have to be made, wholly inconsistent, the defendant intended to be bound by it. *Constable v. National R. S. Co.* 154 U. S. 51, 38 L. ed. 903.

The court further held that there was a want of privity, and there was no knowledge of the con-

*v. Dickinson*, 10 Mass. 287,—are instances of such. To enforce such a promise in favor of a third party, where there is no obligation to benefit him on the part of the promisor or promisee, nor anything such as near relationship, nor any consideration from the third party, would be much like enforcing an intended gift or gratuity. *Vrooman v. Turner* settled the law in New York, as the decision,

though subsequently referred to with approval (see *Wilbur v. Warren*, 104 N. Y. 198; *Litchfield v. Flint*, 104 N. Y. 548; *Comley v. Daxian*, 114 N. Y. 161; *Lorillard v. Clyde*, 123 N. Y. 498, 10 L. R. A. 113; *Durnherr v. Ravu*, 185 N. Y. 219), has never since been questioned. The question was considered and the cases in Massachusetts summed up in an able and exhaustive opinion by

tract, no change in the position of the parties, no new consideration moving from the plaintiffs, and and that though the contract was nominally made for their benefit the gift of the collector was voluntary, the contract really for his benefit. *Ibid.*

A strong dissenting opinion was delivered in the above case by Jackson, Field, and Gray, JJ., in which the right to maintain such action was upheld upon the lines shown in the case of *Vrooman v. Turner*, 60 N. Y. 280, 25 Am. Rep. 185, there being an intent to benefit, privity of contract and an obligation cast upon the defendant to care for the goods. *Constable v. National S. S. Co. supra.*

### XVIII. Contracts under seal.

Where the contract or promise is by an instrument under seal, the court are divided in their opinion, some maintaining the right of action while others reject it, the latter being the doctrine of the majority.

The doctrine in favor of such actions in cases of this nature is upheld in Alabama where the promise is assented to. *Huckabee v. May*, 14 Ala. 263.

The rule is by the statute (Rev. Stat. 1880, § 1012) extended to cases where the undertaking is under seal and therefore the case of *Moore v. House*, 64 Ill. 162, is declared to be no longer law in that state. *Harms v. McCormick*, 80 Ill. App. 125; *Dean v. Walker*, 107 Ill. 640, 47 Am. Rep. 497, to the same effect.

By section 19 of chapter 110, Practice Statutes of Illinois, 1872, every instrument under seal, except pencil bonds, may be sued and declared upon as if they were unsealed. *Adam v. Arnold*, 86 Ill. 186.

There was no distinction between a simple contract and a contract under seal (*Rogers v. Gosnell*, 51 Mo. 466; *Fitzgerald v. Barker*, 70 Mo. 686; *Heim v. Vogel*, 60 Mo. 529), and is extended to a covenant in a deed poll.

It makes no difference that the contract is under seal. *Hughes v. Oregon R. & Nav. Co.* 11 Or. 437.

Applies equally to instruments under seal. *Emmitt v. Brophy*, 48 Ohio St. 82.

So in the case of *Bassett v. Hughes*, 48 Wis. 319, which regarded it as settled, both with respect to simple and specialty contract. *McDowell v. Laev*, 36 Wis. 171.

The doctrine was applied to a case of covenant, by a husband to pay for the wife's maintenance and support upon a permanent separation, giving her a right to reside where and with whom she chose. *Houghton v. Milburn*, 54 Wis. 554.

The contrary doctrine has been held in the following:

No one can maintain an action at law upon a contract under seal but a party thereto, one for whose benefit it is made cannot sue. *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210.

When the contract is under seal, the action must be in the name of the obligee, though the agreement may be for the benefit of another. *Miller v. Kingsbury*, 28 Ill. App. 523; *Moore v. House*, 64 Ill. 162; *Gautzert v. Hoge*, 73 Ill. 30. But these cases would seem to be no longer law in that state. See cases *supra*.

It is a technical and inflexible rule, that if a deed on the face of it expressly describe and denote who are the parties to it, a third person cannot sue 25 L. R. A.

thereon. *Haskett v. Flint*, 5 Blackf. 69, 33 Am. Dec. 452.

Where one covenants with another to do any act for the benefit of a third, the action cannot be maintained upon such covenant in the name of the third person for whose benefit it was made. *Hinkley v. Fowler*, 15 Me. 226.

The right of action on a sealed instrument belongs to the party having the legal interest. So held in *Northampton v. Elwell*, 4 Gray, 81, where the action was brought by the plaintiffs on a bond made to the commonwealth, for the use of the plaintiff town, the law being stated to be now well settled on that point.

The same conclusion was arrived at in *Robb v. Mudge*, 14 Gray, 534, where the defendant's promise to pay the partnership debts of a firm was by way of covenant and under seal.

Upon an agreement under seal one not a party to it cannot maintain an action at law. *Flynn v. North American L. Ins. Co.* 115 Mass. 449; *Pettee v. Peppard*, 120 Mass. 522.

In the case of an instrument under seal made for the benefit of a third person, the action cannot be maintained by the latter. *Robbins v. Ayres*, 10 Mo. 542, 47 Am. Dec. 125.

An action will not lie upon a covenant made for the benefit of a third party by the latter. *Howe v. How*, 1 N. H. 42, a case of a promise by way of covenant to maintain a wife if she survive her husband.

A stranger to a contract cannot sue at law, upon a deed which contains no covenant with him in express terms. *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650. To the same effect, *Cooks v. Varney*, 45 N. J. Eq. 72.

The doctrine in favor of such actions was held to apply to both simple and specialty contracts. *Coster v. Albany*, 43 N. Y. 399.

In the case of a covenant under seal, the action must be in the covenantee, even though it were exclusively for the benefit of a third person and the consideration moved from him. *Mississippi Cent. R. Co. v. Southern R. Asso.* 8 Phila. 107; *De Bolle v. Pennsylvania Ins. Co.* 4 Whart. 68.

Where, however, it is for the benefit of a third person, he would have such an exclusive equitable ownership of the money when received as would entitle him to use the name of the covenantee in an action brought for his benefit. *Mississippi Cent. R. Co. v. Southern R. Asso. supra.*

The action in such cases must be brought in the name of the covenantee, even though the instrument may be expressed to be for the benefit of a third person. *Fairchild v. North-Eastern Mut. L. Asso.* 51 Vt. 613.

The right to sue under an indenture *inter partes*, is confined to the parties to it. *Boss v. Milne*, 13 Leigh, 204, 37 Am. Dec. 644.

In an action of covenant upon a deed *inter partes*, whereby the defendant covenanted with the covenantee to instruct the plaintiff in a certain line, it was held that the plaintiff could not sue for breach of the covenant, although the obligation purported to be made for his sole advantage, and contained an express covenant to perform the act for his benefit. *Haskett v. Flint*, 5 Blackf. 69, 33 Am. Dec. 452.

But where the assignment was made by a debtor

*Metcalf, J., in Mellen v. Whipple*, 1 Gray, 817. That was the case of an agreement by a grantee of real estate to pay a mortgage for

which the grantor was not personally liable. It was held the creditor could not recover from the grantee. The court attempts to

to the defendant in trust for certain creditors, the defendant did not execute the instrument under seal, but accepted the trust and proceeded to execute it, paying all the creditors except the plaintiff, whom on demand he refused to pay. The court held the plaintiff entitled to recover, and that no special promise was necessary to render the defendant liable. *Frost v. Gage*, 1 Allen, 262.

### XIX. Insurance contracts.

The doctrine applicable to simple contracts, generally, and the appropriate and well-established doctrine of contract of insurance, is, that if one makes a promise to another for the benefit of a third, the latter can maintain an action on it in his own name. *Motley v. Manufacturers Ins. Co.* 29 Me. 337, 50 Am. Rep. 501; *Walsh v. Washington Marine Ins. Co.* 32 N. Y. 440, where the policy of insurance was "on account of whom it may concern."

In *Motley v. Manufacturers' Ins. Co.*, *supra*, mortgaged property was insured by the mortgagor in his own name, the policy containing a stipulation that in case of loss the same was to be paid to the plaintiffs, the mortgagees of the premises, and the question was whether the plaintiff could maintain an action for the policy moneys in his own name. The court held that such action was maintainable, and that the act of issuing process was a sufficient acceptance of the benefit.

Where a clause was inserted in a policy of insurance issued to a mortgagor, that the loss, if any, should be payable to the mortgagee, the latter sued on the policy in his own name. *Keeler v. Niagara F. Ins. Co.* 16 Wis. 523, 84 Am. Dec. 714. *Ripley v. Astor Ins. Co.* 17 How. Pr. 444, to the same effect.

In *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 14, it was held that the words "as his interest may appear," in an insurance policy, imported an interest in a third person so as to entitle him to an action upon the policy.

Where, by agreement, the defendant agreed to reinsure an insurance company on all risks upon its policies outstanding at that date, and also to assume all such policies and pay to the holders thereof, all such sums as the said company might by force of such policies become liable to pay, it was held in an action upon a policy that the defendant, by force of its agreement had become liable to the plaintiffs upon the principles established in *Lawrence v. Fox*, 20 N. Y. 268; *Glen v. Hope Mut. L. Ins. Co. of New York*, 56 N. Y. 379, 381.

In *Farrow v. Commonwealth Ins. Co.*, 18 Pick. 53, 29 Am. Dec. 564, where a vessel was insured by brokers for the owners, the insurance money payable to such brokers, it was held that the owners might sue in their own names, the brokers consenting to the suit.

In *Mosser v. Donaldson (Pa.)* 9 Cent. Rep. 153, the question was whether a clause or expression in an insurance policy, "for the benefit of whom it may concern" gave the plaintiffs a right of action as being the parties for whose benefit the contract of insurance was made, there being a plain declaration in the policy that the persons "whom it may concern" were the parties thereto, and it was held that a third party could not sue under the policy.

The real party in interest may sue. *Lane v. Columbus Ins. Co.* 2 Code Rep. 65, a case of a policy of insurance effected by an agent in his own name, with a proviso that he alone could sue thereon, in which the court held the proviso invalid.

### XX. Partnership transactions.

The theory in favor of such actions has in some 25 L. R. A.

cases also been extended to partnership transactions, in cases where a party has purchased a firm's business, assuming its liabilities as part of the consideration; where a continuing partner has agreed to discharge the firm's debts.

The promise or agreement of the defendants was, in legal effect, to pay the creditors the debts due from the vendors of the defendants, from whom the consideration moved. *Maxfield v. Schwartz*, 43 Minn. 221.

Again, in *Shober & C. Lithographing Co. v. Kerting*, 107 Ill. 344, a case of a purchase of a firm's business, assuming its indebtedness as part of the consideration, the court held the assumption of the indebtedness was a sufficient consideration.

So in *Clafin v. Ostrom*, 54 N. Y. 581, where in consideration of the transfer of a firm's property to the defendant, he agreed to pay the firm's debt.

Where the members of a partnership concern entered into an agreement with the defendants for a transfer of the business of the partnership, the defendant assuming the liabilities of the concern, the court held that by their agreement with the vendors the defendants made the outstanding debts of the firm a liability of their own. *Maxfield v. Schwartz*, *supra*.

Where an incoming partner agreed to pay part of the debts of the old firm as part of the consideration for the partnership. *Wheat v. Rice*, 97 N. Y. 293; *Serviss v. McDonnell*, 107 N. Y. 260.

Where, however, by the terms of the contract to purchase the share of a partner, it was agreed that the outstanding debts were sufficient to discharge the outstanding liabilities, and that if they proved otherwise the debtor would pay the deficiency, it was held that the creditors could not hold the incoming partner liable upon his promise to pay for the debts based upon such covenant. *Edick v. Green*, 38 Hun, 202.

Where a partnership firm disposed of the business, the purchaser undertaking to pay the firm's debts, it was held a creditor could not sue upon such verbal contract, as the contract, although good *inter partes*, was void as to such creditor under the statute of frauds, the creditors not having given up their original claims and accepted the new contract instead, for the reason that while the old debt remains a new contract cannot be substituted. *Shoemaker v. King*, 40 Pa. 107.

Where the action alleged a partnership debt owing to the plaintiffs, and a sale by one partner to the defendant upon his assuming and paying the same, the court distinguished the case upon the ground that a debt already existed and showed no privity of contract. *Manny v. Fraser*, 27 Mo. 412.

Where a covenant was entered into upon the dissolution of a partnership by the continuing party, to discharge the debts of the firm, it was held that the creditors were entitled to the benefit thereof. *Devol v. McIntosh*, 23 Ind. 529.

In *Zeil's App.*, 111 Pa. 532, there was a contract between partners to apply the assets, remaining at the time of the dissolution, to a payment of the individual debts of one of the partners enumerated in the articles, such partner being heavily in debt at the formation of the partnership, and the agreement being shown and known to the creditors and made for their benefit. The court held they had a clear right to enforce it, although not parties thereto.

In *Merrill v. Green*, 55 N. Y. 270, however, where a partner gave a bond with surety for the payment of the firm's debts, upon a dissolution, it was held that the firm's creditors could not recover against the obligors, whose only liability was to the obli-



classify the cases in that state in which one not a party to the promise has been permitted to sue upon it. The classification may be

briefly stated as—First, cases where the defendant has in his hands money which in equity and good conscience belongs to the

gee, and distinguished the case from *Lawrence v. Fox*, 20 N. Y. 203.

Where a creditor sought to recover upon an agreement, between his debtor and a person not a partner in the firm, to pay a portion of the firm's indebtedness, it is held such indebtedness would not lie as it could not be shown to be for his benefit, or that it covered any portion of his debt. *Wheat v. Rice*, 97 N. Y. 206.

#### XXI. Purchase subject to a lien, debt, or mortgage.

With respect to a purchase of property subject to a debt, lien, or mortgage, the question has arisen whether the original creditor, lienor, or mortgagee has a right to sue upon the undertaking of the purchaser as made for his benefit, and the courts have upheld such actions as coming within the doctrines which favor the right of a third party to sue upon a contract made for his benefit, in cases where the vendor was personally liable for the amount and the purchaser has covenanted or assumed the debt or liability as part of the consideration of the purchase.

The liability of the grantee in such a deed rests upon the doctrine that where one person promises another to do an act for the benefit of a third person, such third person may maintain an action. *Thorp v. Keokuk Coal Co. of New York*, 48 N. Y. 263.

Such a promise is primary and not collateral. *Huyler v. Atwood*, 28 N. J. Eq. 504, 38 N. J. Eq. 275.

Where the grantor is in equity bound to pay the debt as his own, then the covenant may be treated as a promise made for the benefit of the lienor, and may be enforced in a legal action, although the primary object of the covenant was to protect the grantor against his personal liability for the debt secured upon the land. *Pardee v. Treat*, 38 N. Y. 339; *Burr v. Beers*, 24 N. Y. 173, 30 Am. Dec. 327.

The principle extends to cases where personal property is the subject of the contract, and where real estate is conveyed upon which there is a mortgage, the amount of which the grantee promises to pay the mortgagee. *Dingeldien v. Third Avenue R. Co.* 37 N. Y. 575; *Lawrence v. Fox*, 20 N. Y. 203; *Burr v. Beers*, *supra*; *Hartley v. Harrison*, 24 N. Y. 171; *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509.

The legal effect of the transaction is to leave the portion of the purchase money, represented by the incumbrance, in the hands of the purchaser for the purpose of paying the incumbrance, and the promise being made for the benefit of the holder of the incumbrance, he may maintain an action to enforce it. *Twichell v. Mears*, 8 Biss. 211.

The purchaser, however, must covenant to pay the mortgage. *Brewer v. Maurer*, 38 Ohio St. 542, 43 Am. Rep. 436.

If the defendant comes into possession by reason of a contract under which he promises to pay, he is liable. *Pope v. Porter*, 38 Fed. Rep. 7.

The law will imply an agreement to pay upon which an action of assumpsit will lie by the mortgagee. *Twichell v. Mears*, *supra*; *Urquhart v. Brayton*, 13 R. I. 109.

In *Urquhart v. Brayton*, *supra*, the court stated that the purchaser not only bought the estate subject to the mortgages, but impliedly assumed to pay the mortgages as part of the consideration.

To the same effect, *Hayden v. Snow*, 9 Biss. 511, a case of the assumption of a mortgage debt.

In such an action the property is considered as belonging in equity to the plaintiff who is entitled by virtue of the mortgage to take possession, sell and apply the proceeds in payment of the debt. *Pope v. Porter*, *supra*.  
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The promise, though not made directly to the complainant, is looked upon as insuring to his benefit, and upon his acceptance of it, he can sue in his own name, either at law or in equity. *Carver v. Eads*, 65 Ala. 190.

It must be shown, however, that the contract is for the benefit of the mortgagee, and is made with that intent. *Meech v. Ensign*, 49 Conn. 191, 44 Am. Dec. 225.

Otherwise the mortgagee cannot avail himself of the purchaser's assumption to pay the mortgage. *Norwood v. De Hart*, 30 N. J. Eq. 412.

The purchaser's promise to pay the creditor or mortgagee the amount owing by the vendor is a sufficient consideration for the promise and will support an action by the creditor or mortgagee against the promisor. *Helms v. Kearns*, 40 Ind. 124; *Allen v. Bucknam*, 75 Me. 353, a case of a purchase of property assuming a lien, both the vendor and the original lienor assenting.

Such a purchaser is not a stranger to a privity, and is subject to the same rules which prevail against his vendor, becoming the principal debtor. *Figart v. Halderman*, 75 Ind. 537.

The assumption of the vendor's indebtedness as part of the consideration creates the personal liability. *George v. Andrews*, 60 Md. 23, 45 Am. Rep. 706.

As between the parties to such an instrument the purchaser becomes the principal and the mortgagor the surety. *Ibid.*; *Paine v. Jones*, 76 N. Y. 274; *Willard v. Worsham*, 76 Va. 392; *Huyler v. Atwood*, 28 N. J. Eq. 504.

The right of the mortgagee is simply a right to substitution, subject, however, to the equities between the purchaser and his immediate grantor. *Osborne v. Cabell*, 77 Va. 423.

The amount allowed to the grantee out of the purchase money, by reason of his assumption of the mortgage, is a fund in his hands applicable to the payment of the mortgage in exoneration of the grantor. *Willard v. Worsham*, *supra*.

The mortgagee or creditor is entitled upon equitable principles to the benefit of all collateral securities held by the debtor, and may therefore resort, by way of equitable subrogation, to the covenant of the purchaser. *Ibid.*

Such a covenant creates an additional security for the mortgage debt and inures as a promise to the mortgagee. *Wilbur v. Warren*, 104 N. Y. 193.

It must, however, be shown that such original mortgagor was himself personally liable. *Carter v. Holahan*, 33 N. Y. 496; *Wilbur v. Warren*, *supra*; *Norwood v. De Hart*, 30 N. J. Eq. 412; *Spencer v. Spencer*, 95 N. Y. 353.

In *Campbell v. Smith*, 71 N. Y. 23, 27 Am. Rep. 5, the covenant to pay the mortgage was absolute, and the mortgagee had therefore the right to enforce it, the court recognizing the principles established in *Lawrence v. Fox*, 20 N. Y. 203.

By the acceptance of such a deed containing a covenant to pay, a grantee becomes liable as covenantor. *Bowen v. Beck*, 94 N. Y. 86, 45 Am. Rep. 124.

Such agreement is within the equity of the provisions of the revised statutes, authorizing the court of chancery in foreclosure proceedings to make a decree over for the deficiency against a third person liable for the payment of a mortgage debt. *Halsey v. Reed*, 9 Paige, 446, 4 L. ed. 769.

The principles upon which such actions are maintainable were considered as settled in *Dingeldien v. Third Avenue R. Co.* 37 N. Y. 575.

The principles laid down in *Lawrence v. Fox*, 20 N. Y. 203, and *Burr v. Beers*, 24 N. Y. 173, 30 Am.

plaintiff,—as, if A. put money or property in the hands of B. as a fund from which A's creditors are to be paid, and B. has promised

expressly or impliedly to pay such creditors; second, cases where a near relationship, as father and child, or uncle and nephew, exists

Dec. 327, were followed in *Ricard v. Sanderson*, 41 N. Y. 179, the case of a purchase subject to a mortgage, the grantee assuming the liability.

And again in *Turk v. Ridge*, 41 N. Y. 308; *Thorp v. Keokuk Coal Co. of New York*, 48 N. Y. 258; *Calco v. Davies*, 78 N. Y. 211, 20 Am. Rep. 120; *Pardee v. Treat*, 82 N. Y. 385.

Where the purchaser assumes payment as portion of the purchase money he becomes personally liable for the payment of the mortgage. *Hartley v. Harrison*, 24 N. Y. 170; *Burr v. Beers*, *supra*, where a personal action was upheld, the court recognizing the principles of *Lawrence v. Fox*, *supra*.

In *Snell v. Ives*, 85 Ill. 279, where the action was brought upon a promise made to pay the debts and undertakings of a railroad company upon the purchase of its property.

In the case of an agreement to pay a bond for the payment of a debt in the purchase of property. *Beasley v. Webster*, 64 Ill. 458.

To the same effect, *Carter v. Zenblin*, 68 Ind. 436; *Arnold v. Lyman*, 17 Mass. 400, 9 Am. Dec. 154; *Crawford v. Edwards*, 38 Mich. 354; *Unger v. Smith*, 44 Mich. 232; *Higman v. Stewart*, 38 Mich. 523; *Miller v. Thompson*, 34 Mich. 10; *Tichenor v. Dodd*, 4 N. J. Eq. 454; *Stariba v. Greenwood*, 28 Minn. 521; *Follansbee v. Johnson*, 28 Minn. 311.

Where the purchaser assumes the payment of a mortgage or prior lien as part of the consideration. *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Crawford v. Edwards*, and *Unger v. Smith*, *supra*; *Cooper v. Foss*, 15 Neb. 515; *Willard v. Worsham*, 76 Va. 362.

In *Dean v. Walker*, *supra*, the opinion of the court was dissented from by *Sheldon, Ch. J.*, and *Dickey, J.*

Where a married woman sued upon a promise made by the purchaser of property from her husband, to pay her a certain sum in lieu of her inchoate right to dower. *Worley v. Sipe*, 111 Ind. 238.

In *Mize v. Barnes*, 73 Ky. 506, the sole question was whether, if by an arrangement between the vendor and vendee, the latter executed a note for the purchase money to a third person, a lien could be retained in the deed in favor of such third person. The court held that such being the intention of the parties it might be retained for the benefit of the third person with her consent, although such third party was not a party to the deed, the contract being made with the grantor for the benefit of such party, and therefore enforceable by such party.

And again where the defendant had the use and occupation of land belonging to the plaintiff under a promise to pay rent. *Brewer v. Dyer*, 5 Cush. 337.

Such an action was maintained in *Therasson v. McSpedon*, 2 Hilt. 3, where the defendant agreed to pay the liabilities, and a certain sum to shareholders of a mining company upon the purchase of its property.

In *Cashman v. Henry*, 75 N. Y. 103, 31 Am. Rep. 437, it was held that a married woman was personally liable upon her covenant to pay a mortgage debt, as part of the consideration for property purchased.

So in *Beers v. Robinson*, 9 Pa. 229, where the plaintiff was a creditor and proved that his debtor's property was sold at auction, and the notes given by the purchasers were handed to defendant, who promised the debtor to pay his debts so far as they and the property purchased by the defendant would go.

In such a case, however, the grantor may release the grantee from liability, and in such a case he will not be liable to the prior mortgagee. *Arnaud v. Grigg*, 29 N. J. Eq. 482.

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Where, however, the conveyance is simply "subject to a mortgage" without any express agreement to pay, none will be implied and the grantee assumes no personal liability. *Dingeldein v. Third Avenue R. Co.*, 37 N. Y. 575; *Belmont v. Coman*, 23 N. Y. 438, 78 Am. Dec. 218.

It is necessary that there should be something further than a mere statement in the conveyance that the deed is made subject to the mortgage. *Stabbing v. Hall*, 29 Barb. 530.

Where the conveyance was taken of land, subject to a mortgage, the grantee covenanting to indemnify the grantor against the mortgage, it was held that the grantee having died intestate, the land was the primary fund to be resorted to, and that there was no personal liability attaching. *Duke of Cumberland v. Codrington*, 8 Johns. Ch. 229, 254, 1 L. ed. 601, 610.

Such an action cannot be maintained, where the mortgagee acquires no independent equity arising from the dealings between himself and the subsequent grantee of the mortgaged premises, and stands exclusively on the engagement of the grantee with his grantor to assume and pay the mortgage debt. *Youngs v. Trustees for Support of Public Schools of New Jersey*, 31 N. J. Eq. 220.

So a contract made between a mortgagor and a purchaser of property may be rescinded for fraud, where the mortgagee has not assented to its terms, and the purchaser will thereby be released of his liability. *Cohrt v. Koch*, 66 Iowa, 658.

In *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130, the court held that an extension of time to the grantee by the mortgagee created a release of the grantor, unless made with his consent.

Where the original lender or mortgagee extends the time for the payment of the debt to the original mortgagor, he thereby releases the grantee from his original liability. *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 708.

Any release or variation of the terms of the original contract between the mortgagee and the original mortgagor will discharge the grantee from his personal liability. *Paine v. Jones*, 76 N. Y. 274.

He cannot have the benefit of such contract, if it has, before bill filed, been released and discharged in good faith, by the parties to it.

In *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440, it was held that the assumption by the mortgagee of the payment of an anterior mortgage did not impose a personal liability enforceable by the first mortgagee, the promise being for the benefit of the mortgagor only.

The court distinguished the above case from *Burr v. Beers*, 24 N. Y. 173, 30 Am. Dec. 327, and *Lawrence v. Fox*, 20 N. Y. 238, upon the ground that it was not an absolute conveyance, the engagement being merely for the advancement of money for the purpose of protecting the property of the promisee, the advance if made being a mere lien upon the property. *Garnsey v. Rogers*, *supra*.

Where the purchaser assumed to pay the mortgage debt as part of the consideration, it was held that the purchaser, so far as the vendor was concerned, became the original debtor and might be sued by him upon his promise, and that the rights of the mortgage creditor were not affected. *Boardman v. Larrabee*, 51 Conn. 39.

In *Pettee v. Peppard*, 120 Mass. 522, where property originally subject to a mortgage was conveyed by deed reciting that fact, whereby the grantee covenanted to assume and pay as his own debt, and save the grantor harmless and indemnified from such debt, the court holding the promise

between the promisee and the person to be benefited; third, cases of which *Brewer v. Dyer*, 7 Cush. 337, is an instance, in which

the defendant agreed with a lessee of premises to take the lease and pay the rent to the lessor, and entered with the knowledge of the

could only be enforced by the mortgagor, there was no privity between the purchaser and the mortgagee.

In *Prentice v. Brimball*, 128 Mass. 291, the case of a purchase of an equity of redemption, the grantee assuming the mortgage as part of the consideration, it was held the mortgagee could not maintain an action upon such promise in his own name, the grantor transferring no money or funds to the defendant, and the defendant making no contract with the mortgagee or his assigns upon which an action at law would lie.

The same conclusions were arrived at in *Coffin v. Adams*, 181 Mass. 183, it being stated that it was not to be doubted in that commonwealth, that an action at law upon a stipulation in a deed poll, by which the grantee assumed and agreed to pay as his own debt a previous debt of the grantor secured by mortgage of the mortgaged property, could be brought in the name of the grantor only.

The case of *Brown v. Stillman*, 43 Minn. 126, was distinguished from *Follansbee v. Johnson*, 28 Minn. 211, there being nothing in the former case to warrant the inference that the contract was made for the benefit of the mortgagee or the plaintiff, he not being put forward as the party to whom the consideration was to be paid, or to receive a part of it reserved in the hands of the grantee for his benefit, nor was there any debt or obligation due from the grantor; but the grantee assumed to pay as part of the consideration and thus made the debt his own.

In *Butterfield v. Hartshorn*, 7 N. H. 845, 28 Am. Dec. 741, where an executor left part of the purchase money in the hands of a purchaser, for the purpose of paying certain debts owing by the testator, it was held that the creditors could not sue the purchaser for payment of such accounts, unless they assented to the arrangement or elected to look to such purchaser as their debtor, and to release the estate, and then only after demand, which must be before suit.

In *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650, it was held that to a deed *inter partes*, conveying an estate by a mortgagor to a purchaser, a prior mortgagee was a stranger, both to the contract and to the consideration, and was not in privity with the grantee, either with respect to the contract or the estate granted.

Where a purchaser of land agrees to pay off, as part of the consideration, a mortgage or other incumbrance on the property, he becomes a surety and his obligation is enforceable in equity to the extent of the deficiency. *Klapworth v. Dressler*, 13 N. J. Eq. 62, 73 Am. Dec. 69.

A creditor is entitled to the benefit of all collateral obligations for the payment of a debt, which a person standing in the situation of a surety for others has received for his indemnity, and to relieve him or his property from liability for such payment. *Ibid.*

Where the deed was intended simply as a security for a debt, a contract being executed to convey to the wife of the grantor upon her paying the amount of the liens and defendant's debt, the court held that the lienor had no right of action. *Pardee v. Treat*, 32 N. Y. 385.

In *Boot v. Wright*, 84 N. Y. 74, 38 Am. Rep. 496, the liability of the defendant for the deficiency arising on the sale of mortgaged premises turned upon the question whether the deed from a grantor was intended as an absolute covenant, or simply as a mortgage; that if it was merely a mortgage, the covenant to assume and pay the plaintiff's debt was in effect an agreement between the 25 L. R. A.

grantor and the defendant; that the latter should advance the amount of the prior lien upon the security of the land, and gave no right of action to the plaintiff, who was neither a party to the contract nor the person for whose benefit it was made, the court following the principles laid down in *Garnsey v. Rogers*, 47 N. Y. 238, 7 Am. Rep. 440. *Pardee v. Treat*, *supra*.

The doctrine in favor of such contracts was upheld in the case of a parol contract upon a purchase, to pay certain creditors of the grantor. *Seaman v. Hasbrouck*, 35 Barb. 155.

In *Pardee v. Treat*, 32 N. Y. 385, the case turned upon the question whether the doctrine of *Lawrence v. Fox*, 30 N. Y. 233, was applicable to the covenant of the defendants in a deed from their grantors "to assume and pay as part of the consideration" the lien upon the premises conveyed. The court held that if the deed was an absolute conveyance, and the relation between the grantor and the defendants was that of vendor and purchaser, simply, the case of *Burr v. Beers*, 24 N. Y. 178, 30 Am. Dec. 327, was decisive of the right of the plaintiff as assignee of a judgment against the grantor to maintain the action, the judgment being a lien upon the premises at the time of the conveyance.

Where the defendant had promised to pay a debt, due upon a note by his vendor to the plaintiff, the original owner of the land, as part of the consideration for his purchase, it was held that the original vendor might maintain an action against such purchaser for the amount due. *Price v. Reed*, 38 Mo. App. 439.

The right was recognized in *Pulver v. Skinner*, 42 Hun. 322, an action against a grantee of property purchased from an intestate, who had in his lifetime undertaken with a debtor for a valuable consideration to pay his debt, the personal representative having sold his estate to the purchaser, the assumption of the debts being part of the consideration.

In *Mellen v. Whipple*, 1 Gray, 317, the action was upon a promise made by the purchaser of the equity of redemption the mortgage having been given to secure the payment of a promissory note, the purchase deed containing only a stipulation that the defendant should pay the mortgage notes which the court held was a matter exclusively between the parties and one upon which the plaintiff could not sue, there being nothing to bring the case within the exceptions to the general rule therein noticed.

In *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210, where the suit was brought in the District of Columbia to enforce the payment of a mortgage debt against the grantee of the equity of redemption upon a mortgage made in New York upon property there, the court held that it would not lie, the *lex fori* governing as to the form and nature of the claim, and that by such law the action could only be maintained by the grantor in the form of an action at law, but his remedy was in equity.

The court looked upon the contract in that case as made with the grantor alone and for his benefit, the consideration moving from him alone, without any privity existing between the parties to the action, and without the mortgagee's assent either express or implied from his subsequent acts. *Willard v. Wood*, *supra*.

In that case the court did not consider that the fact that the mortgagee had received payments on account from the grantee affected the case, holding that if they were received it was only by virtue of the agreement between the grantor and the

lessor, paid him the rent for a year, and then left before the term expired. We have referred so fully to the decisions in New York

and Massachusetts because in those states the question has more frequently arisen, and been more ably and thoroughly discussed, than

grantee and created no new contract between the grantee and the mortgagee. *Ibid.*

The same conclusion was arrived at in *Keller v. Ashford*, 128 U. S. 610, 33 L. ed. 607.

## XXII. State statutes.

The Alabama Civil Code, ed. 1886, p. 577, provides: Section 2584. Actions on promissory notes, bonds, or other contracts, express or implied for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not, subject to any defense the payor, obligor, or debtor may have against the payee, obligee, or creditor, previous to notice of assignment or transfer, except that, in actions upon bills of exchange and promissory notes payable at a bank or banking house, or at a designated place, and other commercial instruments, the suit must be instituted in the name of the person having the legal title.

In *Yerby v. Sexton*, 48 Ala. 811, the court passed upon the meaning of the words "the party really interested" as found in the Alabama code, and held that where the dry legal title is in one and a clear equitable title is in another, whether by transfer, delivery, or otherwise to whom alone the money belongs and who only is entitled to receive it, and authorized to discharge the debtor, in such cases there is no trouble; the action must be brought in the name of the equitable owner, as he is the party really interested. But when the party having the legal title is also the only party entitled to receive the money and discharges the debtor, although, when collected he holds the money, not for his own use, but for the use of some other person or persons, and to whose use he is to apply it, or to whom he is bound to pay it,—in such cases the action must be brought in the name of the party having the legal title.

The Arizona Code of Civil Procedure provides: Section 680. Every action shall be prosecuted in the name of the real party in interest, except as otherwise prescribed.

The Arkansas Revised Statutes, chapter 119, ed. 1884, p. 972, provides: Section 4933. Every action must be prosecuted in the name of the real party in interest, except as provided in sections 4935, 4936, and 4938.

Section 1559 of the California Civil Code provides that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

The Dakota Civil Code provides: Section 3490. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

In Georgia, section 2747 of the Code, ed. 1882, provides, if there be a valid consideration for the promise, it matters not from whom it is moved, the promisee may sustain his action through a stranger to the consideration.

Section 3221 of the Revised Statutes of Idaho, ed. 1887, p. 380, provides a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

The Revised Statutes of Illinois, ed. 1880, section 19, p. 1012, provides that any deed, bond, note, covenant, or other instrument under seal (except penal bonds) may be sued and declared upon or set off as heretofore, or in any form of action in which such instrument might have been sued and declared upon or set off if it had not been under seal, and demands upon simple contracts may be set

off against demands upon sealed instruments, judgments, or decrees.

By section 2543 of the Iowa Code of Civil Procedure, it is provided every action must be prosecuted in the name of the real party in interest except as provided in the next section. The following section affects actions brought by the trustees, and others in a like position.

The Civil Code of Kentucky provides, section 18, every action must be prosecuted in the name of the real party in interest, except as provided in section 21.

Section 21. A personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a receiver appointed by a court, the assignee of a bankrupt, or a person expressly authorized by statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted.

The Civil Code of Louisiana, 1870, article 1890, and the Louisiana Code of Practice, article 35, *supra*, page 601, support the right of a third party to sue upon the contract.

By the Statutes of Minnesota, ed. of 1878, vol. 1, chapter 68, § 23, p. 709, every action shall be prosecuted in the name of the real party in interest, except as hereinafter provided, but this section does not authorize the assignment of a thing in action not arising out of a contract.

By section 28 of the Statutes of Minnesota, of 1878, vol. 1, p. 710, it is provided an executor or administrator and trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section.

The Missouri Code, section 1900, provides every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract.

And section 1901. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

The Montana Code of Civil Procedure, (Comp. Stat. ed. 1887, pp. 60, 61) provides, section 4, every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act.

And section 6, an executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

The Nebraska Code of Civil Procedure, section 29, provides every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 32, which relates to actions by trustees and others standing in a fiduciary position.

elsewhere in this country. There has been no decision of this court at variance with the rule as held in those two states. In every

case but one the promise was to pay a debt of the promisee, and a fund was either left or put in the hands of the promisor for the

The Nevada General Statutes, ed. 1885, p. 755, provides, section 3023, every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act.

The New Mexico Code of Civil Procedure provides, section 1832, every action must be prosecuted in the name of the real party in interest, except as provided in the next section.

Under section 118 of the New York Code, a person with whom, or in whose name, a contract is made for the benefit of another, may maintain the action, such party being deemed the trustee of an express trust.

Under sections 25 and 27 of the Ohio Civil Code, when a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach, either in his own name or in the name of the party to whom made.

The Oregon Code of Civil Procedure provides, section 27, every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section 23, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

And section 29, an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section.

The South Carolina Code of Civil Procedure provides, section 132, every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 134; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of the grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

The Compiled Laws of Utah, ed. 1876, p. 492, provide, section 4, every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act.

The Washington Code of Civil Procedure provides, section 4, every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law.

The West Virginia Code, chapter 71, provides, section 2, an immediate estate or interest in, or the benefit of a condition respecting any estate, may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made, for the sole benefit of a person with whom it is made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.

The Wisconsin Revised Statutes, ed. 1890, p. 1432, provide, section 2005, every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 2007; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of the contract.

The Revised Statutes of Wyoming, ed. 1887, p. 555, § 5 L. R. A.

provide, section 2382, an action must be prosecuted in the name of the real party in interest, except as provided in the next two following sections; but when a party asks that he may recover by virtue of an assignment, the right of set-off, counterclaim, and defense, as allowed by law, shall not be impaired. The sections referred to apply to actions on bonds and by executors, officers, trustees, and so forth.

### XXIII. The English doctrine.

It is laid down in Comyns' Dig. title, "Action upon the case upon assumpsit," B 15, that an assumpsit lies though the consideration arise in part from another; as if a man promise a pig of lead to A, and his executor give lead to make a pig to B and assumes to deliver it to A, an assumpsit lies by A against him.

In *Bourne v. Mason*, 1 Vent. 4, it was held that the daughter of a physician might maintain assumpsit upon a promise made to her father for her benefit, in case he performed a certain cure.

The modern English cases overrule the older ones and show that the consideration must move from the party entitled to sue upon the contract. *Tweddle v. Atkinson*, 1 Best & S. 803, 30 L. J. Q. B. 265, 8 Jur. N. S. 332, 4 L. T. N. S. 468, 9 Week. Rep. 731.

In the above case the court declared the rule to be well established in England, that no stranger to the consideration could take advantage of a contract, although made for his benefit.

The court considered it a monstrous proposition to hold that a person was a party to a contract for the purpose of suing thereon for his own benefit, where he was not a party for the purpose of being sued. *Tweddle v. Atkinson*, *supra*.

The case of *Price v. Easton*, 1 Barn. & Ad. 433, 1 Nev. & M. 303, follows the doctrine laid down in *Tweddle v. Atkinson*, *supra*.

The same principle would appear to have been applied in *Dutton v. Poole*, 1 Vent. 318; *Alton v. Midland R. Co.* 19 C. B. N. S. 213, 34 L. J. C. P. 282, 11 Jur. N. S. 672, 12 N. T. N. S. 703, 13 Week. Rep. 913.

In *Gandy v. Gandy*, L. R. 30 Ch. Div. 57, 54 L. J. Ch. 1154, 53 L. T. N. S. 306, 33 Week. Rep. 803, the court stated it was sufficient to say that in the case of *Tweddle v. Atkinson*, *supra*, the true common-law doctrine was laid down.

A mere agreement between two parties that one shall pay the debt of the other to his creditor, gives no right of action by the creditor against such promisor. *Re Rotherham Alum & Chemical Co. L. R. 25 Ch. Div. 111, 53 L. J. Ch. 290, 50 L. T. N. S. 219, 32 Week. Rep. 131.*

Yet, there would seem to be an exception to such rule, in the case of money had and received for the use of another, an express or implied assent being shown to the holding of such money. The mere fact of the receipt of the money, however, is not enough to raise such implied promise. *Lilly v. Hays*, 4 Ad. & El. 543, 1 Nev. & P. 23, 3 Harr. & W. 333.

It must, however, be shown that the parties have a beneficial right or interest. *Gandy v. Gandy*, *supra*.

A mere agreement between A and B that B shall pay to C (an agreement to which C is not a party, either directly or indirectly) will not prevent A and B coming to a new agreement and releasing the old one. If C were a *cestui que trust* it would have that effect. *Re Express Engineering Co. L. R. 18 Ch. Div. 123.*

If the true intent and effect of a deed is to give the parties a beneficial right under it, that is to say,

purpose. That one case was decided in a line with the rule held in the *Vrooman and Mellen Cases*. A grantee of real estate had assumed a mortgage debt for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. *Brown v. Stillman*, 48 Minn. 126. Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are prepared to say that, where there is nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it. Such is this case.

*Order affirmed.*

**Vanderburgh, J.**, took no part in the decision.

a right to have the covenant performed and to call upon the trustees to protect their rights and interests under it, such parties will, outside of the common-law doctrine, in equity be allowed to enforce their rights under the deed. *Gandy v. Gandy, supra*.

In *Gandy v. Gandy, supra*, the action was upon a covenant made by a husband, upon separation with trustees to maintain the children, and the question was as to the children's right to sue upon the covenant. It was held that in order to entitle a third person, not known as a party to a contract, to sue either of the contracting parties, the third party must possess an actual beneficial right placing him in the position of *cestui que trust* under the contract.

Where it was agreed on behalf of the company, that the promisee should sell and the company buy a certain business, and assume the payment of certain expenses and charges of the registration of the company then owing to the attorneys, the agreement being adopted by the memorandum of the association and ratified by the directors, the attorneys sought, upon the winding up of the company, to prove for their claim against the company. It was held the claim must be disallowed, the contract being made before the company existed, a mere ratification not binding the company. *Re Express Engineering Co. supra*.

In *Gandy v. Gandy*, L. R. 80 Ch. Div. 63, the above case was referred to as establishing the true common-law doctrine. In the latter case, however, the court admitted that, whatever might have been the common-law doctrine, yet in that case a true effect of the deed in question was to give a beneficial interest under it, that is to say, a right to have the covenants performed and to call upon the trustees to protect the interests and rights of the beneficiaries who would, outside of the common-law doctrine, in a court of equity, be allowed to enforce their rights under the deed, the application of the doctrine depending upon its being made to and upon the true construction of the deed, which in that case was held to give a beneficial interest upon which the plaintiff was entitled to recover.

In *Gregory v. Williams*, 3 Meriv. 582, on an agreement to pay one party which is not made directly to him but through another by whom the consideration is furnished, the latter was held a trustee in equity for the former, although the court questioned whether the action would lie at law.

In a Canadian case of *Moot v. Gibson*, 21 Ont. Rep. 248, it was held that where the contract gave the stranger a beneficial right he might enforce it by action.

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Botilla E. SMITH, *Recept.*,

v.

LIBRARY BOARD OF THE CITY OF MINNEAPOLIS, *Appt.*

(.....Minn.....)

\*1. Under the provisions of its charter (Special Laws 1885, chap. 8), defendant board has the power to become an ordinary bailee as to such personal property as may be of a proper character for exhibition in its public museum; a coin collection for instance.

2. At the defendant's request, plaintiff, without compensation, loaned to it, for exhibition in its museum, several cases of coins. The law required of defendant that it exercise ordinary care and prudence in caring for the same. And if a resolution was passed by defendant board, and brought to the notice and knowledge of plaintiff, that it would not be responsible for the safety of the coins in any manner, it would still be liable in case the same were stolen and lost by reason of its gross negligence.

3. Several unimportant assignments of error considered and disposed of.

(July 5, 1894.)

**A**PPEAL by defendant from an order of the District Court for Hennepin County refusing a new trial after verdict in favor of plaintiff in an action brought to hold defendant liable for the value of certain coins which were in its possession for exhibition to the public. *Affirmed.*

The facts are stated in the opinion.

*Messrs. David F. Simpson and William H. Morse*, for appellant.

The receipt was not competent for the purpose of proving the terms of a contract between the plaintiff and defendant.

It is not signed by the defendant library board, or by any officer of the board on its behalf, and it does not purport to be signed by Mr. Putnam under or by virtue of any direction or authority from the library board.

It was not competent evidence against the defendant as an admission of an agent, servant, or officer of the library board.

*Mechem, Ag. §§ 714, 716; Browning v. Hinkle*, 48 Minn. 544; *La Rue v. St. Anthony & D. Elevator Co.* (S. Dak.) April 4, 1893.

The defendant library board had no authority to make such a receipt and incur any liability thereunder, and had no power or authority to authorize Mr. Putnam, as its agent, to execute such a paper on behalf of the board, and consequently it was not and could not be a valid and binding contract on the part of the library board.

The powers of the library board are only such as have been expressly granted to it, and those necessarily or fairly implied in or incident to the powers expressly granted to the

\*Headnotes by COLLINS, J.

**NOTE.**—For a collection of authorities upon the subject of the liability of a gratuitous bailee, see note to *Bunnell v. Stern* (N. Y.) 10 L. R. A. 481.

board, and those essential to the declared objects and purposes of the board, not simply convenient, but indispensable.

1 Dill. Mun. Corp. 4th ed. § 89, citing among other cases: *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669; *Eufaula v. McNab*, 67 Ala. 588, 42 Am. Rep. 118; *Cook County v. McGree*, 93 Ill. 236; *Smith v. Newburgh*, 77 N. Y. 130; *Bentley v. Chicago County Comrs.* 25 Minn. 259. See also *Grand Rapids Electric Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co.* 83 Fed. Rep. 369; *Merriam v. Moody*, 25 Iowa, 168; *State v. Smith*, 31 Iowa, 493; *Keokuk v. Scruggs*, 59 Iowa, 447; *Wilson v. Shreveport*, 29 La. Ann. 678.

Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.

*Minturn v. Larue*, 64 U. S. 23 How. 436, 16 L. ed. 575.

General language at the conclusion of a provision must be taken in connection with, and limited by, the special powers conferred; and where general words follow particular ones, the rule is to construe the former as applicable to the things or persons particularly mentioned.

*State v. Shaw*, 59 Minn. 153; *Keokuk v. Scruggs*, *supra*; *St. Louis v. Laughlin*, 49 Mo. 559; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304.

The power and authority of the library board to make contracts and incur obligations in the mode authorized by the act creating it is limited and restricted to contracts and obligations payable out of the revenues of the board for the fiscal year in which such contracts and obligations are made and incurred (section 5) and also by the restricted power of the board to levy taxes to raise money with which to establish, maintain, and pay expenses of libraries, etc.

*Eufaula v. McNab*, 67 Ala. 588, 42 Am. Rep. 118; *New Orleans, M. & O. R. Co. v. Dunn*, 51 Ala. 128.

The loss of the coins being accounted for, and the manner of their loss being admitted by the parties to the theft, it was incumbent upon the plaintiff, in order to recover in the action, to prove, by a preponderance of the evidence, that the theft of the coins was by reason of the negligence of the defendant, and the fact that the coins had been stolen is not *per se* evidence of negligence on the part of the defendant, and affords no presumption of any such negligence.

Story, Bailm. § 888, and authorities cited; *Cogg v. Bernard*, 2 Ld. Ravm. 909; *Doorman v. Jenkins*, 2 Ad. & El. 256; *Harris v. Packwood*, 3 Taunt. 264; *Marsh v. Horne*, 5 Barn. & C. 322; *Platt v. Hubbard*, 7 Cow. 497; 2 Am. & Eng. Encyclop. Law, p. 59, and cases cited.

*Messrs. Rea, Hubachek & Healy*, for respondent:

A principal is liable to third parties for whatever the agent says or does; whatever contract, representations, or admissions he makes; whatever negligence he is guilty of, and whatever fraud or wrong he commits, provided the agent acts within the scope of his apparent authority, and provided a liability would attach to the principal if he was in the place of the agent.

1 Am. & Eng. Encyclop. Law, p. 410; *Tice v. Russell*, 49 Minn. 66.

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That the coins were in a room with other property owned by or loaned to defendant, and in its charge, neither refutes the charge of negligence, nor relieves from liability.

Story, Bailm. 9th ed. §§ 63, 64, 64a.

*Collins, J.*, delivered the opinion of the court:

For more than two years prior to September 1, 1892, plaintiff had been the owner of a large collection of coins, placed in cases for exhibition. During all of this time these cases of coins were in the possession of defendant, and by it were being exhibited to the public with other articles of interest, at its building in the city of Minneapolis. There was some dispute between the parties as to the terms or conditions under which the coins were placed in defendant's custody, but it is evident that they were loaned by plaintiff at defendant's solicitation; that nothing was to be paid for their use; but that defendant was to and did pay the premium upon a fire insurance policy covering the same, and did furnish one case for a part thereof. One evening, about the date first mentioned, one of the cases, with its contents, was stolen from the building, and lost to plaintiff, whereupon she instituted this action to recover the value of the coins, alleging that they were stolen and lost because of defendant's gross negligence and carelessness.

1. On the trial of the case there was introduced in evidence (defendant objecting) a receipt of date April 6, 1891, signed by defendant's librarian, in which he acknowledged that the coins had been received for exhibition in the loan collection of the library, to be returned in good condition. The ruling of the trial court when receiving this receipt in evidence is assigned as error on two grounds—First, that it was not signed by defendant board, or by any of its duly authorized officers, nor did it purport to be signed by the librarian by virtue of any authority of the board or of its officers, nor was any attempt made to show that it was so signed; second, that in no event was defendant board authorized to incur a liability of the character found in the receipt, or to enter into a contract of the nature of that attempted thereby, which, briefly stated, was a contract of bailment. It was stoutly maintained on this second point that, under its charter, defendant board was not empowered to become a bailee. While we feel satisfied that on the evidence, as it stood when the court overruled the defendant's objection to the introduction of the receipt, there was nothing which warranted its reception, it is manifest that under the charge of the court no prejudice could have resulted to defendant from its introduction, provided it had authority, under its charter, to receive the coins as a loan from the owner; and this was in controversy, as before stated. The defendant board derived its powers under Special Laws 1885, chap. 8. It was authorized to establish and maintain in the city of Minneapolis public libraries and reading rooms, galleries of art, and museums, for the use and benefit of the inhabitants of the city, and for this purpose, had power to take, by "gift, grant, purchase.

devise, bequest or otherwise any real or personal property." It had power to make and publish, from time to time, by-laws for its own guidance; rules and regulations for the government of its agents, servants, and employes, and "for the government and regulation of the libraries and other collections" under its control. It had other expressly enumerated powers, and finally, in addition to these, was granted "power and authority to undertake and perform every act necessary or proper to carry out the spirit and intent" of the act. The defendant board was chartered for the purpose of establishing and maintaining public libraries and museums. While it was not expressly authorized to take property as a loan or deposit, or to incur the liability of an ordinary bailee, such express authority was not necessary. In addition to the powers expressly granted, it had those which are necessarily or fairly implied in or incident to the powers expressly granted, and those also essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. That it could take personal property in some other way than by gift, grant, purchase, devise, or bequest is evident from the words "or otherwise," which are added to those mentioned. It was also expressly empowered to undertake and perform every act necessary or proper to carry out the spirit and intent of the incorporating act. Coins of all descriptions are regarded as essential and indispensable to the establishment and maintenance of museums, and it is a well-known fact that in nearly every institution of this kind there are large and valuable collections owned by private individuals, and held by the exhibitors as loans or deposits. Frequently, the most valuable works of art and the rarest collections of curios can only be obtained in this way. We have no doubt of the power of the board to take property of this character by express or implied contract, and to incur liability thereunder. In doing this it is undoubtedly acting within the scope of its powers, and carrying out the spirit and intent of the statute creating it.

2. It is admitted that defendant board desired that plaintiff place the coins in its custody and for exhibition, and that the plaintiff was also desirous, for reasons of her own, that they be exhibited to the public, and that the latter be informed as to the ownership. With this mutually understood, they were handed over and put upon exhibition, defendant having entire control of them for the time being. At defendant's request, plaintiff loaned her property to it, and the law required of the former that it exercise ordinary

care and prudence in caring for the same. If ordinary care and prudence were not exercised by the board in regard to the property, and it was stolen, then defendant board would be liable in damages, and the trial court so charged. But it was contended that some time after the coins came into defendant's possession, without any express understanding as to the latter's liability, a resolution was passed by the board, of which plaintiff was notified, that it would not be responsible for the safety of the coins, or for them, in any manner, except as to loss by fire. It did procure and pay for a fire insurance policy at this time. On the trial, plaintiff denied that she was informed of the resolution, and in view of the conflict in testimony the jury were instructed that, if they were of the opinion that plaintiff had knowledge of this resolution, she could not recover, unless they found that the coins were stolen and lost by reason of the gross negligence of the defendant. Of this feature of the charge the latter should not and does not complain. Evidently, under the charge of the court, as applied to the admitted facts, any error with respect to the admission of the receipt in evidence, and also as to what the librarian said to plaintiff and her husband relative to the responsibility of defendant board, worked no prejudice to it. The result was not affected by either the receipt or the statements.

We are of the opinion that plaintiff's husband was competent to testify as to the value of the coins. It was not necessary that he should have bought and sold such articles up to the day of trial. See *Brackett v. Edgerton*, 14 Minn. 174 (Gil. 184), 100 Am. Dec. 211; *Hoxie v. Empire Lumber Co.* 41 Minn. 548; 7 Am. & Eng. Encyclop. Law, p. 512. But in any event the motion to strike out all of the testimony of the witness was properly denied, for much of his testimony related to matters other than values.

In view of the previous testimony of the janitor as to his knowledge of what transpired at the library building on the evening the coins were stolen, we think it was permissible to ask him as to his statements made next morning to plaintiff in reference to a fire in the vicinity of the building just before the coins were missed, and as to the attendants going to it, for the purpose of laying the foundation for impeachment. This disposes of all the assignments of error which we regard as entitled to discussion.

*Order affirmed.*

*Buck, J.*, absent, sick, and *Canty, J.*, who, as district judge, tried the case below, took no part.



## NORTH CAROLINA SUPREME COURT.

STATE of North Carolina

v.

Mark AUSTIN, *Appt.*

(114 N. C. 855.)

**An ordinance forbidding unmarried minors to enter any bar-room unless as agent or servant is not void, unreasonable, or inconsistent with a statute which makes it unlawful to sell or give intoxicating liquors to such persons.**

(March 12, 1894.)

**A** PPEAL by defendant from a judgment of the Superior Court for Union County convicting him of violating a city ordinance forbidding minors to enter saloons. *Affirmed.*

The defendant was arrested upon a warrant issued by the mayor and appealed to the superior court, where the jury found a special verdict setting forth that an ordinance of the city prohibited persons under twenty-one years of age from entering bar-rooms, etc., but provided that the same should not apply to any minor who was married or who was acting as agent or servant of his parent or guardian. Defendant was twenty years old, unmarried, and was not acting as agent or servant when he entered the bar-room.

Further facts appear in the opinions.

*Messrs. Batchelor & Devereux* and *Robert B. Redwine* for appellant.

*Mr. Frank I. Osborne, Atty-Gen.,* for the state.

*Burwell, J.,* delivered the opinion of the court:

The town of Monroe has power and authority "to make such by-laws, rules, and regulations for the better government of the town" as the commissioners thereof may deem necessary, provided the same are "not inconsistent with the laws of the land." Code, § 8799. This is an express grant of authority to the officers of this municipal corporation to exercise, within the territory made subject to their control, the police power of the state, the only expressed restriction upon their action being that the rules and regulations made by them shall not be inconsistent with "the laws of the land." Authorities need not be cited to prove that the legislature of the state may transfer to local municipal legislative bodies created by it the duty and responsibility of exercising a portion of its own police power. It seems to be conceded that the legislature has power to declare it unlawful for any minors to enter a bar-room, and thus protect them from the evil influences that might affect them if exposed to the temptations to which their presence in such resorts might expose them. This concession is an admission that the ordinance in question is not repugnant in its provisions to either the federal or state constitutions, for those

fundamental enactments impose their restraining influence on the legislature not less than on its creatures,—the legislative councils of the towns and cities of the commonwealth.

There being, then, no ground for maintaining that the ordinance under consideration is invalid because of its unconstitutionality, and the grant by the legislature to the municipality of the power to exercise its police power in such manner as the commissioners may deem necessary being clear and explicit, it only remains to inquire whether the enactment is consistent with the laws of the state, and is reasonable. In the grant of police power to this municipality, the restriction imposed is that its ordinance shall not be inconsistent with "the laws of the land." The expression "the laws of the land" can only refer to the laws of this state,—the statutes and common law,—by the enforcement of which peace and good order are maintained throughout this state, and by which the conduct of all its citizens, whether they dwell in its cities and towns or not, is controlled. It is not permitted to these local legislative bodies in this state to exercise that portion of the police power intrusted to them upon subjects about which the legislature has seen fit to enact laws (*Washington v. Hammond*, 76 N. C. 38; *State v. Brittain*, 89 N. C. 574), nor to adopt ordinances that tend to obstruct the general policy of the state in the exercise of its police power, as evinced by its statutes. In the treatise of Horr & Bemis on Municipal Police Ordinances (sec. 88), it is said: "According to the American theory of municipal existence, the legislation permitted to be exercised by municipal corporations is a mere delegation of the power of the state, and the ordinances created by virtue of this delegated authority are as much a part of the general scheme of legislation as are the laws of the state. It is therefore necessary that they should be consistent with the laws of the state. . . . Municipalities have no power to repeal, directly, or indirectly, the laws of the state, and their legislation must accord with the policy of the legislation of the state. If the only measure of authority were the terms of the charter, there would often be ordinances plainly within the granted power, but irreconcilable with some state law, or contrary to the settled policy of the state,—a result neither lawful nor intended. Some charters, by express language, restrict the ordinances that may be passed to such as are consistent with the laws of the state. Others are silent upon the subject. But the restriction exists, whether expressed or not, and becomes very important in its application." We can discern no inconsistency between the provisions of the ordinance under consideration and any particular law of the state, or the general policy of its legislation. Indeed, we find in it rather a commendable effort on the part of this local legislative

**NOTE.**—The view of the powers of a municipal corporation which is taken by the prevailing opinion in the above case is not entirely consistent 25 L. R. A.

with those which prevail in other states. An interesting discussion upon the subject will be found in *Champer v. Greencastle* (Ind.) 24 L. R. A. 768.

body to supplement what the state, by its general legislation, has done to protect the young of the commonwealth. The state declares that one who deals in intoxicating liquors shall neither sell nor give to an unmarried minor any such liquors. Code, § 1077. This ordinance declares that such minor shall not enter the bar-rooms that are subject to the control of the town. It helps, and does not hinder, the policy of the state upon this subject. All its tendencies are towards the prevention of the infraction of the law of the state, and the preservation of peace and good order. Its rigid enforcement must be desired by the proprietors of saloons, for only danger and trouble can come to them from allowing such persons to frequent their places of business. *State v. Kittelle*, 110 N. C. 560, 15 L. R. A. 694. It interferes with none of the saloon keeper's rights, and, is, indeed, contrived in part for his protection. It prevents minors from exposure to temptation in places where they should not go. The law which forbids any dealer in intoxicating liquors to give or sell to a minor such liquors is valid. Its validity could scarcely be assailed with any show of reason. Black, Intoxicating Liquors, § 42. This ordinance rests upon the same foundation as that law,—the right of the state, either by direct general legislation or through its municipal "home-rule" agencies, to shield youth from temptation. "It is held," says the author quoted above, "that a law against permitting a minor to enter upon and remain in a retail liquor dealer's place of business is valid, . . . and the state has power to enact and enforce such a law, even in disregard of the parent's wishes, when its object and tendency are to protect the child." *Goldsticker v. Ford*, 63 Tex. 385.

What has been said above seems a sufficient refutation of the assertion that the ordinance is unreasonable, oppressive, and discriminating. It seems to us a wise and wholesome restraint upon the youth of the community,—made in their interest, as well as that of the law-abiding keepers of the bar-rooms. It is not oppressive. The police of our cities and towns—officers charged with the duty of preventing offenses, as well as of arresting offenders—should have the power and authority to prevent youths from entering saloons. They can derive such authority only from such ordinances. It is not unlawfully discriminating. It applies to all unmarried minors, and is no more obnoxious to this objection than is the section of the code mentioned above, and other laws which are made to protect and control the youth of the land. While it is true that all grants of power to municipal corporations should be strictly construed, and that all doubts should be resolved against the authority of the corporation, it is also true that where, as in this case, the grant of power is plain and unequivocal, courts will not interfere with, control, or nullify the acts of the officers of the municipality, except for most cogent reasons. The contrary course would bring about an unseemly intermeddling of the judicial department of the government with the established agencies of the legislative depart-

ment,—the legislative councils of towns and cities,—and such intermeddling could but have the effect of hampering the action of those bodies, and retarding the development of such communities. If fraud, dishonesty, or oppression is charged against them, courts will be swift to investigate the charge, and to correct the evil, if found to exist. But other matters, involving mere questions of expediency and judgment, must be decided in another way. We adopt, as applicable here, the language used by *Judge Daniel in Hellen v. Noe*, 25 N. C. 498: "If a majority of the citizens of the town deem the ordinance impolitic, or injurious to the people of the corporation, they have the power in their own hands to remedy the evil; but we cannot say that this ordinance is against the general law, or is in itself unreasonable."

No error.

**Avery, J., dissenting:**

I cannot concur in the opinion of the court, and, as my dissent rests upon the idea that the municipality has usurped powers not delegated to it, I deem it proper to give expression to my views. The only question presented is whether a municipal corporation, under a grant of power (1) to make such by-laws, rules, and regulations for the better government of said town as they may deem necessary, provided the same be not inconsistent with the laws of the land; (2) to exercise all of the authority conferred on towns generally under chapter 62, vol. 2, of the Code,—is empowered, by ordinance, to prohibit an unmarried minor, except when acting as the agent of his parent or guardian, from entering any bar-room, or room where spirituous, vinous, or malt liquors are kept for sale.

It was not contended on the argument that the legislature, in the exercise of its police power, was not authorized to prohibit infants from exposing themselves to such evil influences, nor was it necessary to discuss the question whether the legislature was empowered by the constitution to delegate to the municipality the authority to enact the ordinance set forth in the special verdict, unless we discover upon a careful examination that the power has been granted either expressly or by fair implication. 1 Dill. Mun. Corp. § 89; *State v. Webber*, 107 N. C. 963; 15 Am. & Eng. Encyclop. Law, p. 1039. The first contested point, therefore, is whether, under the permission to make by-laws contained in the charter, or under the general act, the authority to enact this ordinance has been incidentally conferred. The supreme court of New Jersey stated in the case of *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 83, the doctrine upon which the decision of the question involved depends: "Whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment. The legislature may enact laws imposing restraint upon the natural liberties of the people, for the benefit of the public morals, provided no consti-

tutional right of the individual is violated; but where a municipal corporation, which is a public agency created by the lawmaking branch of the government, undertakes to pass laws in derogation of common right, it is incumbent upon such municipality to show clearly, not only that the legislature is warranted by the constitution in delegating, but has actually conferred, the power claimed." Dillon says (1 Dill. Mun. Corp. § 825, citing *Taylor v. Griswold*, *supra*, in support of the proposition): "An ordinance cannot legally be made, which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant; and, in cases relating to such right, authority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit." One of the cases cited by Dillon to sustain this proposition is *Hayden v. Noyes*, 5 Conn. 391, where the court held that the authority of a town to regulate fishing in a navigable stream within its limits did not warrant it in enacting a by-law prohibiting fishing within its boundaries.

The commissioners of the town of Monroe may, by virtue of its charter, "make such by-laws, rules, and regulations for the better government of said town as they may deem necessary, provided the same be not inconsistent with the laws of the land." The word "law," in its general sense, includes statute and common law, as well as the constitution, and the term "laws of the land" has been so expressly interpreted by high authority. 12 Am. & Eng. Encyclop. Law, p. 950, *note 1*; *Lycoming, F. Ins. Co. v. Wright*, 60 Vt. 515, 22 Am. & Eng. Corp. Cas. 662, *note*. The language which was incorporated in Magna Charta, and transplanted into all of our state constitutions, and has been declared equivalent to "due process of law" is "law [not 'laws'] of the land." The phrase "laws of the land" was construed in the case cited to include both common and statute law, and by other courts to embrace constitutions also. *Cooley*, Const. Lim. p. 32. Is the ordinance in derogation of a right which the common law, from time immemorial, has conferred upon a minor twenty years old? An individual right is that which a person is entitled to have or to receive from others, or to do under the protection of the law. 21 Am. & Eng. Encyclop. Law, p. 406; *Atchison & N. R. Co. v. Baly*, 6 Neb. 40, 29 Am. Rep. 356. The common law clearly includes all principles and rules of action established for the security of the rights of personal liberty and private property which are not embodied in some express legislation. "Personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law." *Anderson*, Law Dict. 619; 1 Bl. Com. 134. Mr. Blackstone says, further, of this privilege of free locomotion that it is "a right strictly natural, and the law of England has never abridged it without sufficient cause, and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission

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of the laws." This is a statement of the well-settled doctrine that even a statute passed by the legislature must be construed strictly when it operates, to any extent, to repeal or abrogate any principle of common law, which protects personal security, personal liberty, or private property. Has an infant a right of locomotion, which the common law protects, and other persons are bound to respect? A person *sui generis* may enter any house where goods, wares, or groceries are sold, subject only to the right of the proprietor to eject him for misconduct. An infant labors under disabilities as to the power to make contracts or execute a will, to hold office, and to do certain other acts; but the common law imposes no more restraint upon his locomotion than upon the movements of an adult, except such as may be incident to parental authority, when exerted. If, therefore, the legislature had attempted, by express statute, to prohibit all minors, except those specified in the ordinance, from entering houses of the particular classes therein mentioned, the law would have been at least subject to a strict construction whenever the courts should be called upon to enforce it. When the duty is imposed on the courts of close scrutiny in searching for a power claimed by implication, it is doubly a duty to see that it exists in some shape, and has not been abused in the particular exercise of it, where the legislation drawn in question purports to be under delegated power, and operates, if conferred at all, in derogation of a personal right recognized by the common law. Such power does not pass, as we have seen, under the general grant of authority to make all needful by-laws, rules, and regulations. Dill. Mun. Corp. § 825. But not only has the legislature omitted to confer, but it has positively prohibited, the making of any ordinance not consistent with the laws of the land, whether statute or common law, such as that elementary principle declaratory of the right of an infant to go where he may choose, subject only to the superior authority of the parent to control him, or the legislature, in plain terms, to impose restraints for his own protection, or the general welfare of the public, and not repugnant to the constitution.

The other powers conferred upon municipal corporations under the general law are embodied in Code, §§ 3801, 3802, which are as follows: "They may establish and regulate their markets, and prescribe at what place, within the corporation, shall be sold marketable things, in what manner, whether by weight or measure, may be sold grain, meal, or flour, if the flour be not packed in barrels, fodder, hay, or oats in straw; may erect scales for the purpose of weighing the same, appoint a weigher, fix his fees, and direct by whom they shall be paid. And it shall not be lawful for the commissioners or other authorities of any town to impose any tax whatever on wagons or carts selling farm products, garden truck, fish and oysters in the public streets thereof. They may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens."

In these two sections we find enumerated

all of the express powers to pass ordinances, except such as arise under the authority to levy taxes, and to repair, improve, and open public streets and sidewalks, contained in the sections immediately preceding and following those quoted above. So that if the ordinance, for a violation of which the defendant is indicted, was not passed by virtue of the power to preserve health, or abate or prevent nuisances, there is no express warrant for its enactment in the general statute, as there is no sufficient grant of authority to pass it in the charter. The power conferred upon the municipality is not to create by legislation a nuisance not previously known to the law, but to protect the people of a town from annoyance by refusing or prohibiting the creation of what already comes within the legal definition of "nuisance."

Cooley, Const. Lim. pp. 242, 741, note 2; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Salem v. Eastern R. Co.* 98 Mass. 481, 96 Am. Dec. 650. In *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, cited by Judge Cooley to sustain substantially the proposition we have laid down, the facts were that the city of Baltimore enacted an ordinance providing that it should "not be lawful for any person, persons or body corporate to work, operate or continue in use, for the purpose of burning oyster shells or stone lime, any kiln situated or erected within the limits of the city of Baltimore under a penalty," etc. The defendant was charged in the indictment with operating a limekiln within the limits of the city of Baltimore for the purpose of burning oyster shells and stone lime, etc. The authority to pass the ordinance was claimed under a provision of the charter empowering the city "to pass ordinances to preserve the health of the city, and to prevent and remove nuisances," being practically identical with section 3802,—the only difference being in the order of conferring the powers, and in the use of the word "abating," instead of "removing," in precisely the same sense. The court held that it was not a nuisance, *per se*, to burn a limekiln at any point within the limits of the city, and the corporation was not authorized, by grant of power to prevent and remove, to prohibit an act not necessarily a nuisance. See also *Ward v. Little Rock*, 41 Ark. 526, 48 Am. Rep. 46. Judge Cooley also cited the case of *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634, in which the court held, in effect, that where the legislature explicitly gave to the town the power, after the lapse of two years, "to determine what were nuisances and to abate the same," the corporation was not authorized to declare any act a nuisance, which was not a nuisance at common law, till after the expiration of the time mentioned. The court, in this case, in a very elaborate argument, maintained the right of a private corporation to manufacture fertilizer, despite any general power in the town to protect or prevent nuisance, unless it should create, in the conduct of its business, a nuisance at common law. It has been held, also, for similar reasons, that a municipal corporation has no more power to legalize an acknowledged nuisance than it has to prohibit

what does not amount to a nuisance as such. *Pettie v. Johnson*, 56 Ind. 189; 15 Am. & Eng. Encyclop. Law, p. 1185; *Horr & Bemis*, Mun. Ord. § 252.

It seems needless to multiply authorities, as we might do almost indefinitely, to show that the word "nuisance," in the statute, must be interpreted according to its technical meaning. The legislature has the authority (no longer questioned in this state) to prohibit the sale of spirituous, vinous, or malt liquors, and possibly to declare bar-rooms a nuisance, but the towns cannot prohibit the sale of liquors without express authority from the legislature to do so. Had the town attempted by ordinance to prohibit the sale of spirituous liquors to minors only, the ordinance would have been void, whether the statute on the subject were in force or repealed, because no such authority is conferred upon it, either expressly or by implication. How, then, does the corporation acquire the power to prohibit a boy, upon whom the law has imposed no such restraint, from entering a house where a business legalized by our statutes is being conducted? It is doubtless desirable that the youth of the state should be guarded against the temptations to which frequenters of such places are subjected. Legislation which will legalize what the town commissioners of Monroe have attempted to enact, if it is deemed constitutional, can probably be had for the asking. But the violation of constitutions or statutes under the specious plea of reforming the world in obedience to a higher law is neither excusable upon moral, nor defensible upon legal, grounds.

I think, for the reasons which I have stated, that neither under the provision of the charter commonly known as the "General Welfare Clause," nor under the power to protect health and prevent nuisances, can the governing authorities of a municipality enact a valid ordinance, purporting to prohibit a boy of twenty years of age from entering where business is conducted presumably under the sanction of the law. The legislature may put the sale of intoxicants under ban of the law so completely that a place where it is illicitly sold shall be deemed a nuisance, but, while such business houses are licensed by law, town commissioners cannot brand them, without authority, as places unfit for boys who frequent other stores and saloons.

It was contended on the argument of the case, and not without authority and reason, that had the legislature, instead of the municipality, enacted a law prohibiting minors from frequenting the business houses mentioned in the ordinance in question, the statute would have been unconstitutional and void. Without passing upon that question, or even conceding, for the sake of the argument, that the legislature has the power to prevent a minor from being employed in, or even entering, a place where intoxicants are sold, it would be none the less essential, in order to give validity to a similar law passed by a municipality, to show the delegation to the corporation of the authority claimed, either expressly or by fair implication. The authorities cited therefore (Black, Intoxicat-

ing Liquors, § 42, and numerous cases from the courts of other states), in support of the legislative authority to pass statutes of the same purport, have no necessary bearing upon the case, in the absence of any attempt to delegate the power which the town attempted to exercise. I think that the judge below erred in instructing the jury, upon the special verdict, to find the defendant guilty, and a new trial should be awarded.

Martha SMITH, Admx., etc., of Joseph Smith, Deceased.,  
v.

NORFOLK & SOUTHERN R. CO., Appt.

(114 N. C. 723.)

1. **Failure of an engineer to stop a train which is due merely to its lack of proper equipment**, where he was guilty of no negligence after discovering the danger, will not preclude the defense of contributory negligence where an intoxicated person is on the track and struck by the train.
2. **One who has voluntarily disabled himself by reason of intoxication** is held to the same degree of care and prudence for his safety that is required of a sober person.
3. **The duty of the engineer of a railroad train to keep a vigilant lookout on the track** in order to discover and avoid any obstructions that may be encountered thereon is enforceable in favor of helpless persons

**NOTE.—Duty to maintain lookout on railroad train.**

*Failure to maintain a lookout at crossings.*

It is the duty of a railroad company to maintain a reasonable lookout at crossings and prevent injury to persons or trains. *Hinkle v. Richmond & D. R. Co.* 109 N. C. 472; *Bullock v. Wilmington & W. R. Co.* 105 N. C. 180.

So in backing trains. *Cheney v. New York Cent. & H. R. Co.* 16 Hun, 415; *Wiley v. Long Island R. Co.* 78 Hun, 20.

And some cases hold that the railroad company is liable for injuries caused from failure to maintain such lookout even if the party injured is guilty of contributory negligence. *Toledo, St. L. & K. C. R. Co. v. Cline*, 81 Ill. App. 563; *Hilz v. Missouri Pac. R. Co.* 101 Mo. 54; *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 133.

There are other cases which hold that while it is the duty of the railroad company to maintain a lookout at crossings, contributory negligence of the injured party will bar a recovery. *Georgia Pac. R. Co. v. Lea*, 92 Ala. 262; *Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. ed. 402; *Heddes v. Chicago & N. W. R. Co.* 74 Wis. 239.

And failure to look out at crossing is negligence, and the question of negligence and contributory negligence is for the jury. *Johnson v. Chicago & N. W. R. Co.* 49 Wis. 523; *Leavitt v. Terre Haute & I. R. Co.* 5 Ind. App. 518.

Under 51 Vict., chap. 22, § 280, requiring a lookout on the last car of a train moving reversely, to warn people on the track, a locomotive and tender constitute a train, and the railroad company is liable for failure to exercise reasonable care in having outlook. *Hollinger v. Canadian Pac. R. Co.* 21 Ont. Rep. 705.

Where a team had crossed near to the engine just after the engine passed, the engineer was not  
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upon the track between crossings when it can be exercised consistently with giving the attention to the engine necessary to its safe and proper management.

4. **The question of contributory negligence depends on the question whether or not the plaintiff's negligence is a remote or proximate cause of the injury.**
5. **If the injury could have been prevented by the exercise of reasonable care and prudence on the part of the defendant after plaintiff's negligence had occurred, contributory negligence is not a defense.**
6. **Failure by an engineer to exercise ordinary care to discover persons on the track** in time to avoid injuring them is not such willful and wanton negligence as to exclude the defense of contributory negligence in case a person so situated is injured.

(*MacRae, J., dissents from proposition 5. Clark and Avery, JJ., dissent from proposition 6.*)

(May 9, 1894.)

**A** PPEAL by defendant from a judgment of the Superior Court for Washington County in favor of plaintiff in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate. *Reversed.*

The charge given to the jury by the trial court was as follows:

"There are four issues or questions for you to answer, as follows: (1) Was Joseph Smith killed by the negligence of the defendant? (2) Did the said Joseph Smith,

negligent in failing to watch the team to see if the horse would back on the track when he reversed his engine after coupling to some cars. *Richmond & D. R. Co. v. Yeamans*, 86 Va. 350.

*Lookout for persons on track; generally.*

Under this subhead some of the injured parties were trespassers, but that fact does not appear to have been considered or discussed. The decisions on that question are found in next subdivision.

Where the person injured was a small child, the failure to keep a proper lookout and prevent injury, renders the company liable. *Gunn v. Ohio River R. Co.* 36 W. Va. 165; *Bottoms v. Seaboard & R. R. Co.* (N. C.) May 9, 1894.

There should be such a lookout as is reasonably required by the circumstances, and it should be more careful where there is risk of access to the track than at other places, and the jury had the right to consider the presence of strangers in the cab as an interference with vision. *Marcott v. Marquette, H. & O. R. Co.* 47 Mich. 1.

But on second trial where the engineer testified that the child could not be on the track without being seen and must have come up out of a culvert, there was a verdict for the defendant. *Marcott v. Marquette, H. & O. R. Co.* 49 Mich. 99.

And in *Houston & T. C. R. Co. v. Boozer*, 70 Tex. 580.

And in *Townley v. Chicago, M. & St. P. R. Co.*, 53 Wis. 623, the question of negligence of the company and contributory negligence of the injured party was for the jury.

And in *Chrystal v. Troy & B. R. Co.* 105 N. Y. 164, where a child was injured it was said to be the first case in New York in which must be defined the liability for not seeing one lawfully on the track, but the evidence did not support a verdict for plaintiff.

by his own negligence, contribute to his own death? (8) Could the defendant, by the exercise of reasonable care and prudence, have avoided the injury? (4) What damage, if any, is the plaintiff administratrix entitled to recover? As to which I lay down the law to you as follows: (1) Negligence is the omission to do some act or to perform some duty required by law to be done or performed, or the doing of the act or the performance of the duty in a careless and improper manner. (2) It is the duty of the defendant company to put competent men in charge of its trains. It is the duty of the engineer or fireman, in running the train, to keep a lookout in front of the train, to see objects on the track in order to avoid accidents; and, if they fail to do so, this failure is negligence on the part of the company; and, if an injury results from a failure to keep this lookout, then company would be liable for it; and if you find the plaintiff's intestate was run over by the train of the defendant company, and killed, because of a failure of the officers in charge of and running the train to keep this outlook and see deceased lying on the track, it would be negligence; and you will answer the first issue, 'Yes.' (8) If you find the facts to be that, by reasonable diligence in keeping a lookout, the engineer could have seen the deceased lying on the track in time to have stopped the train before it ran over deceased, and he did not stop it, it would be negligence, and you will answer the first issue, 'Yes.' (4) The fact that the defendant did

not have air brakes on the trains is not negligence. (5) It was the duty of the defendant to have sufficient brakes and appliances to have stopped the train in emergencies of this character in a reasonable distance; and, if you find that the brakes were not sufficient for that purpose, it would be negligence; and, if the deceased came to his death in consequence of this fact, you will answer the first issue, 'Yes.' (6) It is insisted by the defendant that the train was properly equipped and manned for trains after character of this, being a mixed train of passenger and freight cars. The plaintiff insists that two brakemen to fourteen cars was insufficient. This is a question for you. If you find from all the evidence in this case that two brakemen and the steam brake on the engine were sufficient to properly run the train and control it, then the failure to have more is not negligence; but if you find from all the circumstances growing out of this evidence, as you find it to be, two brakemen, the steam brake on engine, and the number of brakes you find were on this train were insufficient to properly run and control it, then the failure to have a sufficient number would be negligence in the company. (7) If you find that the train could have been stopped with the appliances with which it was equipped, after the deceased could, by reasonable diligence, have been seen, and it was not stopped, but ran over deceased, and killed him, it would be negligence, and you will answer the first issue, 'Yes.' (8) The question for you as to the outlook is not when

See *German v. Suburban Rapid Transit Co. infra*. And in *Herring v. Wilmington & R. R. Co.* 22 N. C. 402, it was held that the failure to keep a lookout and discover a slave child asleep on the track was not negligence, as the owner was guilty of contributory negligence in allowing him to be there. But this case was overruled in *Deans v. Wilmington & W. R. Co.* 107 N. C. 693.

Where the party injured was an adult, mere negligence or want of ordinary care on his part would not prevent a recovery. *Virginia Midland R. Co. v. White*, 84 Va. 498; *Baltimore & O. R. Co. v. State*, 36 Md. 366.

In *Brown v. Hannibal & St. J. R. Co.*, 50 Mo. 481, 11 Am. Rep. 420, it was said that a party who was on the track without license is not guilty of such contributory negligence as will bar a recovery for injury caused by failure to keep a proper lookout.

And contributory negligence of plaintiff is a question for the jury. *Johnson v. Lake Superior Terminal & Transfer Co.* 88 Wis. 64.

But in *Galveston, H. & S. A. R. Co. v. Ryon*, 70 Tex. 55, it was held that if the injured party was guilty of negligence in going on the track (which is not decided) no recovery for his death will be allowed although his presence could have been discovered by due care, and the injury prevented by the company.

And where a policeman on the track was negligent in not looking out for the train, no recovery can be had for causing death where every means were used after discovery although the company was negligent in not discovering him sooner. *Pennsylvania Co. v. Myers (Ind.)* Jan. 2, 1894.

#### *Party on track in city.*

It is the duty of the railroad company to keep a proper lookout in towns and cities to prevent in-

jury to persons, and a failure to use vigilance will render the company liable. *Conley v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 408; *Lynch v. St. Joseph & L. R. Co.* 111 Mo. 601; *Lake Shore & M. S. R. Co. v. Bodemer*, 189 Ill. 586; *South & North Ala. R. Co. v. Sullivan*, 59 Ala. 272.

And backing a train without any one on lookout is negligence and renders the company liable for injury caused. *Savannah & M. R. Co. v. Shearer*, 58 Ala. 672; *Dunkman v. Wabash, St. L. & P. R. Co.* 95 Mo. 232, 16 Mo. App. 548.

But a railroad company is not liable for failing to keep a man posted on the front of a locomotive in the city limits at night where there are no streets and the place is swampy, uneven, and there are no lights notwithstanding a city ordinance, and the use of a footpath without objection is not an invitation to the public. *Baltimore & O. R. Co. v. State*, 62 Md. 479, 50 Am. Rep. 233.

And in *Mobile & O. R. Co. v. Stroud*, 64 Miss. 734, it was held that a railroad company is not responsible for injuries to a person on account of the employees not seeing him when he is in a place where he has no right to be.

It is the duty of the railroad company to keep a proper lookout for children in towns and cities, and it will be liable for injuries caused through failure to keep a vigilant lookout. *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141; *Georgia Pac. R. Co. v. Blanton*, 84 Ala. 155; *Daley v. Norwich & W. R. Co.* 26 Conn. 591; *Frick v. St. Louis, K. C. & N. R. Co.* 5 Mo. App. 435; *Battishill v. Humphreys*, 64 Mich. 494, 514; *Hamilton v. Morgan's L. & T. R. & S. S. Co.* 42 La. Ann. 824; *Reilly v. Hannibal & St. J. R. Co.* 94 Mo. 600.

But if the employees run a car on a side track without looking to see if a child was near, the company is not liable if they could not have seen the injured child behind a standing car by looking.

the engineer did see the deceased lying on the track, but when he could, by the exercise of reasonable diligence, have seen him; and if he could, by reasonable diligence, have seen him in time to stop the train, but did not in fact see him in time to stop it, it would be negligence. (9) If you find the engineer kept a lookout and saw the deceased lying on the track as soon as he could have seen him, and immediately used all the appliances he could control in order to stop the train, and could not do so, it would not be negligence, and you will answer the first issue, 'No.' (10) If you answer the first issue, 'No,' you need not answer the others; for, unless the deceased came to his death by the negligence of the defendant, the plaintiff cannot recover. (11) If you answer the first issue, 'Yes,' I instruct you to answer the second issue, 'Yes,' if you believe the evidence in this case. (12) If you answer the first and second issues, 'Yes,' then come to the third. On this issue the same law is applicable that I have laid down to you as applicable to the first, and the facts that would constitute negligence under the first issue would constitute negligence under the third issue; so that if the facts proven satisfy you that the defendant was guilty of negligence, and you answer the first issue, 'Yes,' it will be your duty to answer the third issue, 'Yes.'"

**Messrs. W. D. Pruden and W. H. Day** for appellant.

**Mr. A. O. Gaylord** for appellee.

**Atchison, T. & S. F. R. Co. v. Smith**, 28 Kan. 541.

In Iowa the engineer is not bound to watch out for trespassers on the track, and the duty of an engineer in regard to saving trespassing children begins after they are discovered. **Burg v. Chicago, R. L. & P. R. Co. (Iowa)** Jan. 31, 1894; **Messer v. Chicago, R. L. & P. R. Co.** 68 Iowa, 602.

As to trespassers see next subhead.

#### *Trespassers.*

In places other than in towns and cities and at crossings, it is generally held that a railroad company is not required to maintain a lookout for trespassers on the track. **East Tennessee, V. & G. R. Co. v. King**, 81 Ala. 177; **Palmer v. Chicago, St. L. & P. R. Co.** 112 Ind. 250; **Terre Haute & I. R. Co. v. Graham**, 95 Ind. 236, 48 Am. Rep. 719; **McAllister v. Burlington & N. W. R. Co.** 64 Iowa, 396; **Oatts v. Cincinnati, N. O. & T. P. R. Co.** 15 Ky. L. Rep. 87; **State v. Baltimore & O. R. Co.** 69 Md. 494; **Christian v. Illinois Cent. R. Co. (Miss.)** Jan. 8, 1894; **Barker v. Hannibal & St. J. R. Co.** 98 Mo. 50; **Central R. & Hkg. Co. v. Vaughan**, 98 Ala. 209; **Georgia Pac. R. Co. v. Ross (Ala.)** Dec. 4, 1893.

Even at a crossing, where a person caught his foot as he was walking up the track. **St. Louis, I. M. & S. R. Co. v. Monday**, 49 Ark. 257. See also **Louisville & N. R. Co. v. Kellem**, *infra*.

Where the injured party was trespassing and was intoxicated, some states hold that no outlook is required. **Memphis & C. R. Co. v. Womack**, 84 Ala. 149.

And intoxication imposes no greater vigilance on the part of the company unless those in charge of the train knew his condition. **Columbus & W. R. Co. v. Wood**, 86 Ala. 164.

But in **Felch v. Concord Railroad (N. H.)** July 25, 1890, and **McDonald v. International & G. N. R. Co. (Tex.)** 22 S. W. Rep. 989, reversing 20 S. W. Rep. 847, 25 L. R. A.

**Shepherd, Ch. J.**, delivered the opinion of the court:

1. We are of the opinion that there should be a new trial upon the charge of his honor on the third issue. This issue was intended to present to the jury the principle of **Davies v. Mann**, 10 Mees. & W. 548, and the jury were instructed that the same law and facts which would constitute negligence under the first issue would be applicable to the third issue. The evidence upon the first issue tended to prove negligence on the part of the defendant by reason of its failure to keep a proper lookout in order to discover the deceased in time to avoid the accident, and also because of its failure to properly equip the train by providing sufficient brakes and brakemen. Now, as the doctrine of **Davies v. Mann** is based upon some omission of duty occurring after the negligence of the deceased (**Gunter v. Wicker**, 85 N. C. 812), which negligence was found by the court on the second issue, it is plain that there was error in blending these two essentially different elements of negligence,—the one existing prior, and the other occurring subsequently, to the negligence of the deceased,—and applying them indiscriminately to the third issue. We cannot know upon what phase of the testimony the jury acted in determining the question of negligence upon the first issue, and we have just as much right to assume that, under the charge of the court, they found that the negligence consisted simply in the failure to properly equip the train, as that they predicated it upon the

and 21 S. W. Rep. 774, it was held that the railroad company was bound to exercise ordinary care in maintaining a lookout to prevent injury to trespassers.

And in **Fraser v. South & North Ala. R. Co.**, 81 Ala. 185, 60 Am. Rep. 145, it was held that where his actions or conditions indicate that he is helpless, the failure to use the means to prevent injury will be reckless negligence, if the trainmen are in a position to have discovered the peril of the party in time.

And in **Houston & T. C. R. Co. v. Symphkins**, 54 Tex. 615, 38 Am. Rep. 632, it was held that the failure to discover a party by the use of due care and diligence will authorize a recovery for injury, where such party was on the track and had a fit, but not where the fit was one of intoxication.

In North Carolina, however, where the trespassing party was intoxicated, and his condition might have been discovered by keeping a reasonable lookout so as to prevent injury, the company will be liable for failure to exercise such care. **Norwood v. Raleigh & G. R. Co.** 111 N. C. 236; **Clark v. Wilmington & W. R. Co.** 14 L. R. A. 749, 109 N. C. 430; **Deans v. Wilmington & W. R. Co.** 107 N. C. 686.

And in **Troy v. Cape Fear & Y. V. R. Co.**, 99 N. C. 236, where the injured party was intoxicated, it was said that a reasonable lookout is required even for trespassers, and the company will be liable for injuring those who are not guilty of contributory negligence.

These cases next *supra* hold with the case of **SMITH V. NORFOLK & S. R. Co.** that a railroad company is required to keep an outlook, even for trespassers.

Many cases hold that the company is not liable for failure to maintain a proper lookout, where the party injured was trespassing, even though such person is a small child. **Woodruff v. Northern Pac.**

alleged failure to observe ordinary care in keeping a reasonable lookout, etc. Under the first view, there can be no doubt that the finding upon the second issue would have barred a recovery; for if the engineer discovered the deceased as soon as he could have done so by keeping a proper lookout, and immediately applied all the means within his control to avoid the collision, and his failure to do so was by reason of the improper equipment of the train (an omission of duty which might have existed for weeks or months), then the negligence of the defendant would be no more proximate than that of the deceased, and there would be no ground whatever for the operation of the principle of *Davies v. Mann*. If this be not so, and the principle of that case is to be extended to negligence occurring both prior, as well as that which is subsequent, to the negligence of the deceased, it is perfectly useless to pretend that the doctrine of contributory negligence as to cases of this character has any place in the jurisprudence of this state. This inadvertence on the part of his honor (and such, alone, do we consider it) affords the defendant a clear ground of new trial, and this would be equally true if, as suggested, the third issue had been omitted, and the same instruction had been given on the first.

2. We are also of the opinion that there was error in ignoring that universally established principle in the law of contributory negligence which imposes upon one who has voluntarily disabled himself by reason of

intoxication the same degree of care and prudence which is required of a sober person. This is so well established that it would seem unnecessary to cite authority in its support, but, as it appears to be questioned, we will reproduce a few extracts from some of the text-books, which are substantially repeated by every writer upon the subject. Mr. Wood, in his work on Railways (vol. 2, § 1457), after stating that one cannot voluntarily incapacitate himself from liability to exercise ordinary care, and then set up such incapacity as an excuse for his negligence, remarks: "The rule, therefore, is that the same care is required of a person when he is intoxicated as when he is sober, though, if the defendant is aware of his state before the injury, it is bound to exercise greater care to avoid inflicting any injury upon him." In Patterson's Railway Accident Law (p. 74) it is said: "The fact that the person injured was intoxicated at the time of the injury will not relieve him from the legal consequences of his contributory negligence." In Bishop's Noncontract Law (p. 513) it is said: "Contributory negligence is the product of a general ill condition of the mind, and not of a specific intent. Therefore, on principle, drunkenness does not excuse it, and so also are the authorities." In Thompson on Negligence (vol. 1, p. 480) the author remarks: "Nor will the self-inflicted disability of drunkenness excuse the wayfarer from the exercise of such care as is due from a sober man." In Shearman & Redfield on Negligence (vol. 1, p. 93) it is said, in effect,

R. Co. 47 Fed. Rep. 689; *Mobile & O. R. Co. v. Watly*, 69 Miss. 145; *Scheffler v. Minneapolis & St. L. R. Co.* 32 Minn. 513; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Louisville & N. R. Co. v. Greene (Ky.)* 19 Am. & Eng. R. R. Cas. 95.

It was said in *Ward v. Southern Pac. Co. (Or.)* 23 L. R. A. 715, that a railroad company is not guilty of negligence in not keeping a lookout for a trespassing child on the track.

But while a lookout is not required for persons who are trespassing, yet if it is anticipated that such persons will be at a particular place, due caution is to be used. *Cassida v. Oregon R. & Nav. Co.* 14 Or. 551.

And in *Chicago, B. & Q. R. Co. v. Grablin (Neb.)* Oct. 13, 1893, it was held that a railroad company is liable for injury to a child trespassing if the engineer by the exercise of such lookout as was consistent with his other duties could have seen the child in time to have prevented injury.

And in *Texas & P. R. Co. v. O'Donnell*, 58 Tex. 37, it was held that a railroad company was liable for injury to a child of tender years which it might have prevented by ordinary care in keeping outlook, if the parent had used care in guarding the child.

Where an adult party was injured in a small town but was trespassing on the right of way, although no vigilant lookout was kept, the company was not held liable. *Given v. Kentucky Cent. R. Co.* 12 Ky. L. Rep. 960.

And the company was held not liable for failure to maintain a proper lookout where the party injured was trespassing in the yards of the company. *Rome R. Co. v. Tolbert*, 85 Ga. 447; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112.

#### *Employé on track.*

A railroad company was held liable where an em-

ployé was properly on the track, stepped off to allow a train to pass, and on stepping back was run over by a detached car and caboose following the train, and the conductor and brakeman were in the cupola of the caboose but no one on the forward car on the lookout. *Farley v. Chicago, R. I. & P. R. Co.* 56 Iowa, 337.

And a railroad company was held liable where an employé of a road using an adjoining track was run down and killed by reason of failure of the fireman running the engine to look out. *McMarshall v. Chicago, R. I. & P. R. Co.* 80 Iowa, 757.

And the same was held even where the deceased was guilty of the want of ordinary care. *Baltimore & O. R. Co. v. State*, 33 Md. 542.

And where the engineer knew that carpenters were working on an elevated station and backed his engine without looking or warning, the question of negligence was for the jury, and the failure to look out by the engineer showed want of ordinary care. *Germann v. Suburban Rapid Transit Co.* 37 N. Y. S. R. 360.

But in *Nave v. Alabama G. S. R. Co.* 96 Ala. 204, it was held that the failure to see an employé stationed to flag trains coming from the other direction, is nothing more than simple negligence, which will not authorize a recovery when the plaintiff himself was guilty of contributory negligence in failing to see the train which was visible for more than a mile.

And the inference that a railroad company caused injury by failing to keep a proper lookout, is dispelled by evidence that deceased caught his foot in a catguard. *Louisville & N. R. Co. v. Kellem*, 14 Ky. L. Rep. 734. See also *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257.

#### *Injuries to passenger.*

The railroad company is liable for injury to a



that, if the intoxication is such that it prevented the injured person from taking ordinary care to avoid the injury, he cannot recover. See also, Pearce, *Railroads*, 295; Whittaker's Smith, Neg. 403, note; 4 Am. & Eng. Encyclop. Law, p. 79. In Beach on Contributory Negligence (p. 403) it is said: "Drunkenness is a wholly self-imposed disability, and, in consequence, is not to be regarded with that kindness and indulgence which we instinctively concede to blindness or deafness or any other physical infirmity."

Disabilities, moreover, of any kind, are to be a shield, and never a sword. It would be a strange rule of law that regarded a certain course of conduct negligent and blameworthy upon the part of a sober man, but that held the same conduct, on the part of the same man when intoxicated, venial and excusable. Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication *cum periculo*. When they make themselves drunk, and in that helpless condition wander upon the premises of sober men, and sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence; and the courts consistently hold that such intoxicated trespassers [the notes show that the author is speaking of railroad accidents] have no standing in any form where justice is impartially administered." These authorities, supported by a

multitude of cases cited in the notes to the various text-books, established beyond all controversy that the deceased, under the circumstances of this case,—that is, not having been discovered by the engineer,—is to be treated, up to the moment of the collision, as a sober man, and that his helpless condition is not to be assimilated to those cases where the disability has not been self-imposed, and where the helpless condition is treated as a remote cause of the injury by reason of previous negligence or the visitation of Providence. Of course, if the engineer knew, or had reason to know, of his helpless condition in time to have stopped the train and avoided the injury, and failed to do so, he would be guilty of such reckless conduct as would subject him to the punishment of the criminal law, as well as impose a civil liability upon the railroad company. This principle, as we have stated, is peculiar to the self-imposed disability of intoxication, and is as firmly fixed in the law of negligence as it is, as a general rule, in the criminal law of the land. That this is so is evident from the fact that, after the most industrious research, there cannot, it seems, be found in the entire annals of English or American jurisprudence a single decision at common law (nor have we seen any under a statute) in which a recovery has been permitted for injuries inflicted along the line of the road under the circumstances of this case. Even in Missouri and Texas, where perhaps the most advanced doctrine obtains, it has been decided that the action cannot

passenger from collision of train with stock on track if the accident might have been avoided by the engineer looking in the proper direction. *Nashville & C. R. Co. v. Messino*, 1 Sneed, 220; *Fordyce v. Jackson*, 58 Ark. 504, 601.

And the failure to notify an engineer of the expected arrival of an excursion train with which his train collided in switching, was negligence and rendered the company liable for death of passenger caused thereby, where such injury would have been prevented by keeping lookout. *Eddy v. Letcher*, 57 Fed. Rep. 115.

#### Stock.

Under the Alabama statute rendering a railroad company liable for injury to stock from negligence of the company, the company must keep a diligent lookout for stock and will be liable for injury to stock for failure to keep such lookout. *Western R. Co. of Alabama v. Sistrunk*, 35 Ala. 357; *Central R. & Bkg. Co. of Georgia v. Lee*, 96 Ala. 444; *Louisville & N. R. Co. v. Posey*, Id. 232; *Mobile & B. R. Co. v. Kimbrough*, Id. 127; *East Tennessee, V. & G. R. Co. v. Baker*, 94 Ala. 682; *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279; *Kansas City, M. & B. R. Co. v. Watson*, 91 Ala. 483; *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41.

Failure to maintain a steady lookout is itself culpable negligence in Alabama. *Western R. Co. v. Lazarus*, 38 Ala. 453.

Failure to keep a proper lookout that could have enabled the engineer to have prevented the injury to stock is negligence, and justifies a recovery. *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 1; *Richmond v. Sacramento Valley R. Co.* 18 Cal. 351; *Illinois Cent. R. Co. v. Middlecworth*, 43 Ill. 494. (But see *Illinois Cent. R. Co. v. North*, 142 Ill. 578 reversing 42 Ill. App. 509, *infra*, which distinguishes this case if not overruling it; *Chicago & N. W. R. Co. v. Barrie*, 25 L. R. A.

55 Ill. 222; *Chicago & A. R. Co. v. Legg*, 32 Ill. App. 218; *Rockford, R. L. & St. L. R. Co. v. Irish*, 72 Ill. 404; *Missouri Pac. R. Co. v. Gedney*, 44 Kan. 329; *Kansas City, Ft. S. & G. R. Co. v. Hines*, 20 Kan. 605, 32 Kan. 619; *Missouri Pac. R. Co. v. Reynolds*, 31 Kan. 132; *White v. St. Louis & S. F. R. Co.* 20 Mo. App. 564; *Carlton v. Wilmington & W. R. Co.* 104 N. C. 365; *Snowden v. Norfolk Southern R. Co.* 95 N. C. 93; *Wilson v. Norfolk & S. R. Co.* 90 N. C. 130; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190.

If a defective headlight only enables the engineer to see fifty or sixty yards ahead, and the train could not be stopped in less space than one hundred and twenty yards, and the stock could have been seen by the use of a proper headlight, the railroad company is liable. *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487.

And in *Northeastern R. Co. v. Martin*, 78 Ga. 603, it was held that a verdict for plaintiff will not be set aside where there was no lookout at the time, on both sides of the cab, the engineer on the lookout on the right side and the fireman busy firing the engine; and the court said that if the railroad relies on a fireman to look out they had better get somebody else to look out when he is busy.

And on the failure to see a mare on a straight track, until within twenty or thirty yards off, where she had run 300 yards down the track in front of the engine, the night being clear and starlight, the question of negligence on the part of the company was one for the jury. *Kent v. New Orleans & T. R. Co.* 67 Miss. 608.

The engineer is required to use due care and vigilance in keeping lookout for stock, in the Indian Territory. *Gulf, C. & S. F. R. Co. v. Johnson*, 10 U. S. App. 627, 54 Fed. Rep. 474; *Gulf, C. & S. F. R. Co. v. Ellis*, 10 U. S. App. 640, 54 Fed. Rep. 481; *Gulf, C. & S. F. R. Co. v. Ellidge*, 4 U. S. App. 136, 49 Fed. Rep. 356; *Gulf, C. & S. F. R. Co. v. Cuda*, 4 U. S.

be maintained unless the engineer knew, or had reason to know, of the exposed and unconscious condition of the deceased. *Yarnall v. St. Louis, K. C. & N. R. Co.* 75 Mo. 575; *Houston & T. O. R. Co. v. Symphkins*, 54 Tex. 615, 38 Am. Rep. 692. See also, numerous cases cited in the notes to *Kean v. Baltimore & O. R. Co.* (Md.) 19 Am. & Eng. R. R. Cas. 321.

In the Texas case it will be noted that the court distinctly held that it was the duty of the engineer to keep a lookout to avoid injury even to trespassers; yet a new trial was granted, on the ground that it was not left

to the jury to determine whether the injured party was intoxicated or was suffering from a providential visitation,—"a fit." If his lying on the track, insensible to danger, was due to the former, and not to the latter, cause, it was declared that plaintiff could not recover. It may be further observed that this case is cited as an authority in *Troy v. Cape Fear & Y. V. R. Co.*, 99 N. C. 298, and it is remarkable that, even in the two states where it is said the doctrine of comparative negligence obtains, this action could not be maintained. *Illinois Cent. R. Co. v. Cra-*

App. 200, 49 Fed. Rep. 358; *Gulf, C. & S. F. R. Co. v. Washington*, 4 U. S. App. 121, 49 Fed. Rep. 347.

In *Hoffman v. Missouri Pac. R. Co.*, 24 Mo. App. 545, it was held that the liability of the company begins after having discovered the peril of the stock, and not that the company is liable for failure to use reasonable diligence to discover the situation of the stock. But this doctrine is denied in *Hill v. Missouri Pac. R. Co.* 49 Mo. App. 520.

A railroad company is liable for injury to stock straying on track where not fenced, if it fails to exercise reasonable care to have a lookout for the stock so as to avoid injury. *Hill v. Missouri Pac. R. Co. supra*.

Under Ky. Gen. Stat., chap. 37, § 2, the owner of stock killed may recover one half the value of the stock, where he has not received compensation for fencing against road, but a mutual contract to fence by the railroad and owner would relieve the company from liability for failure to keep a lookout for stray cattle. This however may be rescinded by lapse of time. *Ohio Valley R. Co. v. O'Daniel*, 15 Ky. L. Rep. 225.

But in *Howard v. Louisville, N. O. & T. R. Co.* 67 Miss. 247, it was held that the failure to keep lookout because both engineer and fireman are busy with other duties does not render the company liable.

And in Minnesota the common law in reference to the restraint of domestic animals prevails and as to stock trespassing, the employers are not negligent in failing to look out ahead. *Stacey v. Winona & St. P. R. Co.* 42 Minn. 158; *Looke v. First Div. St. Paul & P. R. Co.* 15 Minn. 350; *Palmer v. Northern Pac. R. Co.* 37 Minn. 223.

And in Illinois Cent. R. Co. v. Noble, 142 Ill. 578, reversing 42 Ill. App. 509, and distinguishing *Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 494, it was held that a railroad company was not bound to keep a lookout for trespassing stock at a place where the company has fenced the track.

In *Little Rock & Ft. S. R. Co. v. Holland*, 40 Ark. 386, and *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562, it was held that it was the duty of the engineer to look out for stock wrongfully on the track, and that the company was liable for injury from failure to do so, but these cases were in effect overruled in cases next *infra*.

And in Arkansas it is now held it is not negligence for a railroad company to fail to keep a lookout for stock. *Memphis & L. R. R. Co. v. Kerr*, 5 L. R. A. 420, 52 Ark. 163; *Kansas City, Ft. S. & M. R. Co. v. Shaver* (Ark.) Nov. 15, 1890.

And in the absence of a statute requiring a fence against stock, it is not negligence to fail to keep a lookout over the entire breadth of the right of way. *Kansas City, S. & M. R. Co. v. Kirksey*, 48 Ark. 366.

The railroad company is not liable if it uses all the means at hand to prevent collision, possible, as soon as the animal is discovered, and the engineer is diligent in keeping a lookout. *East Tennessee, V. & G. R. Co. v. Baylies*, 75 Ala. 405, 74 Ala. 150; *Mobile & G. R. Co. v. Caldwell*, 63 Ala. 198.

#### Tennessee.

In Tennessee under the code provisions known 25 L. R. A.

as section 1186 of the Code, and sections 1226, 1300, of the later edition, which provide that the railroad company shall maintain a lookout always ahead, and be liable for injuries caused for failure so to do, and for failure to give warning, it is held that the liability of the company in such a case for injury to persons on the track is absolute. *Nashville & C. R. Co. v. Nowlin*, 1 Lea, 423; *Louisville & N. R. Co. v. Connor*, 9 Heisk. 19; *Katzenberger v. Lawo*, 13 L. R. A. 185, 30 Tenn. 236; *East Tennessee, V. & G. R. Co. v. White*, 5 Lea, 1640; *East Tennessee, V. & G. R. Co. v. Pratt*, 35 Tenn. 9.

Under the provisions of the Tennessee statute, when the motion of the train is reversed, the engine must be placed on the other end of the train with a lookout ahead, or else the company must take the consequences. *Knoxville, C. G. & L. R. Co. v. Acuff*, 52 Tenn. 25; *Little Rock & M. R. Co. v. Wilson*, 13 L. R. A. 364, 30 Tenn. 271.

And contributory negligence will not defeat a recovery but may mitigate damages. *Nashville & C. R. Co. v. Smith*, 6 Heisk. 174; *Chattanooga R. Co. v. Walker*, 11 Heisk. 383; *East Tennessee, V. & G. R. Co. v. Humphreys*, 12 Lea, 200; *Chesapeake, O. & S. W. R. Co. v. Foster*, 38 Tenn. 672.

And in *East Tennessee & G. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 149, it was held that the liability for failing to keep a lookout for a boy asleep on the track was the same as under the statute.

In the case of a train breaking in two, it was held that the statute was not applicable, but that the common law was the same, and contributory negligence could be considered in mitigation of damages. *Patton v. East Tennessee, V. & G. R. Co.* 13 L. R. A. 184, 30 Tenn. 370.

In *Louisville & N. R. Co. v. Robertson*, 9 Heisk. 278, it was held that the statute did not apply where an employé in the yard was injured while engaged in his duties in making memorandum.

And under the statute imposing liability for failure to keep lookout for stock this means only at the place where the accident occurred and not all along the line. *Louisville & M. R. Co. v. Stone*, 7 Heisk. 468.

And when headlight is obscured by rain, the company is not liable under the statute for killing stock. *Louisville & N. R. Co. v. Melton*, 2 Lea, 222.

In *Byrne v. Kansas City, Ft. S. & M. R. Co.* (Tenn.) 24 L. R. A. 693, it was held that the precautions required by the statute were not necessary where a person suddenly got on the track before the signal could be given or means applied to stop the train.

And under the Tennessee statute the lookout for stock need only be on the track and not over the entire right of way. *Louisville, N. & G. S. R. Co. v. Reidmond*, 11 Lea, 205.

In this note cases in regard to lookouts on trains making flying switches are not included—for which see note to *Kentucky Cent. R. Co. v. Smith*, (Ky.) 18 L. R. A. 63. See also *Wallace v. City & S. R. Co.* (Or.) post, 663, as to care required to avoid injury to children on the track.

L. T.

gin, 71 Ill. 177; *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill. 103; *Toledo, P. & W. R. Co. v. Riley*, 47 Ill. 514; *Southwestern R. Co. v. Hankerson*, 61 Ga. 114. We are unable to understand how, upon principle, the case of one who is asleep on the track can be assimilated, as argued, to that of a self-imposed disability of intoxication, which, as we have seen by all of the authorities, stands upon its own peculiar ground. Being on the track is not itself negligence (*Troy's Case*), and, if such a person is unexpectedly overcome by sleep, his disability cannot be said to have been self-imposed. Neither are we able to see how the case of a deaf mute walking on the track can be likened unto that of a person who is lying there stupefied by strong drink. A high degree of care is required of one who is deaf, and who places himself in a position of known danger. Still, if the engineer can, by reasonable diligence, discover him on the track and his insensibility to danger, the disability being involuntary, he is entitled to recover. Nor can we perceive any similarity between the intoxicated man and a cow that has strayed upon the track, the cow, of course, not being the author of its insensibility to danger, and the owner really guilty, as is held by this court, of no negligence whatever in turning his cattle out to graze.

The principle of which we are speaking has never been denied by this court as a distinct ground of decision, though the case of a drunken man was used in *Deans' Case*, 107 N. C. 686, as one of the illustrations of certain very important principles in the law of negligence, which it will be seen hereafter we fully approve. The point did not arise in that case, as it was not found or admitted that the deceased was intoxicated, and the ruling below was simply to the effect that, upon the whole testimony, the defendant owed no duty to look out and discover trespassers upon the track, and therefore was not guilty of negligence. The ruling of his honor was regardless of the fact whether the deceased was drunk or sober, and it was necessary that this court should declare the duty of railroad companies as to persons on the track at places other than crossings, and also to discuss the doctrine of contributory negligence in its relation to the principle commonly called the "Rule in *Davies v. Mann*." The language used in the opinion is as follows: "If the engineer discover, or, by reasonable watchfulness, may discover, a person lying upon the track asleep or drunk, or see a human being who is known by him to be insane or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it." From this language it might be inferred that the duty of the engineer begins only upon the discovery of the person in danger; for, until he does discover him, the duty of resolving all doubts in favor of his preservation from danger cannot very reasonably arise. Taken, however, in connection with other parts of the opinion

and the declaration of the court in subsequent cases, it cannot be doubted that it was intended to declare the duty of keeping a proper lookout for all persons who may be on the track. The declaration, however, of a duty, and the effect of intoxication in contributory negligence, are very different things; and the latter question was, for the reasons above mentioned, not presented to the court. It is true that from the opinion it might be inferred that intoxication, if it had been found as a fact, would have excused the negligence of the deceased; but, as we have said, this particular point was not decided, nor do the authorities cited in the opinion support this view. Let us examine these cases. In *Houston & T. O. R. Co. v. Smith*, 53 Tex. 179, the injury was inflicted upon a man who was walking upon the railroad track, and was negligent. He was held, under the circumstances, to be guilty of contributory negligence, and it is to be noted that there was evidence tending to show that he was intoxicated. In *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 279, the action was brought for injuries received by the plaintiff in a collision between a locomotive and the wagon in which the plaintiff was riding. There was nothing in the case about intoxication; but, in the course of his learned opinion, Judge Christy, in discussing the general subject of negligence, remarked that, if the engineer "sees" a person in peril on the track whom he has reason to believe to be badly intoxicated or otherwise insensible to danger, he must use all the means in his power to stop the train and avoid a collision. In *East Tennessee & G. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 149, the accident complained of was to a child eight years of age; and in *Meeks v. Southern Pac. R. Co.* 56 Cal. 518, 38 Am. Rep. 67, the accident was to a child six or seven years of age. In neither of these cases was the effect of intoxication discussed, and they were evidently cited for the purpose of sustaining the rule imposing the duty upon the engineer of keeping a lookout for persons along the line of the track, and upon that question they are in point. To the same effect is the much-cited case of *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78; but, as bearing upon the particular question under consideration, it may be noted that the action was brought for the killing of cattle straying upon the track, and that the duty which the law imposes upon an intoxicated person was in no way involved in the decision. The following language, however, appears in the discussion of the general subject: "Or if an intoxicated man is lying in the traveled part of the highway, helpless, if not unconscious, must I not use care to avoid him? May I say that he has no right to incur the highway, and therefore carelessly continue my progress, regardless of consequences? Or, if such a man has taken refuge in a field of grass or a hedge of bushes, may the owner of a field, knowing the fact, continue to mow on or fell trees, as if it was not so? Or if the intoxicated man has entered a private lane or byway, and will be run over if the owner does not stop his team which is pass-

ing through it, must he not stop them?" We have quoted the entire paragraph, so that it can be readily seen that this dictum (and it is nothing more) really means, what we all concede, that, if such an intoxicated person is discovered, it is a duty dictated by humanity, as well as the law, to avoid inflicting an injury upon him. If this is not so, what meaning is to be attached to the words "carelessly continue my progress," "knowing the fact," and "does not stop them?" When Mr. Wood (vol. 2, p. 1464) speaks of the duty which is due to persons lying on the track in connection with a child or an animal, he very clearly did not intend to say that, when a drunken man is not discovered, he is to be absolved from the consequences of his own negligence, as the only case he refers to of persons lying on the track is the case of *Meeks v. Southern Pac. R. Co.*, *supra*, where a child lying on the track was run over and injured. That he did not mean that a drunken man would be excused from exercising the same care that is required of a sober man is evident from his explicit statement of the contrary doctrine, which we have heretofore quoted, and which is sustained by all of the authorities. This is also perfectly manifest from the fact that on the very next page he quotes with approval that part of the opinion in *Lake Shore & M. S. R. Co. v. Miller*, *supra*, which contains the language of Judge Christy to which we have referred, and which indicates that the railroad company is only liable for the failure of duty after discovery of the drunken man. The author says: "And this, we believe, is an accurate statement of the duty of railway companies under the circumstances referred to." It is manifest from this examination that these cases do not sustain the proposition that an intoxicated person is absolved from the duty of exercising ordinary care, and it is but proper to say that they were probably cited for the purpose of sustaining the general principles laid down in the extract which we have quoted.

Having shown, we think conclusively, not merely by the weight but by the entire course of judicial opinion, that the self-imposed disability of intoxication affords no more excuse in the law of negligence than it does in the criminal law, we cannot understand how we could be justified in the abrogation of this principle, which has stood for centuries, simply by reason of what may be implied from the language of an opinion in a case that did not distinctly raise the question. This, it seems to us, would not be following the doctrine of *stare decisis*, and the argument that a court can arbitrarily reject a fundamental principle of law by calling it a fiction is, we think, wholly inadmissible. If we can do this, there is no reason why the same principle may not be rejected as a fiction in the criminal law; and, indeed, we do not see why we could not dispose of any other well-grounded rule of law in the like summary manner. The supposed analogy with the principle of equity which relieves a wholly intoxicated person against the consequences of his contracts cannot be supported. Equity shields him in such

cases when he has been imposed upon by reason of such incapacity, but neither equity nor law ever converts intoxication into a sword, by means of which a drunken man can make a profit out of his self-imposed disability, when a sober man, under the same circumstances, would be entitled to no relief. It would, as Mr. Beach says, be a strange law that would enable a drunken man to recover when under the same circumstances a sober man would be denied all redress; and there certainly can be no more inhumanity in denying a recovery to one who, by an act done in his intoxicated condition, might probably contribute to the wrecking of a train and the destruction of the lives of passengers, than to hang a man for murder committed while wholly unconscious of his act, by reason of the influence of strong drink. The law does not treat such unfortunate persons who may be on the track as outlaws. On the contrary, this court and several others have declared it to be the duty of the engineer to keep a vigilant lookout for them and all other persons; but, when he fails to discover them by the omission of ordinary care (and this is the measure of his duty, — *Deans' Case*, *supra*; *McAdoo v. Richmond & D. R. Co.* 105 N. C. 140), there would seem to be no injustice in denying a recovery to one who has voluntarily stupefied his senses, so as to be unable to provide for his own safety. The engineer is running a train over his own right of way, and by an inadvertence, which amounts simply to the failure to use ordinary care, fails to discover a person who really has no right to be on the track, and who he cannot reasonably anticipate will make it a place of drunken repose. The engineer, when he discovers the man, uses every means in his power to avoid the injury. The man, had he been sober, could easily have escaped; but, by reason of the self-imposed disability of intoxication, makes no effort to do so. Can there be anything wrong in refusing to cast upon the defendant the whole responsibility of the collision, and making it pay for an accident which would not have happened had the deceased been sober, and for which had he been sober, he could not have maintained an action? The law is just, as well as humane, and denies a recovery under such circumstances. Such has always been the law both in England and America. It has been approved by such great jurists as Ruffin, Nash, Pearson, and their distinguished successors, and we feel that we are treading upon safe ground when we follow in their footsteps. If the legislature sees fit to change the law in this respect, it has the power to do so, but we do not think that so radical a change in the law of negligence should be wrought by what we cannot help thinking would be "judicial legislation."

As we have already intimated, the fact that the elementary principle referred to seems to be seriously disputed is the only reason we have said so much in its support, as we believe it to be established beyond all question by the consensus of judicial decision, as well as the opinion of all of the authors upon the subject. If, then, the same

degree of care is required of the deceased "as is required of a sober man under the same circumstances," it is plain that his negligence was concurrent with that of the engineer, and he was therefore guilty of contributory negligence. *McAdoo's Case, supra*, and the authorities cited. Indeed, as we shall hereafter see, his negligence, operating, as it did, up to the moment of the collision, and after the decisive negligence of the engineer, was really subsequent negligence, and goes far beyond what is sufficient to bar a recovery. Had the deceased been looking and listening, as he was required to do, he would have had ample time to have escaped from his peril after the engineer had passed the point when his efforts would have been unavailing to save him. Under this view, he being, in contemplation of the law, able to avoid the consequences of the prior negligence of the defendant, it would seem that, if the train had been injured by the obstruction, his negligence would have been the proximate cause of the accident, and the defendant, and not the deceased, would have been entitled to recover. A sober man, as we have seen very clearly, could not have recovered; and is a premium to be offered to negligence, caused by the self-imposed disability of drunkenness, which prevents one from using ordinary care by looking and listening for the approach of trains which he is bound to know the defendant has a right to run, and will run, over its own property, in the pursuit of its legitimate business? In this case there is a total absence of testimony tending to show that the conduct of the engineer was wanton or willful, and his testimony to the effect that he sounded the alarm, and applied the brakes, and used all other means under his control to avoid the accident, as soon as he discovered the deceased lying on the track, is wholly uncontradicted. The action, then, being founded upon the failure to use ordinary care, is subject, of course, to the defense of contributory negligence, and we cannot conceive of a plainer case than the one now before us. We feel very sure that his honor's failure to apply the principle which we have been discussing entitles the defendant to a new trial.

3. While the foregoing considerations are, in our opinion, sufficient to dispose of this appeal, we deem it our duty, in view of the argument of counsel, to express our approval of certain general principles laid down in *Dean's Case*, and also our views as to how they should be applied. Leaving, then, the facts of this particular case behind us, we will state that one of the principles referred to is that which imposes upon the engineer of a railroad train the duty of keeping a vigilant lookout on the track, in order to discover and avoid any obstructions that may be encountered thereon. This duty is due to the passengers, and, when consistent with the necessary attention of the engineer and other employes on the engine to its safe and proper management, the duty is likewise due to the owner of cattle running at large, to the owner of other property which, under certain circumstances, may be on the track, and also, as a general rule, to persons who

may be on the same at places other than crossings. When, under the particular circumstances of a case, such property or persons may, by the exercise of ordinary care, be discovered in time to avoid a collision, the failure to exercise such ordinary care is negligence, and the plaintiff will be entitled to recover, unless he has been guilty of contributory negligence. Of course, where a person is discovered, and is apparently not unconscious of danger, it is to be presumed that he will observe ordinary caution, and the engineer is not required to stop the train. Although this principle, as applied to persons on the track, does not generally prevail, there seems to be a growing disposition on the part of the courts to recognize it as a common-law duty, and in Georgia and Tennessee it has been imposed by statute.

In Tennessee, however, it was said by Lurton, *Ch. J.* (*Patton v. East Tennessee, V. & G. R. Co.* 89 Tenn. 370, 12 L. R. A. 184. See also *St. John's Case, supra*), that such is the law without reference to the statute, and he quotes with approval the language of Mr. Wood, who says "that a railroad company is bound to keep a reasonable lookout for trespassers upon its track, and is bound to exercise such care as the circumstances require to prevent injury." 2 Wood, *Railway Law*, 1267. This language is also quoted with approval by the supreme court of West Virginia, and a recovery was sustained, upon the same principle, for injuries to a child trespassing upon the track. *Gunn v. Ohio River R. Co.* 36 W. Va. 165. To the same effect is *Meeks v. Southern Pac. R. Co., supra*, and other cases.

This ruling on our part is supported by the plain intimation, if not, indeed, the decision, of this court in *Troy v. Cape Fear & Y. V. R. Co., supra*, in which it is said that a person walking upon a railroad track is not guilty of contributory negligence *per se*, nor does such a "technical" trespass relieve the railroad company of the duty of exercising ordinary care to avoid the infliction of injury, provided such person, after he gets on the track, does nothing "positive or negative to contribute to the immediate injury." The court adopts the principle laid down in the leading case of *Houston & T. C. R. Co. v. Symphkins, supra*, and it may be well to reproduce an extract from the opinion in that case. The court said: "In our opinion, there is a distinction between the duty devolving on the owners of land on which there is a dangerous excavation and that devolving on a corporation invested by law with the extraordinary power of traversing the country with huge cars, whose progress is everywhere attended with danger. They who place such dangerous machines in motion should, we think, be required to take precautions against their injuring any one who may happen to be in their pathway. 'The care in conducting any business should be proportionate to its dangerous nature. *Gorman v. Pacific Railroad*, 26 Mo. 448, 72 Am. Dec. 220.' The extent of the precaution required of a railroad company depends on all the circumstances. The regulation of railroads exact watchfulness of the engineers,

and this rule should operate for the benefit of the public as well as the company.

"Authorities are not lacking in support of the position that a 'reasonable lookout,' varying according to the danger and all the surrounding circumstances, is a duty always devolving on those in charge of a train in motion. *Baltimore & O. R. Co. v. State*, 86 Md. 366; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22; *Hicks v. Pacific R. Co.* 64 Mo. 490. The duty of watchfulness has often been enforced against railroads in cases of injuries to cattle trespassing on their tracks, and that, too, in the absence of any statutory provision, or in cases outside of the statute. We prefer that line of decisions holding railroads bound to exercise their dangerous business with due care to avoid injury to others, as correct in principle and sound in policy, and as protecting even a trespasser who is not guilty of contributory negligence." These principles, when applied with a proper regard to the defense of contributory negligence, commend themselves to our judgment as just as they are humane, and they are especially applicable to railroads operating within our state, where, as a matter of common knowledge, the use of their tracks by pedestrians is tacitly acquiesced in. We can see no hardship in exacting this duty of engineers, and holding their principals responsible when they fail to exercise due care in discovering and avoiding injuries to helpless persons between crossings, who are in plain view upon their tracks; and this is really the duty imposed upon them in such cases. As we have stated, this duty has been established by several decisions of this court, and at the present term we enforced it in the case of an injury to a child of tender years, who could, by the exercise of ordinary care, have been discovered by the engineer. *Bottoms v. Seaboard & R. R. Co.* (N. C.) 19 S. E. Rep. 730. We see no reason to reverse our former rulings upon this important subject, simply because in some of the other states a contrary doctrine is held. We believe that they are founded upon principle, as well as respectable authority; and for these reasons, as well as a due regard to the doctrine of *stare decisis*, we should adhere to the principles therein enunciated.

4. We have thus dwelt upon the existence and nature of this duty, because it is impossible to discuss the doctrine of contributory negligence, even to a limited extent, unless we have a clear conception of this constituent element, as well as of other terms and definitions relating to the subject. Indeed, it may be safely remarked that no science is more dependent upon the accuracy of its terms and definitions than that of the law. Looseness of language and dicta in judicial opinions, either silently acquiesced in or perpetuated by inadvertent repetition, often insidiously exert their influence, until they result in confusing the application of the law, or themselves become crystalized into a kind of authority, which the courts, without reference to true principle, are constrained to follow. These observations are particularly applicable to the doctrine of contributory negligence, and especially in

its relation to what is generally called the "Rule of *Davies v. Mann*." All along the highway of judicial decision we find it strewn with the wrecks of overruled cases, exploded dicta, and condemned or qualified expressions, that we are inclined to sympathize in the despairing remarks of Judge Thompson that "the whole subject of contributory negligence remains in a state of great confusion and uncertainty." 2 Thomp. Neg. § 7. Mr. Beach, Mr. Patterson, and some other writers attribute much of this obscurity to improper definitions of the rule in *Davies v. Mann*, and we think, with them, that it is simply a means of determining whether the plaintiff's negligence is a remote or a proximate cause of the injury. Before the introduction of the rule, any negligence on the part of the plaintiff, which in any degree contributed to the accident, was judicially treated as a proximate cause, and constituted contributory negligence, which barred a recovery. *Dowell v. General Steam Nav. Co.* 5 El. & Bl. 195. Several reasons have been assigned in support of this principle, one of which is that a court of law, unlike a court of admiralty, has "no scales to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief," and therefore, if the plaintiff were allowed to recover, "it might be that he would obtain from the other party compensation for his own misconduct." 2 Thomp. Neg. 1146-1154. This was considered a harsh rule, as it left the plaintiff to bear all the damages, although he may have been but remotely, and consequently but slightly, in fault. The doctrine, however, was qualified by the ruling in *Davies v. Mann*; and it was determined that, although the plaintiff was guilty of a want of ordinary care in contributing to the injury, yet this would not prevent him from maintaining an action if the defendant might have avoided the injury by the exercise of ordinary care on his part. Much confusion, as we have seen, has resulted in the application of this principle, and it has been claimed to be authority for the doctrine of comparative negligence, and it has also been criticised as practically abolishing the doctrine of contributory negligence altogether. A very reasonable explanation of it is made by Mr. Patterson, however, who says: "The rule has been misunderstood and misapplied. It means only that that negligence upon the part of the plaintiff, which bars his recovery from the defendant, must have been a proximate cause of the injury, and that it is not a proximate, but only a remote, cause of the injury when the defendant, notwithstanding the plaintiff's negligence, might, by the exercise of ordinary care and skill, have avoided the injury. Thus stated, the rule is consistent with the theory upon which the doctrine of contributory negligence is based, and furnishes no support for that of comparative negligence." Patterson, *Railway Accident Law*, 51. Mr. Beach expresses the same view, and adds that "the attempts of the judges to ring a new change, or to find some novel and original phrase in which to express the rule that, whenever the negligence

of a plaintiff proximately contributes to cause the injury for which he seeks to recover damages, he has no cause of action, has thrown the law into confusion." Beach, Contrib. Neg. p. 88; Pollock, Torts, 295; Bishop, Non-Cont. L. 459; 2 Wood, Railway Law, 1447; Whart. Neg. 823; 4 Am. & Eng. Encyclop. Law, 18, 19, 27, notes. It must also be observed that shortly after the decision of *Davies v. Mann*, Lord Campbell, in 5 El. & Bl. 195, understood the doctrine to be the same as stated above. These views have been distinctly adopted by this court in several cases, and are well expressed in *Farmer v. Wilmington & W. R. Co.*, 88 N. C. 564, in which Mr. Justice Ashe states that whether the plaintiff was guilty of contributory negligence depends upon whether his act "was a proximate or a remote cause. If the act is directly connected, so as to be concurrent with that of the defendant, then his negligence is proximate, and will bar his recovery; but, where the negligent act of the plaintiff precedes in point of time that of the defendant, then it is held to be a remote cause of the injury, and will not bar a recovery, if the injury could have been prevented by the exercise of reasonable care and prudence on the part of the defendant." Thomp. Neg. 1157, note 8; *Gunter v. Wicker*, supra; *Doggett v. Richmond & D. R. Co.* 78 N. C. 805; *Roberts v. Richmond & D. R. Co.* 88 N. C. 560.

Thus, it appears that, where the doctrine of *Davies v. Mann* is applicable, it excludes contributory negligence; and, if this be so, it would be confusing to say that, notwithstanding the contributory negligence of the plaintiff, he may nevertheless recover if the defendant could, by ordinary care, have avoided the injury. Whether a third issue should be submitted is a matter addressed to the discretion of the judge, but, when he does submit such an issue, it will avoid dispute as to the meaning of terms to omit the word "contributory." This is in accord with the suggestion of Mr. Justice Avery in the well-considered opinion in *McAdoo v. Richmond & D. R. Co.*, supra.

Recurring, however, to the main question, it becomes important to determine what is a "proximate cause," within the meaning of the rule, and it was to this point that the learned argument of counsel for the defendant was chiefly addressed. In *Farmer v. Wilmington & W. R. Co.*, supra, and the authorities cited, it will be seen that this depends upon whether "the negligent act of the plaintiff precedes in point of time that of the defendant;" and this is the view, according to Judge Thompson, which is supported by the weight of English and American authorities. 2 Thomp. Neg. 1157. Counsel insists that, until the actual discovery of the person apparently in danger, the negligence of such person cannot be said in a legal sense to precede that of the defendant; and therefore, unless the injury could have been avoided by the exercise of ordinary care after such discovery, the plaintiff has no cause of action. It must be manifest that, if this is the correct view, the rule in question would have but little room for

application; for when an engineer actually sees a person apparently insensible to danger, and fails to use ordinary care to avoid his injury, he is guilty of such a reckless and wanton disregard of human life that his conduct is so far regarded as willful as to practically place him entirely outside of the law of negligence. Beach, Contrib. Neg. 55. Many cases were cited by counsel in support of his proposition, but, on examination, it will be seen that they come from states where the duty of the engineer to anticipate and keep a lookout for persons along the line of the road is not imposed. The failure to advert to the nonexistence of this duty is but an illustration of one of the many ways by which the doctrine of negligence is confused. In speaking of such decisions, a discriminating writer remarks: "But these cases may rest on the principle that it is no want of ordinary care not to look out for persons where they have no right to be." And it is to be noted that Judge Thompson's "discovery clause," as Mr. Beach disapprovingly calls it (Beach, Contrib. Neg. 55), seems to be based in part upon this very idea. 2 Thomp. Neg. p. 1157, § 7. Judge Thompson, however, very candidly admits that his view is not sustained by the weight of authority, and, after stating that "the practitioner is concerned to know the conclusion of the courts rather than the views of writers," proceeds to lay down the rule which omits the discovery feature, and which has been literally adopted by this court in *Farmer's Case*, supra, and many others. That a discovery of the danger is not necessary to make the negligence of the plaintiff a proximate cause of the injury is evident from the case of *Butterfield v. Forrester*, 11 East, 60, the earliest decision upon the subject of contributory negligence, as the negligence there which defeated a recovery was the failure of the plaintiff, by the exercise of ordinary care, to discover and avoid a collision with an obstruction which the defendant had negligently placed in the street of Derby. So, on the other hand, in the case of *Davies v. Mann*, it did not appear that the defendant discovered the historic donkey fettered upon the highway, and it seems that the failure to discover and avoid him was the true ground of the action. It is also to be remarked that in the first case in which the principle of *Davies v. Mann* was applied by this court it did not appear that the defendant saw the plaintiff in the place of danger; and it was held that, although the plaintiff was negligent, yet it was previous to that of the defendant, who, by the exercise of ordinary care, might have avoided the injury. *Gunter v. Wicker*, supra. We think that a plain and simple statement of the rule is to be found in Shearman & Redfield in their work on Negligence, volume 1, § 99. It is that "the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." This is entirely consistent with our doctrine, as the negligence of the party injured in such a case may well be considered to have preceded that of the defendant in point of time. See Cooley,

Torts, 70, 71, which is cited and commented upon in *Clark v. Wilmington & W. R. Co.*, 109 N. C. 449, 14 L. R. A. 749; Bishop Non-Cont. L. 463. This view is but another way of stating the principle that "where the negligence of the person inflicting the injury is subsequent to and independent of the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to have avoided its effects, and prevented injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation." The foregoing extract is taken from the able article on "Contributory Negligence" in the *America & English Encyclopedia of Law* (vol. 4, p. 27), and is sustained by *Tuff v. Warman*, 5 C. B. N. S. 573, and numerous authorities cited in the notes, and also by our own decisions.

Applying the rule which we have stated to accidents upon railroad tracks, it may be illustrated as follows: First. There must be a duty imposed upon the engineer, as otherwise there can be no negligence to which the negligence of the injured party is to contribute. The duty under consideration is to keep a vigilant lookout (consistent with other necessary duties in running the train) in order to discover and avoid injury to persons who may be on the track, and who are apparently in unconscious or helpless peril. When such a person is on the track, and the engineer fails to discover him in time to avoid a collision, when he could have done so by the exercise of ordinary care, the engineer is guilty of negligence. The decisive negligence of the engineer is when he has reached that point when no effort on his part can avert the collision. Hence, if A., being on the track, and, after this decisive negligence, fails to look and listen, and is in consequence, run over and injured, his negligence is not concurrent merely, but really subsequent to that of the engineer, and he cannot recover, as he, and not the engineer, has "the last clear opportunity of avoiding the accident." If, however, A. is on the track (and here it may be remarked, in passing, that being on the track is not *per se* negligence, — *Troy's Case*, *supra*), and while there, and before the decisive negligence of the engineer, he, by his own negligence, becomes so entangled in the rails that he cannot extricate himself in time to avoid the collision, and his helpless condition could have been discovered had the engineer exercised ordinary care, then the negligence of A. would be previous to that of the engineer, and the engineer's negligence would be the proximate cause, he, and not A., having the last clear opportunity of avoiding the injury. The same result would follow in the case of a wagon negligently stalled, when no effort of the owner could remove it; and there are other cases to which the principle is applicable. These illustrations show how the rule of *Davies v. Mann* operates in cases where the primary duty is to keep a lookout and to discover, and the principle we have stated should be applied by the courts to the various

phases of fact arising upon the testimony, and juries should not be left to determine the case simply under the general language of the rule. This, it seems to us, is the only way in which the rule can be properly applied in the presence of a duty like that which is imposed upon railroad companies as to persons or property upon the track. To say that the principle of *Davies v. Mann* does not apply until the discovery of the danger is to practically abrogate the duty. It may be here observed that a recovery is permitted by a person who, being on the track when there is no immediate danger, is stricken down by the visitation of Providence, when he might have been discovered by the exercise of ordinary care. There being no negligence in such a case by simply going upon the track, there is no contributory negligence, and the same is true as to children of such tender years as to be incapable of discretion. We have not attempted to discuss the law of contributory negligence in all of its aspects, and our chief object has been to meet the arguments of the able counsel, which were directed against the existence of the duty under consideration and the application of the principle of *Davies v. Mann* until the actual discovery of the danger. It has been suggested that, when the engineer fails to exercise ordinary care in discovering persons on the line of the track, he is not guilty of ordinary negligence, which all the text-writers and our own court, time and again, have declared is the legal effect of a want of ordinary care (*McAdoo's Case* and authorities cited), but that his conduct is so willful and wanton that there can be no contributory negligence whatever. Under such a rule, not only will railroads be made insurers against the consequences of the negligence of all persons trespassing upon their property, but even the engineer may be convicted of murder by reason of a mere inadvertence. It is hardly necessary to say that all of the decisions of our court are against such a position, and this is the general current of authority. We think that, in declaring the duty we have been considering, this court has gone as far as a reasonable exercise of its authority permits. If such a revolutionary change is to be made in the law of negligence, or, rather, if the law of negligence is to be altogether abolished in such cases, it should be done by the legislature, and not by this court. "*Jus dicere non dare*." For the reasons given in the first two divisions of this opinion, we think there should be a new trial.

**MacRae, J.:**

I concur in the conclusion reached by the *Chief Justice* that there should be a new trial, but I do not concur in any expressions which indicate that there is a duty upon the defendant's servant, in the absence of reasonable ground of apprehension, to anticipate that a person, *sui juris*, will voluntarily expose himself to danger.

**Clark, J., dissenting:**

When a person is walking on the track, the engineer is to presume that, upon sounding the signal, he will get off, and is not called



on to slacken speed or stop (*Meredith v. Richmond & D. R. Co.* 108 N. C. 616), unless he recognizes him in time as an insane or deaf man, or unless it is a child without sufficient discretion. *Bottoms v. Seaboard & R. R. Co.* [at this term] (N. C.) 19 S. E. Rep. 730. If the man, in a paroxysm or from drunkenness or asleep, is lying on the track, and the engineer sees him in time to avert the injury, and does not do so, the company is liable. Why? Because the negligence of the man does not authorize the engineer to kill him or cripple him; and if, after discovery of his helpless condition, when made in time to avoid injury, the man is killed or crippled, such killing or crippling is wanton or reckless, and the company is liable, though, of course, the negligence of the party on the track continues up to the very moment of the impact. Now, take this state of facts as found by the jury. The man is helpless, lying prone upon a railroad track, and the engineer, by the exercise of ordinary care, in keeping a proper lookout, could have discovered the helpless man in time to have avoided killing or crippling him; but because he was not using ordinary care, and was negligent in that duty, the engineer does not in fact see the helpless man in time, and runs over him. Is not the company liable? But it is said that the company owes no duty to the man lying helpless on the track. This plea is the same as one made of old, "Am I my brother's keeper?" And we are told that that brother's blood "cried from the ground."

In *Clark v. Wilmington & W. R. Co.*, 109 N. C. 430, 14 L. R. A. 749, it was held (it is true by a divided court) that the railroad company was liable for killing a man on a short trestle, though the man was walking. The company was held responsible, though the engineer on a rapidly moving train could hardly have had time to calculate exactly where the trestle was, and that, at the respective rates the man and engine were moving, the engine would overtake the man exactly at that spot where he could not easily have stepped off. That case is a precedent, and entitled to due weight as such. If the company is held to liability for striking a walking man (who is expected to step off) because the engineer cannot calculate that he will overtake the man at a particular, dangerous spot, for a stronger reason should the company be liable when the man is down on the track, and the engineer can know that he is in a dangerous place with less trouble than making a calculation, and by the exercise of no other faculty than the use of his eyes in keeping the ordinary lookout, which his duty to the passengers and train in his charge requires him to keep any way. Population is increasing, and likewise the speed and rapidity of railroad trains. It will be more and more impossible to keep people off the track as the country settles up. Their being there is no license to kill or cripple them on sight. The railroad companies have the right of way over their own tracks, but they must use it with reason, and with a regard to human life. "*Sic utere tuo, ut alienum non laedas.*" If the man is walking on the track, he is reasonably to be expected to get off in

time, especially if the whistle is sounded. If he does not, clearly the company is not liable. The man is negligent, and the company shows neither wantonness nor recklessness. If the man is crossing the track, he must look and listen. If he does not, and the engine strikes him, it is clearly his fault, and there is no recklessness or wantonness on the part of the engineer; for, as the man has only five feet to go, clearly the engineer could not see him in time to avoid striking him. If the party struck is a mere child, or livestock, and the engineer could have seen them in time to avoid injury, and does not, the company is liable, because of its own negligence in not keeping a proper lookout. Its failure to keep such lookout is such recklessness as makes it liable, for it "owes no duty" to the livestock or the child. If the man is down on the track, he is as helpless and as little to be expected to get off as a little child or livestock. There is no more deadly machine than a modern 60 or 100 ton engine, driving across the country, on its narrow ribbon of steel, at 60 miles an hour. Whatever it strikes fairly is killed, as surely as if struck by a cannon ball. Commerce requires the free use of the track by these deadly machines. But the hand upon the throttle valve must be steady, and a lookout for danger well kept. This is common sense and justice. It can never be made a part of the law of the land that these Goliaths of mechanism can kill or crush whatever they shall find in their path. Livestock and children they must look out for. If, by failure to do this they are injured, the company is liable. The safety of a man lying on the track cannot be insured. He has no business to be there. But if the engineer on a passing train, by ordinary care, in keeping the lookout, which his duty to the safety of the train requires, could see the man (as the jury find) in time to avoid killing him, and does not do so, this negligence in one vested with so important a trust is recklessness, which renders the company liable, notwithstanding the negligence of the party struck by the engine. Respect for the doctrine of *stare decisis* forbids us to so soon overrule the decisions of this court in the late cases of *Deans v. Wilmington & W. R. Co.* 107 N. C. 636; *Clark v. Wilmington & W. R. Co.* *supra*, and others on that line. The decision in *Deans v. Wilmington & W. R. Co.* *supra*, imposed no additional duty on railroad companies. The company was and is liable for a failure to keep a lookout if thereby injury is caused to its passengers, to livestock, or to a little child. That decision merely held that the same failure to keep a proper lookout would make the company liable as to a man lying in a helpless condition on the track. This does not, as argued, abolish or affect the doctrine of contributory negligence. The failure of one in charge of so powerful, dangerous, and rapidly moving a machine to keep a proper lookout is recklessness, which makes the company liable whenever the jury find that, by a proper lookout, the helpless man could have been discovered in time to avoid killing him. Human life is worth that much consideration, if it is worth anything.

**Avery, J.**, also dissents.

## ILLINOIS SUPREME COURT.

CHICAGO & NORTHWESTERN R. CO.,  
Appt.,  
v.  
WEST CHICAGO PARK COMMISSION-  
ERS.

(151 Ill. 130.)

1. After twelve years acquiescence, in common with the city and the general public, in the control of a street by park commissioners, a railroad company will not in a proceeding by them to prevent its placing tracks in the street, be heard to question their authority on the ground that the consent of the city and abutting owners to their control was not technically regular.
2. A party cannot on appeal insist on error committed at his own instance or contrary to his express stipulations upon which the lower court was induced to act.

(June 19, 1894.)

**A**PPEAL by defendant from a decree of the Circuit Court for Cook County in favor of complainant in a suit brought to enjoin defendant from laying tracks across a street in the City of Chicago. *Affirmed.*

The facts sufficiently appear in the opinion. **Mr. W. C. Goudy**, for appellant:

The owners of a majority of the frontage on Washington street, between Halsted street and Central Park, did not consent in writing to the taking of the street for a boulevard.

*Thorn v. West Chicago Park Comrs.* 130 Ill. 599.

The railway company is not estopped from proving the fact that there was a want of consent by the city, or by the abutting owners.

*Bigelow, Estoppel*, 345; *People v. Brown*, 87 Ill. 435; *Flower v. Elwood*, 66 Ill. 438; *Ball v. Hooten*, 85 Ill. 159; *Davidson v. Young*, 88 Ill. 145; *Dorlarque v. Cress*, 71 Ill. 380; *Ohandler v. White*, 84 Ill. 435; *Smith v. Newton*, 88 Ill. 230; *Bradford v. Chicago*, 25 Ill. 411; *Jack v. Weiennett*, 115 Ill. 105, 56 Am. Rep. 129.

**Mr. A. W. Pulver** also for appellant.

**Messrs. Mason B. Loomis, W. W. Evans, and Gardner G. Willard**, with **Mr. Francis A. Riddle**, for appellees:

The defendant corporation cannot now question the regularity of any of the proceedings under which the West Chicago park commissioners acquired and have since exercised control over Washington boulevard.

The public were bound to take notice of their several acts and doings as a public body. *Swift v. Williamsburgh*, 24 Barb. 430.

The company was bound to take notice, and is now estopped from questioning the legality of such proceedings, under which the commissioners acquired and have exercised control over said street as a boulevard.

*Racine & M. R. Co. v. Farmers Loan & T. Co.* 49 Ill. 847, 95 Am. Dec. 595; *Chicago, R. L. & P. R. Co. v. Joliet*, 79 Ill. 25; *Strosser v. Ft. Wayne*, 100 Ind. 443; *State v. Central Pac.*

**NOTE.**—As to the validity of the statute permitting streets to be placed under the control of the park commissioners, see *West Chicago Park Comrs. v. McMullen* (Ill.) 10 L. R. A. 315, 25 L. R. A.

*R. Co.* 21 Nev. 75; *Stuart v. Kalamazoo School Dist. No. 1*, 30 Mich. 69; *People v. Farnham*, 35 Ill. 562; *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304; *Rector v. Board of Improvement*, 50 Ark. 116.

An abutting property owner cannot remain silently by until a street improvement is made, and then resist the payment of an assessment levied for the purpose of paying for such improvement, although such improvements are made under invalid statutes.

*Kellogg v. Ely*, 15 Ohio St. 64; *Taber v. Ferguson*, 109 Ind. 281; *Powers v. New Haven*, 120 Ind. 190; *Storer v. Cincinnati*, 4 Ohio C. Ct. Rep. 279; *Hammerslough v. Kansas City*, 46 Kan. 37; *Twiss v. Port Huron*, 68 Mich. 541; *Slats v. Wertzel*, 62 Wis. 189; *Ross v. Baltimore*, 51 Md. 271, 34 Am. Rep. 307.

It cannot be contended that the improvement of so radical and expensive a nature in making the street a boulevard, did not confer a benefit upon the Northwestern Railroad Company, as an abutting property owner.

*Andrews v. People*, 83 Ill. 529, 84 Ill. 23; *Gillet v. Wiley*, 126 Ill. 324; *Curry v. Mount Sterling*, 15 Ill. 323; *Hyde Park v. Borden*, 94 Ill. 26; *Preston v. Mann*, 25 Conn. 128; *Horn v. Cole*, 51 N. H. 292, 12 Am. Rep. 111; *Continental Nat. Bank v. National Bank of Com.* 50 N. Y. 538.

The subsequent conduct of property owners who signed by agents was an adoption and ratification of their acts and equivalent to an original authorization.

*Story*, Ag. 9th ed. § 244; *Strosser v. Ft. Wayne*, 100 Ind. 453; *Hurd v. Marple*, 2 Ill. App. 402; *Booth v. Wiley*, 102 Ill. 106; *Searing v. Butler*, 69 Ill. 578; *Connett v. Chicago*, 114 Ill. 239; *Williams v. Merritt*, 23 Ill. 623; 1 *Livermore*, Ag.; 2 *Herman*, *Estoppel*, last ed. § 1063, p. 1194.

The city consented to the selecting and taking of the street by the park commissioners.

The municipality in such acquiescence was the agent of the general public, and its acquiescence bound the railroad company.

*Strosser v. Ft. Wayne*, 100 Ind. 451; *Chicago & N. W. R. Co. v. People*, 91 Ill. 255; *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 498; *Martel v. East St. Louis*, 94 Ill. 69; *Pratt County v. Goodell*, 97 Ill. 91.

Appellant was duly and legally notified of the assessment proceedings and had full opportunity to make any defense. The question as to whether Washington street was legally selected and taken by the park commissioners is *res judicata*.

*Welker v. Hinz*, 16 Ill. App. 326; *Gage v. Parker*, 103 Ill. 528; *Dyer v. Hopkins*, 112 Ill. 168; *Kedzie v. West Chicago Park Comrs.* 114 Ill. 280; *Andrews v. People*, 83 Ill. 529; *Andrews v. People*, 84 Ill. 28; *Thomson v. Morris*, 57 Ill. 383; *Clubb v. Wise*, 64 Ill. 157; *Rockwell v. Langley*, 19 Pa. 508.

This principle of *res judicata* embraces not only what actually was determined in the former case, but also extends to any other matter properly involved and which might have been raised and determined in it.

*Rogers v. Higgins* 7 Ill. 247; *Kelly v. Don-*

*Id.*, 70 Ill. 385; *Garrick v. Chamberlain*, 97 Ill. 620; *Ruegger v. Indianapolis & St. L. R. Co.* 108 Ill. 456; *Harmon v. Auditor of Public Accounts*, 128 Ill. 127; *Oromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Aurora v. West*, 74 U. S. 7 Wall. 106, 19 L. ed. 50; *Stockton v. Ford*, 59 U. S. 18 How. 418, 15 L. ed. 395; *Covington & O. Bridge Co. v. Sargent*, 27 Ohio St. 287; *Atty-Gen. v. Chicago & E. R. Co.* 112 Ill. 520.

A judgment is conclusive, not only as to the subject-matter in suit, but as to all other suits, which, though concerning other subject-matters, involved the questions in controversy.

*Gardner v. Buckbee*, 8 Cow. 120, 15 Am. Dec. 256; *Bouchaud v. Dias*, 3 Denio, 238; *Babcock v. Camp*, 12 Ohio St. 11; *Sawyer v. Woodbury*, 7 Gray, 449, 68 Am. Dec. 518; *Carperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187; *Eastman v. Cooper*, 15 Pick. 276, 26 Am. Dec. 600; *Sage v. McAlpin*, 11 Cush. 165; *Reloit v. Morgan*, 74 U. S. 7 Wall. 619, 19 L. ed. 205; *San Antonio v. Lane*, 32 Tex. 411; *Doty v. Brown*, 4 N. Y. 71, 58 Am. Dec. 350; *Taylor v. Castle*, 42 Cal. 367; *Cannon v. Brame*, 45 Ala. 262; *Percy v. Fooks*, 86 Conn. 102; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608; *Reg. v. Harrington Middle Quarter Twp.* 4 El. & Bl. 780.

**Shope, J.**, delivered the opinion of the court:

Counsel for appellant state the question involved in this case to be as follows: "The Chicago & Northwestern Railway Company undertook to lay a railroad track across a public street in the city of Chicago, formerly called 'Washington Street,' but now called 'Washington Boulevard.' The West Chicago park commissioners claimed that the track could not be laid without their permission, resting the claim upon the allegation that the control of the street had been transferred from the city to them, and denying the right of the railroad company to lay the track without a permit. This is the subject-matter of the controversy in this case, and the right of the railway company to so occupy the street depends upon the question as to whether the control of the street had been legally turned over by the city to the park commissioners." With this statement of the controversy, a re-examination of the question as to the extent of the powers of the park commissioners over a street brought within their municipal control under the Act of 1879 will not be necessary. In the late case of *McCormick v. South Park Comrs.* (filed at Ottawa, June 19, 1894) 150 Ill. 516, that question was discussed and determined, and the holding was that, in respect of streets leading to the park, acquired under the Act of 1879, the park commissioners had authority and control co-extensive with that vested in them of and concerning the parks, driveways, and boulevards under their control, and that, therefore, they had ample power to prevent the erection of a structure without their permission, which, when erected, would extend over and upon the street. And in view of the construction given to the acts there under consideration, it cannot be said that the West Chicago park commissioners have any less power and dominion in respect of streets acquired by them under the later act. 1 Private Laws 1869, § 4, p. 342. 25 L. R. A.

Indeed, there would seem to be no controversy in this case as to the authority of the park commissioners in the premises, if they be found to be in lawful control of the street. In the agreed statement of facts, upon which the cause was submitted in the trial court, it is stipulated, among other things, that appellant was the owner in fee simple of the land now occupied by the portion of Washington street in question, and on either side thereof, long anterior to opening of said street across the same, and had two tracks thereon; that Washington street was opened across said land in 1874, over the tracks of appellant, thereon laid, by condemnation proceedings instituted by the city of Chicago, etc., and that "said railway company was authorized, by the terms of its charter, granted by the legislature of the state, to acquire said property, and to lay its railroad tracks thereon for the conduct of its business as a common carrier. And by the same authority it has the legal right to lay additional tracks parallel with those already constructed, unless the control of West Washington street has been legally transferred from the city of Chicago to the West Chicago park commissioners; and, if such legal control has been acquired by said commissioners, then said railway company has only authority to lay a third track with the consent and permission of said commissioners, which has not been granted. It will therefore be seen that it will only be necessary to determine, so far, at least, as appellant is concerned, whether the park commissioners were in legal control.

The objections of appellant question the validity of the proceedings under which the park commissioners came into control of the street, and the objections are: (1) That consent in writing of the owners of a majority of the frontage upon the street was not first obtained; that is, that the petition purporting to be signed by such owners was in many instances not so signed, but by agents, guardians, officers of corporations, etc., without showing authority to make such signatures, or that the persons whose names were attached were in fact the owners; and (2) that the city of Chicago did not consent to taking of the street by the park commissioners; that is to say, that by the ordinance of the city entitled "An ordinance, consenting that the board of West Park commissioners may take, regulate, control and improve a certain part of West Washington street, from the west line of Halsted street to Central Park," adopted September 29, 1879, it was provided: "(2) Unless the said board of park commissioners shall within thirty days from the approval hereof, select and take the said parts of streets, for the purposes aforesaid, this ordinance shall cease to be of any force or effect, and the consent given, by section one aforesaid, shall be deemed to be withdrawn." And it is insisted that the park commissioners did not select and take the street within the thirty days prescribed in said ordinance, and that this could not be done, within the meaning of the act, by mere physical taking, but that consent in writing of the owners must have been obtained within that period; and this, it is claimed, was not done in this case. It appears that previous to the passage of said ordinance numerous petitions had been presented con-

senting to the taking of the portion of Washington street in question, the last two of which consented to the taking of the street from the river to the park. That on October 17, 1879, the board of park commissioners adopted a resolution that, in pursuance of the Act of 1879, "consent on the part of the corporate authorities of the city of Chicago having been duly granted, this board will, and does hereby, select and take that part of West Washington street extending from the west line of Halsted street to Central Park, for the purposes named in said act, and will regulate, control, improve, and maintain the same in manner and form as contemplated by said act. This resolution is adopted in accordance with the consent of the owners of a majority of the lots and lands abutting on said street, so far as taken or proposed to be taken by the board, as given or to be given." And that on October 18, 1879, a duly authenticated copy of said resolutions were filed in the office of the city clerk of Chicago. It also appears that on February 16, 1880, a petition was again presented to the said board of park commissioners, purporting to be signed by owners and representatives of owners, consenting to the taking of said part of Washington street. In this petition the signatures objected to by appellant are pointed out in its brief. On the same day resolutions were adopted by the board approving and concurring in the petition, and ordering it and the resolutions to be filed, etc. It is claimed by appellant, as has been said, that these transactions are not sufficient to show consent on the part of the city, or a selecting and taking of the street within the terms of said ordinance, or proper consent on the part of the owners.

While, upon this record, we think it might be fairly claimed that the provisions of the act have been substantially complied with, a consideration of the objections raised must necessarily depend upon the determination beforehand of the question made by appellee as to whether appellant, upon the facts of this case, is in a condition to question the regularity of the proceedings by which the park commissioners acquired, and have since exercised, control over Washington boulevard. If the facts and circumstances shown are such as would render it inequitable and improper for appellant to insist upon these objections, it cannot avail that such proceedings have not been technically formal, and in strict compliance with the statute. Under the state of case here shown it could not be contended that either of the parties to the transfer of the street is competent to insist upon the informalities here set up to render void the transaction; and if the city itself could not insist thereon, appellant certainly, in this regard, is in no better situation. After the exercise of control of the street for many years by the park commissioners, with the consent of the city, though never so informally given, and the expenditure by them of hundreds of thousands of dollars thereon in the way of improvements and betterments, without question of their right so to do, the city would be incompetent to raise the objections here made on principles of estoppel so plain and fundamental as to require no citation of authority. Nor do we think the individual citizen, who, together with all others

affected thereby, has for many years acquiesced in the exercise of authority by a municipality, and has all that time contributed by way of payment of taxes to the support thereof, paid special assessments for local improvements, which he has seen undertaken and perfected by the expenditure of vast sums of money, and to all which he made no objection, can, after this, be heard to insist upon want of power in the municipality, upon the ground that in the original acquisition of control some provision of the law was not technically observed. What would have been the result had the objections now urged been made, as in *Thorn v. West Chicago Park Comrs.*, 180 Ill. 594, at the incipency of the corporate control by the park commissioners, or in some appropriate direct proceeding, is not necessary to determine. From 1879, when the park commissioners assumed control of the street in question, there has been, for aught that appears in this record, an acquiescence on the part of the people in the authority of the park commissioners, and the exercise by them of the functions of their office. The state, as well as citizens immediately concerned, for practically 18 years preceding the filing of this bill, has never, so far as we are informed, questioned the regularity of the proceedings whereby the control of the street was transferred from the city to the park commissioners. To now declare such proceedings nugatory, and overturn the authority so long and uniformly acquiesced in, on the grounds here insisted upon, would, irrespective of what the real facts were, be of doubtful expediency, if not contrary to sound policy; for, after such lapse of time and acquiescence, if the spirit of the law has been observed, it cannot avail that the letter has been disregarded. The park act creating the West Chicago park commissioners is to be liberally construed in all courts and places in favor of the jurisdiction and powers thereby conferred, and of the proceedings under the same. *Private Laws 1869, p. 354, § 11.* And in harmony with the views expressed in *McCormick v. South Park Comrs. supra*, such construction can be no less applicable to proceedings for the acquisition of streets leading to the park. As said by Cooley, J., in *Stuart v. Kalamazoo School Dist. No. 1*, 30 Mich. 69: "If every municipality must be subject to be called into court at any time to defend its original organization and its franchises, at the will of any dissatisfied citizen who may feel disposed to question them, and subjected to dissolution perhaps, or to be crippled in authority and power if defects appear, however complete and formal may have been recognition of its rights and privileges on the part alike of the state and of its citizens, it may very justly be said that few of our municipalities can be entirely certain of the ground they stand upon, and that any single person, however honestly inclined, if disposed to be litigious or over-technical and precise, may have it in his power in many cases to cause infinite trouble, embarrassment, and mischief." In that case a bill had been brought by a taxpayer of the district to restrain the collection of school taxes assessed against the complainants, upon the ground, among others, that there had been no compliance with the law in the organization of the

district. In passing upon this point the court used the language above quoted, and the holding was that the regularity of the organization of the district, which had assumed to possess and exercise powers of a district regularly organized for thirteen years, without objection, could not be called in question in such private collateral suit.

In *People v. Maynard*, 15 Mich. 470, the court, by Campbell, J., said: "Even in private associations the acts of the parties interested may often estop them from relying on legal objections, which might have availed them if not waived. But in public affairs, where the people have organized themselves under color of law into the ordinary municipal bodies, and have gone on, year after year, raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as on the regularity of their origin; and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can be no longer open to question." And this language was quoted in support of the holding in *Stuart v. Kalamazoo School Dist. No. 1*, *supra*. In *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304, by an information in quo warranto, the question was raised as to the corporate existence of the town of Oquawka, and of the authority of the president and trustees to exercise the powers and franchises of a municipal corporation. Pleas were filed showing the organization of the corporation in 1851; the election of town officers from year to year thereafter; that it was generally recognized as a public municipal corporation, and exercised powers and franchises as such, passed and enforced ordinances, levied and collected taxes, made contracts and incurred liabilities, provided police regulation, etc. And it was there said: "Municipal corporations are created for the public good; are demanded by the wants of the community; and the law, after long continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence. *Bank of United States v. Dandridge*, 25 U. S. 12 Wheat. 64, 6 L. ed. 553; *Dunning v. New Albany & S. R. Co.* 2 Ind. 437; *Middlesex Husbandmen & Mfrs. Soc. v. Davis*, 3 Met. 133; *House v. House*, 5 Harr. & J. 125. The law will incline to sustain, rather than to defeat, them. It would seem incompatible with good faith, and against public policy, although irregularities may have intervened in the organization of the town, now to hold that it is not a body corporate; and we do not think the law requires us to do so." See also *People v. Farnham*, 35 Ill. 562. *Worley v. Harris*, 82 Ind. 493, was a bill for injunction to restrain the officers of the town of Ellettsville from collecting a tax upon the grounds that the town had not been properly organized, and that no accurate survey and plat of the territory to be embraced had been made, over which it had assumed to exercise its municipal powers. And the court then said: "How long it had been exercising such powers is not stated. It may have been acting in good faith as a corporation, levying and

collecting taxes for more than twenty years, for aught that appears in this complaint. Construing the complaint fairly, we may presume that it had been acting as a corporation for many years. Under such circumstances, its right to so act cannot be collaterally questioned." *State v. Leatherman*, 38 Ark. 81, was information in quo warranto to test the validity of the incorporation of Arkansas City. The court makes use of the following forcible language: "But it had been an existing *de facto* corporation all the time from 1873 till now, and many things had in good faith been done under it which it would be shocking now to undo. The disastrous consequences would not be confined to the case of Arkansas City. Municipal corporations throughout the state have become numerous. They are not only highly beneficial, but necessary agencies of good government. We can see how many of them may have been heretofore, or may be henceforth, put in operation under the same, or similar mistakes. To declare them all null, after long acquiescence on the part of the state, would open a very Pandora's box of litigation, and produce incalculable hardship and confusion." And, after quoting from *Jameson v. People* and *People v. Maynard*, *supra*, the court says, in respect of the opinions in these cases, that they "are emboldened by them to declare in behalf of the public good that the state herself may, by long acquiescence, and by continued recognition through her own officers, state and county, of a municipal corporation, be precluded from an information, to deprive it of franchises long exercised in accordance with the general law." Without expressing any opinion as to the correctness of the view there taken, the case is important, as showing the extent to which the doctrine has been carried.

But it is insisted by counsel for appellant that the doctrine enunciated does not apply to the case at bar: that appellant is not questioning the validity of the original organization of the municipality, but the legality of the particular proceedings by which control of the street was acquired. So far as the right of appellant to insist upon the objections made is concerned, we can see no difference in legal effect. If the circumstances are such as would preclude it from questioning the one, no substantial reason can exist why it should not be precluded from questioning the other. To have territory within and upon which the powers conferred can operate, is vital to the corporate entity. If the theory of appellant was correct, the same objection might be made to the proceedings by which the commissioners came into control of the park, and, if allowed to prevail, would render their jurisdiction nugatory, and their organization ineffectual, notwithstanding years of acquiescence by the public. Only by the exercise of power upon the selected territory are the contemplated objects of their creation effectuated. Deprive them of the territory, and their power therein is gone, and can be no longer felt. A board of park commissioners, under the act, without the park, would be like a city council, under the cities and villages act, without a city, a village board of trustees without any village. The one cannot exist in practical or legal con-

temption without the other. Withdraw the subject over which the municipal power is to be exerted, as the very end and aim for which the corporation was created, and the corporation ceases to exist, except perhaps in legal fiction, and no formality would be necessary to work its dissolution. 1 Dill. Mun. Corp. § 110. And when appellant objects to the proceedings by which the commissioners acquired jurisdiction the objection is deeper than would seem at first view, and goes to the very thing without which the organization would be a dead letter, and, if it were to prevail, would render void all the proceedings of the municipality during the years past, involving the levy and collection of taxes and local assessments, aggregating a vast sum, expended in the making of great and lasting improvements. To so hold at this late day would, in our opinion, be contrary to the clearest principles of public policy. Without prolonging the discussion, we regard the consensus of authority as sustaining the doctrine that, after long-continued acquiescence in the exercise of jurisdiction by a municipality, the validity of the proceedings by which the jurisdiction was originally acquired cannot be called collaterally in question at the suit of a private party. See *Swift v. Williamsburgh*, 24 Barb. 430; *Strosser v. Ft. Wayne*, 100 Ind. 448; *State v. Central Pac. R. Co.* 21 Nev. 94; *Ross v. Baltimore*, 51 Md. 271, 34 Am. Rep. 307; *Sherwin v. Bugbee*, 16 Vt. 439.

In view, therefore, of what has been said, it will not be necessary for us to here analyze the proceedings to ascertain whether they have been sufficiently regular as to vest the park commissioners with legal control of the street. It appears from the stipulation of facts filed in the cause August 3, 1892: "That for more than twelve years last passed the said West Chicago park commissioners have continuously been in possession and control of said Washington street as a boulevard as aforesaid, and that during that time the city of Chicago has abandoned the possession and control thereof, and during said time neither the city of Chicago nor any other corporation or person has in any action, suit, or proceeding (other than this suit) called in question the legal right of said commissioners to such possession and control, or of their acts or doings in the premises." Whatever irregularity or informality may have intervened, such as is shown upon this record, has been cured by the long continued concurrent acquiescence of the city, the park commissioners, and of the general public. We are of opinion that appellant is as much bound by such acquiescence, in which it has participated, as the general public or any private member of the community might be, and that therefore, it is in no condition to insist upon the objections raised in this collateral proceeding.

But it is insisted that, having acquired the land before it was included within the city limits, appellant was duly authorized, under its charter, therefore granted, to use such property for railroad purposes, and to lay its tracks thereon, and, having such right anterior to the acquisition of municipal control, it still has the same right, burdened only with the easement of the public in the street. Appellant became the owner of the land in 1865. In 1869 it was

included within the corporate limits, and in 1874 the city of Chicago instituted appropriate proceedings in the superior court of Cook county to condemn a strip 100 feet wide across said land for the purpose of extending the street in question. Judgment was rendered in favor of appellant for \$8,000 for the land taken and damages to land not taken, and the street extended. Appellant is precluded from this contention by the stipulation upon which the cause was submitted upon the hearing below. As already seen, it was stipulated that the railway company was authorized by the terms of its charter to acquire the property, and lay its tracks thereon for the conduct of its business; and it is then expressly stipulated: "And by the same authority it has the legal right to lay additional tracks paralled with those already constructed, unless the control of West Washington street has been legally transferred from the city of Chicago to the West Chicago park commissioners, and, if such legal control has been acquired by said commissioners, then said railway company has only authority to lay a third track with the consent and permission of said commissioners, which has not been granted." And it necessarily followed that, if the chancellor found the park commissioners were in legal control of the street named, the "railway company was only authorized to lay a third track with the consent and permission of said commissioners," which it was conceded had not been granted. It is too familiar to require the citation of authority that a party will not be permitted, in the court of review, to insist upon error committed at his own instance, or contrary to his express stipulation upon which the lower court was induced to act. The effect of the stipulation was to withdraw from the consideration of the court the question now insisted upon, if it was found that the legal control of the street had passed from the city of Chicago to the park commissioners, and to submit the case upon the latter issue. The question, therefore, of whether appellant has been deprived of any of its rights under its charter, without due process of law, is not presented for determination. Nor do we find it necessary to discuss or determine whether appellant took its charter powers subject to such future regulation as the legislature, in its sovereign capacity, might provide for the promotion of the common good. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Tiedeman, Pol. Powers*, § 189, and cases cited. Whatever may be said in respect of the claim of appellant to the ownership of the fee in the street, or its rights under its charter, these rights, under the stipulation, must be regarded as subject to the paramount right of the general public to the use of the street, and its control and improvement, in the discretion of the local municipal authorities, as the public interest may require. *Old Town v. Dooley*, 81 Ill. 255; *Palatine v. Kreuger*, 121 Ill. 72; *Illinois Cent. R. Co. v. Chicago*, 188 Ill. 458.

The chancellor having found, as we have seen he was justified in doing, that the park commissioners were in legal control of the street, under the stipulation of the parties the decree entered necessarily followed, and will be affirmed.

## KANSAS SUPREME COURT.

Daniel L. CHIPMAN *et al.*, *Plffs. in Err.*,

v.

Jennie C. CARROLL *et al.*

(.....Kan.....)

“1. Where there is an agreement between the mortgagor and the mortgagee that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and in fulfillment of this agreement the mortgagor takes out a policy of insurance in his own name, which is not assigned to the mortgagee, or made payable to him in any way, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy; and where the mortgagee obtains judgment upon his mortgage, but before there is any sale or conveyance the mortgagor takes out a policy of insurance in his own name, and a loss occurs before any sale, the mortgagee is entitled to recover the loss, as the judgment does not extinguish his debt.

2. Where the husband and wife jointly execute a mortgage upon their homestead, and there is an agreement that the premises shall be insured for the benefit of the mortgagee, and subsequently the husband takes out

\*Headnotes by HORTON, Ch. J.

NOTE.—Rights of mortgagee to benefit of insurance taken in name of mortgagor.

*Rights of mortgagee in absence of contract.*

The mortgagee is not entitled to the proceeds of a policy, taken by the mortgagor or the owner of the equity of redemption, in his own name, in the absence of any contract to insure for the mortgagee. *Carter v. Rockett*, 8 Paige, 437, 4 L. ed. 493; *Ryan v. Adamson*, 57 Iowa, 30; *Vandegraaff v. Medlock*, 3 Port. (Ala.) 389, 29 Am. Rep. 266; *Stamps v. Commercial F. Ins. Co.* 77 N. C. 209, 24 Am. Rep. 463; *Columbia Ins. Co. of Alexandria v. Lawrence*, 35 U. S. 10 Pet. 507, 9 L. ed. 512.

Although the policy contained a clause, providing that the assured may assign the policy to E. R. (the mortgagee). *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044.

Or where the policy may say “for whom it may concern.” *McDonald v. Black*, 30 Ohio, 185, 55 Am. Rep. 443.

And in *Plimpton v. Farmers' Mut. F. Ins. Co.*, 43 Vt. 497, 5 Am. Rep. 297, it was said that a mortgagee has no claim on the proceeds of a policy obtained by the mortgagor in his own name in the absence of contract, but that was not the question involved in the case.

*Where there is a contract or covenant to insure.*

A mortgagee is entitled to an equitable lien on the proceeds of a policy obtained by the mortgagor, where the mortgage contained a covenant to insure for the mortgagee, or where the mortgagor contracted or agreed to insure for the mortgagee, fully sustaining the case of *CHIPMAN v. CARROLL*. *Thomas v. Von Kapff*, 6 Gill & J. 373; *Harard v. Draper*, 7 Allen, 267; *Doughty v. Van Horn*, 29 N. J. Eq. 30; *Ames v. Richardson*, 29 Minn. 380; *Re Sands Ale Brewing Co.* 3 Biss. 173; *Greet v. Citizens Ins. Co.* 5 Ont. App. 586.

And the same was held, where the policy was payable to the mortgagee, as his interest might appear. *Hall v. Philadelphia Fire Assn.* 64 N. H. 463.

And the mortgagee was entitled to the proceeds 36 L. R. A.

a policy of insurance upon the premises in his own name, and soon after a loss occurs, the mortgagee has an equitable lien on the proceeds of the policy, and such proceeds are not exempt upon the ground that the policy was upon the homestead of the parties.

3. After a loss, the insurance company may be garnished, where the payment of the loss is not conditional on anything remaining to be done.

(March 10, 1894.)

ERROR to the District Court for Miami County to review a judgment in favor of defendants in a proceeding brought to reach the proceeds of a policy of fire insurance upon property which had been mortgaged by the defendants Carroll to the plaintiffs and subsequently destroyed by fire. *Reversed.*

Statement by HORTON, Ch. J.:

On June 2, 1887, Frank S. Carroll and wife executed a note and mortgage for \$1,500 to Daniel L. Chipman, and on the same day executed a second note and mortgage, for \$500, to Ephriam Mower. The land described in the mortgages then constituted the homestead of Frank S. Carroll, and the title to the

of insurance, where the mortgage contained a covenant to insure, and the owner of the equity of redemption directed his agent to procure insurance, loss if any payable to the mortgagee, and then canceled such indorsement on the policy. *Reid v. McCrum*, 91 N. Y. 412.

And the mortgagee, holding a policy as collateral, was entitled to a lien on the proceeds as against all parties having notice. *Ellis v. Kreutzinger*, 27 Mo. 311, 72 Am. Dec. 270.

So he was entitled to an equitable lien, where the mortgage provided for such insurance, and the mortgagor assured him that the policy was for his benefit. *Wheeler v. Factors & Traders Ins. Co.* 101 U. S. 439, 25 L. ed. 1055.

And the same was held where the mortgage contained a covenant to insure for mortgagee, and an order was given the mortgagee for the funds with which to rebuild, and he then declined to rebuild. *Watt v. Gore Dist. Ins. Co.* 8 Grant, Ch. 523.

And the mortgagee was entitled to the funds where a lessee covenanted to insure, and the mortgagee rebuilt and claimed the money. *Garden v. Ingram*, 23 L. J. Ch. 473.

And the mortgagee was entitled to an equitable lien on the proceeds of second insurance policy, taken by the mortgagor in his own name, and assigned to others for prior debts, and payable to them as their interest might appear, where the deed of trust provided that the grantor would not impair the lien, and the second policy caused a scaling of the first. *Wilson v. Hakes*, 36 Ill. App. 539.

But the mortgagee had only such interest in a second policy taken by mortgagor in its own name, as would make good the scaling, although the mortgage contained a covenant to insure for mortgagee “as its interest might appear” and the companies first insuring afterwards became insolvent. *Nordyke & Marmon Co. v. Gery*, 112 Ind. 585. See *Dunlop v. Avery*, 14/ru.

And under Maine Rev. Stat., chap. 49, giving the mortgagee a lien on insurance obtained by the mortgagor, notice must be given the company in

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same was in him. The mortgage to Chipman contained the following clause: "But if default be made in such payment, or any part thereof, or interest thereon, or the taxes, or if the insurance is not kept up thereon, then this conveyance shall become absolute." Frank S. Carroll transacted the business in negotiating the loans, and Chipman and Mower, then and ever being nonresidents of this state, transacted their business through C. W. Chandler, their agent at Paola, in this state, who was afterwards succeeded by Chandler Bros., and that firm continued acting as the agents of Chipman and Mower. After the execution of the mortgage, the dwelling was insured by Frank S. Carroll, and, by clause attached to the policy, the loss, if any, was made payable to Chipman or his assigns. On November 27, 1889, judgment was rendered upon the mortgages above recited for \$1,636.64, with 9 per cent from that date, in favor of Chipman, and for \$569.42, with 9 per cent from that date, in favor of Mower, and the land owned ordered sold by virtue of the mortgages. On March 29, 1890, Frank S. Carroll, in his own name, negotiated insurance upon his dwelling with the People's Insurance Company, of New Hampshire, in a sum over \$1,200, and with the Burlington Insurance Company, of Iowa, in the sum of \$900. On April 13, 1890, the dwelling was totally destroyed by fire. On April 26, 1890,

special execution was issued, ordering the sale of the land to satisfy the judgments in favor of Chipman and Mower. On April 28, 1890, Chipman and Mower, by F. M. Chandler, of the firm of Chandler Bros., their agent, filed an affidavit for garnishment against the insurance companies, stating the amount of the judgments; that the same were still in full force, wholly unpaid, and not subject to any counterclaim or set-off; that execution had been issued thereon, but would not be returnable for more than thirty days; that Frank S. Carroll and Jennie C. Carroll had not properly enough, subject to execution, to satisfy the judgments, or even the half thereof; that the money due from the insurance companies was not exempt,—and reciting other material facts. On the same day a garnishee summons was issued to the insurance companies, and served by the sheriff, by delivering copies thereof to N. W. Wells, as the manager and agent of the companies at Paola, in this state, and by delivering a copy thereof to the defendants Frank S. Carroll and wife. On May 10, 1890, another garnishment summons was issued, and served May 12, 1890, on the Kansas state superintendent of insurance. On May 10, 1890, and immediately after receiving a copy of the garnishee summons, Frank S. Carroll went to Kansas City, Mo., and attempted to make an assignment of the insurance due from

time, or else no lien will be allowed. *Burns v. Collins*, 64 Me. 215.

And under a covenant in the mortgage stipulating that the mortgagor should insure in some company to be approved by the mortgagee, he was not entitled to insurance obtained by the mortgagor in his own name without the knowledge of the mortgagee. *Stearns v. Quincy Mut. F. Ins. Co.* 124 Mass. 63, 36 Am. Rep. 647.

And the mortgagee is not entitled to a lien on the proceeds of a policy payable to a second mortgagee, under a covenant to insure in the first mortgage, but he would have a lien as against the mortgagor. *Dunlop v. Avery*, 80 N. Y. 562, reversing 23 Hun. 509. See *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535.

And a party having a bill of sale of personalty, where the deed contained a covenant to insure, but did not provide for the application of insurance money, is not entitled to the funds as against an assignee in bankruptcy of the mortgagor, where the bankruptcy was before the fire. *Lees v. Whiteley*, L. R. 2 Eq. 142, 35 L. J. Ch. 412, 14 Week. Rep. 634, 14 L. T. N. S. 472.

In *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 366, reversing 17 Ill. App. 299, in a case of vendor's lien, it was said that a mortgagee is entitled to the insurance to the extent of his lien, if the mortgagor agreed to insure for his benefit, and the company had notice of his claim, even if the loss was payable to another.

#### *Who may maintain an action for the proceeds.*

There is some conflict in the decisions as to the proper party to maintain an action for the proceeds of a policy obtained by the owner, loss if any payable to the mortgagee as his interest may appear; but some courts hold that the action may be maintained by both mortgagor and mortgagee jointly. *Winne v. Niagara F. Ins. Co.* 91 N. Y. 185; *Williamson v. Michigan Fire & Marine Ins. Co.* 86 Wis. 393.

Or where the policy is assigned as collateral for

the debt. *Boynton v. Clinton & E. Mut. Ins. Co.* 16 Barb. 254.

Where nonjoinder of mortgagee is waived by failure to object by demurrer or answer, and the action would be barred if brought by the mortgagee, it was held that the owner could recover on a policy, payable to the mortgagee. *Carr v. Providence Washington Ins. Co.* 109 N. Y. 504.

Other courts hold that a mortgagee is the proper party plaintiff in an action to recover the proceeds of a policy obtained by the owner or his lessee, loss if any payable to the mortgagee as his interest may appear, if his claim exceeds the amount of insurance due, and this seems to be the weight of authority. *Motley v. Manufacturers Ins. Co.* 29 Me. 397, 1 Am. Rep. 591; *Maxey v. New Hampshire F. Ins. Co.* of Manchester, 54 Minn. 272. *Berthold v. Clay Fire & Marine Ins. Co.* 2 Mo. App. 311; *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619; *Travelers Ins. Co. v. California Ins. Co.* 8 L. R. A. 769, 1 N. Dak. 151; *Hammel v. London Queen Ins. Co.* 50 Wis. 240, 41 Am. Rep. 1. But see *Etna Ins. Co. of Hartford v. Baker*, *infra*, and cases following.

So where a policy on chattels was issued in the name of the owner, payable to the mortgagee. *Roussel v. St. Nicholas Ins. Co.* 9 Jones & S. 279.

And the mortgagee should sue on a policy procured by the owner of personalty, on account of whomsoever it might concern at the time of loss. *Rogers v. Traders Ins. Co.* 6 Paige, 583, 3 L. ed. 1111.

So where the mortgagee obtained a policy payable to him in case of loss, to the extent of his interest he may recover if the insurance does not exceed his debt. *Hadley v. New Hampshire F. Ins. Co.* 55 N. H. 111.

So where the mortgagee paid the premium on a policy insuring the mortgagor, loss to be paid to the mortgagee, he was the proper party to sue thereon. *Chamberlain v. New Hampshire F. Ins. Co.* 55 N. H. 249.

And he should sue in his own name, where he held a policy by assignment, in a mutual company



the People's Insurance Company to one S. Schullien. On May 27, 1890, the People's Insurance Company filed in the action its answer as garnishee, in which it stated that, by its policy No. 69,967, it insured the one-story frame building and additions of Frank S. Carroll for \$1,200, and on May 28d received proofs of loss, by fire, of April 18th, and afterwards received notice of the alleged assignment to Schullien, and that it was ready to pay the \$1,200 due under the policy to the party entitled to receive it. On June 4, 1890, Frank S. Carroll and wife filed their verified answer to the affidavit for garnishment, stating (1) that Mower and Chipman should not maintain their action, because no general execution had been issued upon the judgments of Chipman and Mower prior to the filing of said affidavit; (2) that the property and credits sought to be garnished were the proceeds of their homestead, and exempt from execution; (3) that they had assigned their claim against the People's Insurance Company to Schullien; (4) that they denied every allegation in said affidavit. On June 11, 1890, said Schullien filed his answer in said garnishment, setting up the alleged assignment to him. On June 24, 1890, a trial was had upon the matters under the pleadings. On July 16, 1890, the court decided the issue between Chipman and Mower and the People's Insurance Company, in substance, as

follows: "That the insurance company pay the sum due from it to the clerk of the district court for the use of said Frank S. Carroll and Jennie C. Carroll, and that upon the payment of that sum to the clerk of this court the People's Insurance Company, garnishee, be, and it is hereby, discharged; and that said Daniel L. Chipman and Ephraim Mower pay the costs herein, taxed at \$——." Daniel L. Chipman and Ephraim Mower excepted, and brought the case here on August 21, 1890. In the month of February, 1891, Frank S. Carroll, the principal defendant in this case, died; and thereupon Chipman and Mower revived this case in the name of his surviving widow, Jennie C. Carroll, and her children.

**Mr. John C. Sheridan**, for plaintiffs in error:

By his contract with this mortgagee Carroll agreed to keep his dwelling insured for the benefit of the mortgagee and when he obtained insurance he cannot be heard to say that he intended it for a purpose in violation of that agreement.

Where a mortgagor, who has agreed to insure for the benefit of the mortgagee, obtains insurance in his own name, the mortgagee has an equitable lien on the proceeds of the policy although it had not been assigned to him.

1 Jones, Mortg. §§ 400, 407; *Carter v. Rockott*, 8 Paige, 487, 4 L. ed. 498; *Thomas v. Von-*

and the by-laws so authorized such suit. *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 21.

And under Va. Code, § 2415, providing that a person for whom a covenant is made may maintain an action thereon, a mortgagee under a deed of trust may recover on a policy, loss if any payable to the mortgagee as his interest may appear, if his debt exceeds the amount due on the policy. *Tilley v. Connecticut F. Ins. Co.*, 56 Va. 811.

And in *Colby v. Parkersburg Ins. Co.*, 37 W. Va. 789, it was held that a mortgagee may recover on a policy obtained by mortgagor, loss payable to the mortgagee as his interest may appear, although his mortgage did not cover all the property insured, as "his interest may appear" does not refer to his interest in the property, but to the amount of his debt.

And in *Ripley v. Astor Ins. Co.*, 17 How. Pr. 444, and *Hathaway v. Orient Ins. Co.*, 17 L. R. A. 514, 184 N. Y. 409, it was stated that the mortgagee was the proper party to bring an action on a policy obtained by the owner, loss if any payable to the mortgagee; but that was not the question involved.

So where the mortgagees had taken the property and policy in satisfaction of the mortgage, they were the proper parties plaintiff, where the policy was obtained by the mortgagor "loss if any payable to mortgagees as their interest might appear." *Bartlett v. Iowa State Ins. Co.*, 77 Iowa, 86.

In *Meriden Sav. Bank v. Home Mut. F. Ins. Co.*, 50 Conn. 386, it was held that the mortgagee could sue, where the company insuring had by its instrument recognized the claim of the mortgagee, although it was said that the mortgagee could not sue on a policy under seal made with another for its benefit.

And if the mortgagees paid for the policy, and it was delivered to them, made in the name of the owner but payable to the mortgagees as their interest might appear, they might maintain an action thereon, if the policy covered no property outside of the mortgage and did not exceed such interest, 25 L. R. A.

*Hopkins Mfg. Co. v. Aurora Fire & Marine Ins. Co.*, 48 Mich. 148.

And a mortgagor cannot maintain an action, where the mortgagee is insured and it does not appear that the mortgage debt is still unpaid. *Westchester F. Ins. Co. v. Coverdale*, 48 Kan. 444.

If the mortgagee consents, or the mortgagor has paid off the mortgage debt, the mortgagor may maintain an action on a policy payable to mortgagee, or payable to the mortgagee as his interest may appear, or assigned to the mortgagee, or where the mortgagee renounces all claim. *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Ennis v. Harmony F. Ins. Co.*, 3 Bosw. 518; *Graves v. American Live-Stock Ins. Co.*, 48 Minn. 180; *Billings v. German Ins. Co.*, 34 Neb. 532; *Jackson v. Farmers Mut. F. Ins. Co.*, 5 Gray, 52; *Turner v. Quincy Mut. F. Ins. Co.*, 100 Mass. 568; *Coats v. Pennsylvania F. Ins. Co.*, *of Philadelphia*, 58 Md. 172, 42 Am. Rep. 327; *Worley v. State Ins. Co. of Des Moines (Iowa)*, 28 Ia. L. J. 580.

And a mortgagee may maintain an action on a policy taken by the mortgagor, loss if any payable to the trustee, where the policy contained a provision for subrogation to the mortgagee by the company. *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439.

Where the mortgagee paid for the policy and took the same in the names of the mortgagor and himself, loss if any payable to himself, he might maintain an action thereon. *Westchester F. Ins. Co. v. Foster*, 93 Ill. 121.

And a mortgagor who pays the debt and premium for insurance may maintain an action on the policy obtained by the mortgagee in his own name. *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618.

So a suit was properly brought by the mortgagor for the use of A. B. the assignee of the mortgage, where the policy was issued to the mortgagor, loss if any payable to the mortgagee. *Illinois F. Ins. Co. v. Stanton*, 57 Ill. 364.

And in *St. Paul Fire & Marine Ins. Co. v. Johnson*,

*Kapf*, 6 Gill & J. 873; *Providence County Bank v. Benson*, 24 Pick. 204; *Ellis v. Kreutinger*, 27 Mo. 811, 72 Am. Dec. 270; 15 Am. & Eng. Encyclop. Law, pp. 807, 808; *Wheeler v. Factors & Traders Ins. Co.* 101 U. S. 439, 25 L. ed. 1053; *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618.

And where the mortgage is recorded, it is held to be a covenant running with the land, and not affected by subsequent assignments, the record constituting notice to third parties. *Jones, Mortg.* §§ 400, 403, 404; 15 Am. & Eng. Encyclop. Law, p. 808, n.

The above rules are the same whether the policy existed at the time of the mortgage or was taken out afterwards.

1 *Jones, Mortg.* § 400.

And a mere verbal agreement to keep the property insured for the benefit of the mortgagee entitles the mortgagee to have the proceeds of the policy applied in payment of the mortgage debt.

1 *Jones, Mortg.* § 400; *Miller v. Aldrich*, 81 Mich. 408; *Dunlop v. Aery*, 23 Hun, 509; *Ames v. Richardson*, 29 Minn. 330; *National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco*, 88 Cal. 497.

**Mr. W. H. Browne**, for defendants in error:

Whatever rights these plaintiffs in error had to be enforced against these defendants in error had become merged in the judgments of November 27, 1889, and all contractual rights and reciprocal duties existing between these parties prior to that date were embraced and embodied in those judgments whose expressions and recitals were the exact measure of the plaintiffs in error's rights after the date of their rendition and were so at the time of the taking out of the policy of insurance, the date of the fire, the date of the garnishment and date of the trial of this case by the court below.

77 Ill. 596, it was held that a mortgagor may sue in his own name on a policy "loss if any payable to A. (mortgagee) as she shall make it appear," as the whole loss did not appear to be that of A.

A company owning and selling a ship and taking a mortgage to A. B. may maintain a libel for the benefit of all interested, on a policy for the account of whom it may concern, to A. B. owner of nearly all the stock in the ship. *Steamship Samana Co. Limited v. Hall*, 55 Fed. Rep. 632.

But the mortgagee is not the proper party to maintain the action where the mortgage does not cover all the property insured. *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609; *Fire Ins. Co. v. Felrath*, 77 Ala. 194, 84 Am. Rep. 58; *Thatch v. Metropolitan Ins. Co.* 13 McCrary, 387, 11 Fed. Rep. 39.

Or where his claim is less than the amount due on the policy. *Carberry v. German Ins. Co.* 86 Wis. 323.

And in *Ætna Ins. Co. of Hartford v. Baker*, 71 Ind. 102, it was held that under 2 Ind. Rev. Stat. 1273, § 3, p. 38, providing that actions shall be prosecuted in the name of the party in interest, that a mortgagor is the proper party to maintain an action on a policy obtained by the mortgagee in the name of mortgagor, payable in case of loss to the mortgagee as his interest may appear, as the mortgagor is the real party in interest.

In *Friemansdorf v. Watertown Ins. Co.*, 9 Biss. 170, it was held that a mortgagee cannot maintain an action on a policy obtained by the mortgagor,

*Black, Judgm.* § 674.

The money was exempt, obtained upon said policy upon said homestead.

*Continental Ins. Co. of New York v. Daly*, 33 Kan. 608.

If the money is not exempt, there has been no revivor of judgment, and the case ought to be dismissed,

*Ibid.*

**Horton, Ch. J.**, delivered the opinion of the court:

The judgment upon the mortgage of Frank S. Carroll and wife to Daniel L. Chipman was rendered November 27, 1889, for \$1,636.64. The insurance policy which is involved in this case was obtained by Frank S. Carroll on March 29, 1890. The dwelling was burned and loss occurred on the 13th of April, 1890. The judgment rendered has not been paid or satisfied, in whole or in part. The insurance company issuing the policy admitted that it is ready to pay \$1,200 due under the policy to the party entitled to receive it.

The question that we are called upon to decide in this case is whether Chipman has an equitable claim or lien upon the money due on the policy. If there was no covenant in the mortgage, or agreement between the parties, that the premises would be insured for the benefit of the mortgagee, the mere fact that Chipman's mortgage covers the property insured, and the insurer is personally liable for the debt, gives Chipman, the mortgagee, no corresponding claim upon the policy, or the proceeds of it. 1 *Jones, Mortg.* § 401; *Lees v. Whiteley*, L. R. 2 Eq. 143; *Ames v. Richardson*, 29 Minn. 330; *Stearns v. Quincy Mut. F. Ins. Co.* 124 Mass. 61, 26 Am. Rep. 647. But where a mortgage provides that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and, in fulfillment of this covenant, he takes out a policy

loss if any payable to the mortgagee as his interest may appear, in the absence of code provisions authorizing such action.

In *Martin v. Franklin F. Ins. Co.*, 33 N. J. L. 140, 20 Am. Rep. 372, it was held that the owner if he has still an insurable interest to be protected by the policy may maintain an action in his own name on a policy issued to him, "loss if any payable to V. as mortgagee," stating that the insurer may obtain indemnity against the mortgagee by paying the money into court, and if actions be pending at the same time by both the owner and mortgagee the court can protect the insurer, thus intimating that either may sue.

It was said in *Van Buren v. St. Joseph County Village F. Ins. Co.*, 23 Mich. 398, that the mortgagee could not maintain an action on a policy obtained by the mortgagor, loss if any payable to the mortgagee, as it is the mortgagor's interest that is insured, but this was not the question involved.

In *Chandos v. American F. Ins. Co.*, 19 L. R. A. 321, 84 Wis. 184, it was stated that the assured was the party to maintain an action, where the loss was payable to mortgagee as his interest might appear; but this was not the question involved in the case.

Cases involving the question of the invalidity of insurance policies are not here included, neither are cases as to the mortgagor's rights in insurance taken by the mortgagee for his own benefit.

I. T.

of insurance in his own name, which is not assigned to the mortgagee, or made payable to him, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy. 1 Jones, Mortg. § 400, and cases cited. It was expressly ruled in *Miller v. Aldrich*, 31 Mich. 408, that "where the agreement to keep insurance for the benefit of the mortgagee was merely verbal, but the mortgagor had acted upon it by obtaining such insurance, and his grantee, having knowledge of the agreement, subsequently surrendered this policy, and took another, which was not payable to the mortgagee, it was held that he was nevertheless entitled, in equity, to have the insurance money applied in payment of the mortgage debt." In this case the mortgage stipulated, "If the insurance is not kept up thereon, then this conveyance shall become absolute." To explain this provision, it was competent for Chipman, the mortgagee, to prove, if he could, that there was a verbal agreement between the mortgagors and the mortgagee that the insurance referred to in the mortgage was for the benefit of the mortgagee. This agreement would not vary or contradict the terms of the mortgage. It would tend to explain the language of the mortgage, and show what the parties intended thereby. Again, if there was no insurance clause in the mortgage, yet if, to obtain the loan secured by the mortgage, it was verbally agreed between the parties that insurance was to be kept up on the mortgaged property by the mortgagors for the benefit of the mortgagee, as additional security, and subsequently the mortgagors, acting upon this agreement, obtained insurance, with loss payable to the mortgagee, and, after this expired, took out another policy, not payable to the mortgagee, the latter would be entitled to an equitable lien on the proceeds of the policy if any loss by fire occurred. The court committed error in refusing to receive the evidence offered tending to show the verbal agreement, if any, at the time of the loan between the parties, concerning the application of the insurance which was to be kept up on the mortgaged premises.

It is insisted that, as the mortgage was merged in the judgment, any agreement to keep up the insurance on the premises for the

benefit of the mortgagee lapsed. The agreement to keep insurance for the benefit of the mortgagee, if any such agreement was made, was for the protection of the mortgagee, or rather as an additional security for his debt. The judgment did not extinguish the mortgage debt, either in whole or in part. The mortgagee, after his mortgage was merged in the judgment, was as much interested in protecting the property by insurance as prior thereto; and if the mortgagee would have had an equitable lien upon the proceeds of the policy, if taken before judgment, he would clearly have a lien upon the proceeds after judgment, if no sale had taken place. It was decided in *National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco*, 88 Cal. 497, that "where the loss is payable to the mortgagee of the property, and occurs after sale under foreclosure, but before the time for redemption has elapsed, the mortgagee is entitled to recover the loss, as the foreclosure is no extinguishment of his debt until the deed has been made and the time for redemption has expired." *Dunlop v. Avery*, 23 Hun, 509; *Ames v. Richardson*, 29 Minn. 330.

The claim that the proceeds of the policy are exempt because obtained from a policy upon the homestead is not tenable. If the dwelling house had not been destroyed by fire, it and the premises with which it was connected could have been sold in satisfaction of the judgment, as both the husband and wife jointly executed the mortgage. If the insurance company had rebuilt and replaced the dwelling house after its destruction by fire, it could also have been sold, with the premises, to satisfy the judgment. The proceeds of the policy of insurance merely take the place of the dwelling house destroyed by fire, and, while they would be exempt as against general creditors, they are not exempt if Chipman, the mortgagee, has an equitable lien thereon under the mortgage given by the husband and wife, and the agreement—if any exists—with them to keep up insurance for his benefit.

*The judgment will be reversed, and cause remanded.*

All the Justices concur.

Rehearing denied.

### SOUTH DAKOTA SUPREME COURT.

Richard KIMMEL, *Respt.*,

v.

F. C. DICKSON, Receiver of Douglas County Bank.

(.....S. Dak.....)

\*1. K. delivered to a bank a certain sum of money, to be paid over to W. when he should present to the bank a warranty

\*Headnotes by KELLAM, J.

NOTE.—As to when a deposit is special so that the title remains in the depositor, see *Mutual Aco. Assn. v. Jacobs* (Ill.) 16 L. R. A. 516, and *note*. 25 L. R. A.

deed, properly executed, conveying to K. certain lands, together with an abstract showing good title in W., and took a receipt from the bank reciting the purpose for which the money was so left. Subsequently, and before such deed and abstract were presented, or the money paid over, the bank failed, and a receiver was appointed by the court. *Held*, that the money so deposited was a trust fund, and did not become assets of the bank, nor pass to the receiver as such.

2. The fact that upon its receipt the bank gave credit to K. as of a deposit, and mingled the money so deposited with its own, without the knowledge or consent of K., did not change the character of the transaction.

3. Under such circumstances, K. had

the right to follow and reclaim the money so deposited as a trust fund, and it was the duty of the court to direct its receiver to pay the amount over to K.

(April 3, 1894.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Douglas County in favor of plaintiff in a proceeding brought to reach a fund in the possession of the receiver of the Douglas County Bank on the ground that it had been left with the bank as a special deposit. *Affirmed.*

The facts are stated in the opinion.

**Mr. Robert Dollard**, for appellant:

The trust fund must be traced into specific assets in the hands of the receiver, or there must be cash on hand with which the trust fund is intermixed, before payment thereof can be ordered under the law.

As the assets of the bank were in course of administration in equity no priority could be given one *cestui que trust* over another, who had a claim against the general assets of the bank, where he was unable to trace his trust funds into particular assets, if a trust could be enforced at all under such circumstances.

*Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 698.

What the court says in *McLeod v. Evans*, 66 Wis. 407, 57 Am. Rep. 287, although unnecessary to the adjudication of that case, goes to the extent of repudiating the doctrine that the trust property or its proceeds must be in existence in the assets, although undistinguishable in the mass thereof, and substitutes this, that so long as there are assets, if the trust fund went to the benefit of the estate, the trust is an equitable lien thereon.

There are other claims against the bank, of the same character as that of the respondent, amounting to \$7,786.08, and from the usual course of the administration of an estate of this character it is clear, even at this stage, that the assets will not satisfy all of these claims, or any considerable part of them.

He who seeks equity shall do equity.

This rule would not give respondent a right to demand that in the equitable distribution of the assets of the estate his claim should be paid in preference to all others equally meritorious merely because he secured permission to bring a suit against the receiver and prosecuted that suit in advance of others having similar claims.

1 Story, Eq. Jur. pp. 588, 589, 596.

Section 4660 of the Compiled Laws prescribes the rule for administering estates of the character sought to be effected in this action. That section provides that an insolvent estate, when administered in equity, shall inure to the benefit of all creditors in proportion to the respective claims or demands.

It may be insisted that the case under consideration is like a creditor's bill. The first answer to that proposition is that it is not a creditor's bill. And the second is that the filing of a creditor's bill operates as an equitable levy on the property of the debtor, and thereby he gains a priority over other creditors similar to that priority given in law to the levy of an execution.

25 L. R. A.

*Storm v. Waddell*, 2 Sandf. Ch. 494, 7 L. ed. 675; *Kimberling v. Hardy*, 1 Fed. Rep. 574; *Clarke v. Rist*, 3 McLean, 494; *Sedgwick v. Menck*, 6 Blatchf. 156; *Parker v. Muggridge*, 3 Story, 384; *Carr v. Kearington*, 63 N. C. 560; *Fetter v. Cirode*, 4 B. Mon. 482; *Newdigate v. Jacobs*, 9 Dana, 18; *McDermutt v. Strong*, 4 Johns. Ch. 687, 1 L. ed. 981; *Goddard v. Weaver*, 1 Woods, C. C. 260; *Yeatman v. New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589; *Brown v. Nichols*, 9 Abb. Pr. N. S. 17.

As against the assets of the bank in the hands of the appellant no levy, either legal or equitable, could be made by the respondent, as they were in the hands of the court and any proceeding against them, without its authority, would have been an unwarranted invasion punishable as for contempt.

20 Am. & Eng. Encyclop. Law, pp. 141, 142, and notes.

**Mr. G. P. Harben**, for respondent:

The law favors the vigilant, and in the case at bar the respondent, by commencing his action as he did, obtained an equitable lien on as much of the cash received by the appellant as was necessary to pay the respondent the sum of money so received in trust from him by the Douglas County Bank.

The money in dispute was placed in defendant's bank to pay to E. C. Ward on presentation of a warranty deed and abstract to certain lands. The bank failed and defendant Dixon is the receiver. The object of this action is to declare the deposit the trust fund.

Although the relation between a bank and its depositor is that merely of debtor and creditor, yet the fund does not change its character from the fact that the money has been deposited in bank to the credit of the depositor. If the money in his hands was impressed with a trust in favor of another the deposit will remain subject to the trust.

*Third Nat. Bank of St. Paul v. Stillwater Gas Co.* 36 Minn. 75; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *People v. City Bank of Rochester*, 96 N. Y. 32; *Cragle v. Hadley*, 99 N. Y. 181, 52 Am. Rep. 9; *Farmers & M. Nat. Bank v. King*, 57 Pa. 202, 98 Am. Dec. 215; *Peak v. Elliott*, 30 Kan. 156, 46 Am. Rep. 90; *Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 698.

In cases of special deposit the money is not the property of the bank but is held in trust for the owner to be paid on demand.

*Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Marsh v. Oneida Central Bank*, 84 Barb. 298; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314.

The bank is merely the bailee of the depositor, has not authority to use the thing deposited, and must return it in *individuo* to the depositor.

Story, Bailm. 9th ed. 88; *Dawson v. Real Estate Bank*, 5 Ark. 283; *Marine Bank of Chicago v. Rushmore*, 28 Ill. 463.

A person obtaining property by fraud acquires no title to it, but it is held by him and all persons claiming under him with notice, in trust for the original owner.

*Third Nat. Bank of St. Paul v. Stillwater Gas Co. supra*; *Amer v. Hightower*, 70 Cal. 440; *Sleeper v. Davis*, 64 N. H. 59; *McLeod v. Evans*, 66 Wis. 407, 57 Am. Rep. 287.

**Kellam, J.**, delivered the opinion of the court:

In this case the facts are simple and undisputed. On and prior to the 9th day of June, 1898, the Douglas County Bank was a banking corporation under the laws of this state, doing business at Armour, in said Douglas county. On that day respondent, Kimmel, left with such bank \$265, to be paid to E. C. Ward, on presentation by him of a warranty deed conveying to Kimmel certain described land, with an abstract showing good title in the grantor. The bank gave Kimmel a receipt therefor, reciting that it was so received for such purpose. On the 17th day of June following, and before the deed was presented and the money paid over, the bank failed, and respondent, Dickson, was appointed its receiver, and as such received and took possession of all the assets and property found in the possession of the bank, of which only \$259.71 was cash. Subsequently both Kimmel and Ward demanded their money of the receiver, and this action does not involve any controversy between Kimmel and Ward, but simply whether the receiver of the bank should be required to pay over the amount, or so much thereof as the money on hand will pay; or whether the cash so found on hand at the time of the failure of the bank is assets in his hands, to be distributed with and as the other assets of the bank. The court below ordered the receiver to pay over to respondent the said \$259.71 so found in the bank at the time of its failure and taken possession of by him, and this appeal is from such order. In the affidavit of Humbert, secretary of said bank, it is stated that when this money was so left with the bank it "was treated the same as any other deposits of said bank, and mixed with the other money therein." It is not intimated that this was done with the knowledge of Kimmel, or that he in any manner consented to it. Upon these facts it would appear that the money was left with the bank in trust for a particular purpose. The bank could not afterwards, without the acquiescence of Kimmel, change its relation to him from that of a bailee or trustee to that of a general debtor. We apprehend that no different principle is involved because one of the parties happens to be a bank. Suppose, under the same circumstances, Kimmel had left the money with Humbert personally, and he had failed and made an assignment, would this money, so found in his possession, pass to his assignee as his property? If so, when and how did it become so? That he, or the bank in this case, had, without the consent of Kimmel, diverted the money and used it for some other purpose, ought not to affect Kimmel's rights. Abuse of a trust can confer no rights on the party abusing it, or on those claiming in privity with him. It is not claimed that the \$259 found in the bank's vault when it failed is the very money, or a part of it, deposited by Kimmel, and it is not necessary that it should be so. If the money delivered to the bank had been used by it in its business, it had presumably either paid its debts *pro tanto*, or increased its assets; and the general creditors of the

bank would be in the same condition if the money found in its possession were paid over in execution of the trust as though the money deposited had been kept separate, and the identical money received had been so paid over. *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, was a case entirely analogous to this. Peak had left with the bank of which Ellicott, upon its failure, became assignee, money to pay a note, which the bank was to send for. As in this case, he took a receipt showing the purpose for which the money was left. The bank passed the amount to the credit of Peak. After the failure of the bank, it not having paid the note, Peak brought action against the assignee, asking the same relief as is asked in this case, to wit, that the assignee be required to pay over the amount in full as a trust fund. The supreme court reversed the trial court, holding that the transaction constituted a trust; that the relation created was not that of a debtor and creditor, but rather that of principal and agent, or bailor and bailee; and that the subject of such trust did not pass to the assignee as assets of the bank. It was held further that the manner in which the bank had treated the fund by crediting it to Peak and mixing it with its own money did not affect his right to claim the amount from the funds on hand. *Ellicott v. Barnes*, 31 Kan. 170, was a similar case, and the same rule controlled. *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, applies the same principle, with the same result, where a draft had been left for collection with a banker, who afterwards, and before the depositor had received its proceeds, suspended, and assigned. The court held that the proceeds of the draft constituted a trust fund, which did not pass to the assignee, and, there not being sufficient cash in the hands of the assignee to pay the amount, that the same should be a lien upon the assigned estate. The same principle, though to somewhat different facts, was applied in *People v. City Bank of Rochester*, 96 N. Y. 33, and again in *People v. Bank of Danville*, 39 Hun, 187.

The suggestions of appellant that this money is imperatively needed to meet immediate expenses in administering the bank's estate, can have little weight when the money itself is no part of the estate, but belongs to another. There would be no justice in requiring Kimmel to furnish means to assist in settling the affairs of the bank. On behalf of appellant it is further urged that the answer shows that at the time of its failure the bank held a large amount of other special deposits of the same character as this \$265; and it is insisted that by the order appealed from Kimmel is given a priority to which he is not entitled over other equally meritorious claimants. It is doubtful if the proceedings convey the meaning which counsel thus draws from them. The answer of the receiver is evidently framed upon the theory that, notwithstanding the circumstances of this deposit, it was a general deposit, and concludes with admitting the indebtedness of the bank on account of it. After stating how and for what purpose it was made, it proceeds: "And it is alleged

that said \$265 was deposited on account of the plaintiff as herein stated, and not otherwise, and was carried to the credit of the plaintiff by the defendant corporation the same as any other deposits of said bank, and the money constituting said sum of \$265 was mixed with other money deposits of said bank, and its identity destroyed.

And that, after the deposit of said \$265, and previous to the 17th day of June, 1893, said defendant bank received on deposit moneys from its depositors to the amount of \$7,786.63, to be paid out the same as said \$265, the same being funds belonging to depositors, and no part of which have been paid to said depositors, which was mixed with its general deposit funds, of which said \$265 formed a part at the time of its deposit. The defendant further alleges that the total amount due depositors by said defendant bank on said 17th day of June, and which remains unpaid, is the sum of \$20,778.08, and defendant states that, except said \$259.71, cash on hand, the assets of said defendant bank consist of horses, equities, and rights of action; admit that the plaintiff and said E. C. Ward have each demanded said \$265, and defendants have each refused to pay the same; and admit that defendant corporation is indebted to plaintiff in said sum of \$265 as aforesaid, and no part thereof has been paid." Upon this point the affidavit of Humbert, the secretary of the bank, is as follows: "That the said \$265 deposited by plaintiff as aforesaid was treated the same as any other deposits of said bank, and mixed

with the other money therein. . . . That after the deposit of said \$265, and previous to the 17th day of June, 1893, said defendant bank received on deposit money to the amount of \$7,786.63, which was mixed with the deposit funds of said bank, and all of which was paid out by said defendant corporation prior to June 17th, except said sum of \$259.71." Reading the answer of the receiver and the affidavit of the bank's officer together, I think we ought to understand, not that the bank had received and held over \$7,000 of special deposits of the same character as the \$265, but that between the dates named that amount had been deposited generally, and had been treated by the bank, and used and paid out, the same as the \$265. To us these statements do not mean that the bank held other special deposits, delivered to and received by it for, and so appropriated to, a particular purpose or trust; and, even if they were so intended, there is nothing before us to indicate that any such depositor ever has, or ever will, assert his rights. The plaintiff having established his right to be paid, no question of priority is presented until it is shown that there are rival claimants in position to and disposed to raise the question, and that they will suffer by allowing plaintiff to be presently and first paid. Payment to him ought not to be denied or delayed upon a bare suspicion that others similarly situated, now sleeping on their rights, may eventually assert them.

*The order of the Circuit Court is affirmed.*

## CALIFORNIA SUPREME COURT.

Horatio P. LIVERMORE, *Resp't.*,  
v.

E. G. WAITE, Secretary of State, *App't.*

(.....Cal.....)

1. The declaration in a state constitution that a certain city is the seat of government and shall so remain "until changed by law" does not withdraw this provision from the possibility of amendment, although the section itself provides for change by statute approved by the people.

2. An amendment of the state constitution by changing the seat of government to another city on condition of a certain donation of land and money, and an approval by certain officers of the site donated is not such an amendment as the legislature is authorized to submit to the vote of the people, since it would not upon adoption by the people become an effective part of the constitution

without subsequent acts and the approval thereof by certain officers and the exercise of discretion by the commission.

(Paterson and McFarland, JJ., dissent from proposition 1.)

(March 22, 1894.)

**A** PPEAL by defendant from a judgment of the Superior Court for Sacramento County in favor of plaintiff in a proceeding brought to enjoin defendant from taking steps to submit to the voters of the state a proposed amendment to the constitution providing for a change of the location of the state capital. *Affirmed.*

The facts are stated in the opinions.

*Messrs. W. H. H. Hart, Atty-Gen., W. H. Layson, Dep. Atty-Gen., D. M. Delmas and Morehouse & Tuttle* for appellant.

*Messrs. L. T. Hatfield and Johnson & Johnson*, for respondent:

Respondent had capacity to sue.

NOTE.—Decisions as to the proper method of adopting constitutional amendments are sufficiently rare to make the discussion in the above opinions of much value upon that subject.

Pol. Code, § 1195.

Any citizen and taxpayer has the right to proceed against any public officer or set of officers, to restrain their doing any act by which any right of such citizen may be injuriously affected, whether such injury be to a mere civil right or of pecuniary interest.

*People v. Johnson*, 6 Cal. 500; *Nouques v. Douglass*, 7 Cal. 66; *Miller v. Dunn*, 73 Cal. 468; *Mazwell v. Stanislaus County Suprs.* 53 Cal. 389; *Hyatt v. Allen*, 54 Cal. 858; *Gibson v. Trinity County Suprs.* 80 Cal. 559; *Eby v. Board of Red Bank School Dist., Tehama County School Trustees*, 87 Cal. 167; *Winn v. Shaw*, Id. 682; *Lynn v. Polk*, 8 Lea. 121; *Galweay v. Chatham R. Co.* 63 N. C. 148; *Bradley v. Powell County Comrs.* 2 Humph. 481, 87 Am. Dec. 563; *Sinclair v. Winona County Comrs.* 23 Minn. 404, 28 Am. Rep. 694; *State v. Cunningham*, 17 L. R. A. 145, 83 Wis. 90; *Parker v. State*, 18 L. R. A. 567, 138 Ind. 178.

If any public officer threatens or attempts to act, or in any way carry out any direction under any act or resolution of the legislature that is invalid, or attempts to put in force under a valid provision any act that is unconstitutional, he may be restrained by suit at the instance of a citizen and taxpayer.

*Davis v. Gray*, 83 U. S. 16 Wall. 208, 21 L. ed. 447; *Pennoyer v. McConaughy*, 140 U. S. 1, 85 L. ed. 863; *Louisiana Board of Liquidation v. McComb*, 92 U. S. 532, 23 L. ed. 625; *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 733, 6 L. ed. 204; *McCord v. Pike*, 121 Ill. 290; *Chestnutwood v. Hood*, 68 Ill. 132; *State v. Cunningham*, and *Parker v. State*, *supra*; *Lanier v. Padgett*, 18 Fla. 842.

With respect to the right of a citizen to proceed against a state officer to procure an adjudication upon rights under the laws and constitution, there has never been any doubt in this state.

*People v. Bigler*, 5 Cal. 28; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Kensfield v. Irwin*, 52 Cal. 164; *Hatch v. Stoneman*, 66 Cal. 633; *People v. Markham*, 96 Cal. 262; *People v. Markham*, Id. 289; *Chamberlain v. Sibbey*, 4 Minn. 812; *State v. Chase*, 5 Ohio St. 539.

The action of the legislature in this instance did not legally or constitutionally affect the status of affairs with respect to the seat of government of this state.

Section 1 of article 20 of the present Constitution says: "The city of Sacramento is hereby declared to be the seat of government of this state, and shall so remain until changed by law; but no law changing the seat of government shall be valid or binding unless the same be approved and ratified by a majority of the qualified electors of the state voting therefor at a general state election under such regulations and provisions as the legislature, by a two-thirds vote of each house, may provide submitting the question of change to the people."

The court knows that no law of any character has ever, at any time, been enacted as above required, or in any manner whatever.

Section 1 of article 20, as it now stands, requires affirmative action to bring about or authorize a removal of the seat of government, and if those provisions be not abrogated by 35 L. R. A.

appropriate language in a valid amendment providing for a different method, or abolishing all conditions, the proposed amendment must fail.

The provisions of the constitution of the state of California are not grants of power, but restrictions upon the power of the legislature. Where the constitution prescribes a mode of procedure, that mode is the measure of power.

*People v. Johnson*, 6 Cal. 500; *Nouques v. Douglass*, 7 Cal. 65; *People v. Jewett*, 6 Cal. 292; *People v. Rogers*, 18 Cal. 163; *Cohen v. Wright*, 22 Cal. 308; *State v. Rogers*, 10 Nev. 252, 21 Am. Rep. 788; *Cooley, Const. Lim.* 78; *Weill v. Kensfield*, 54 Cal. 111; *People v. Gunn*, 85 Cal. 247; *McDonald v. Patterson*, 54 Cal. 245.

Section 1, article 20, of the State Constitution requires legislation to carry out its provisions and the provisions have not been made. The alleged amendment does not provide the means or terms of removal, but bluntly says it is removed.

When specific directions are given in the constitution, that plan must be followed.

*Weber v. Santa Clara County Suprs.* 59 Cal. 265; *Ewing v. Oroville Min. Co.* 56 Cal. 649; *Marye v. Hart*, 76 Cal. 298.

The provisions of the constitution are mandatory and prohibitory.

Art. 1, § 22.

If in one section of the constitution a power is specially conferred, or a duty specially enjoined, which, in general terms, is prohibited by the other sections, the power or duty specially conferred or enjoined constitutes an exception to the general rule; the direction to employ the power or discharge the duty in the particular instance is as mandatory as the general prohibition.

*San Francisco & N. P. R. Co. v. State Board of Equalization*, 60 Cal. 32; *Cooley, Const. Lim.* 6th ed. 76, 77.

Proceedings of the legislature of the state may be proved by the journals of that body, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk, or printed by their order.

*Code Civ. Proc.* 1918; *Fowler v. Pierce*, 2 Cal. 166; *Oakland Paving Co. v. Hilton*, 69 Cal. 479; *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *Stevenson v. Colgan*, 14 L. R. A. 459, 91 Cal. 651; *Oakland Paving Co. v. Tompkins*, 72 Cal. 5; *People v. Dunn*, 80 Cal. 218.

The journals kept in whatever manner must be conceded to record what was actually done if it shows what was done, and validity of law may be attacked by journals.

*Miller v. Goodwin*, 70 Ill. 660; *South Ottawa v. Perkins*, 94 U. S. 263, 24 L. ed. 156; *Gardner v. Barney*, 78 U. S. 6 Wall. 499, 18 L. ed. 890; *Berry v. Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *Opinion of Justices*, 52 N. H. 622; *Wood's App.* 75 Pa. 59.

In order to determine what things were done in respect to the passage of laws or adoption of resolutions, the courts will examine the journal and roll calls of the respective bodies who take action on any matter of legislation or constitutional amendment.

*Code Civ. Proc.* § 1918, subd. 2; *Weill v. Kensfield*, 54 Cal. 111; *Oakland Paving Co. v. Hilton*, 69 Cal. 479; *Kochler v. Hill*, 60 Iowa. 556; *State v. Tufts*, 19 Nev. 391; *Oakland*

*Paving Co. v. Tompkins*, 72 Cal. 5; *People v. Johnson*, 6 Cal. 500; *Nouques v. Douglass*, 7 Cal. 65.

The changes in the words of the proposed amendment in the assembly and the failure of the senate to concur in the change is fatal.

*Prescott v. Illinois & M. Canal Trustees*, 19 Ill. 327; *Jones v. Hutchinson*, 48 Ala. 721. Also see *Olin v. Meyers*, 55 Iowa, 209; *Railroad Tax Case*, 18 Fed. Rep. 767; *People v. Hills*, 35 N. Y. 449; *Astor v. Arcade R. Co.* 2 L. R. A. 789, 118 N. Y. 98.

If the resolution is not identical in both houses, or in all the different bodies called upon to ratify it, or, in other words, if the document as finally passed upon is not a true copy of what one or the other body adopted and agreed to, the variance is fatal to the act.

*Kochler v. Hill*, 60 Iowa, 556; *State v. Harris*, 19 Nev. 223; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Smithes v. Garth*, 33 Ark. 17; *State v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738; *Wolcott v. Wigton*, 7 Ind. 48. Also *Ryan v. Lynch*, 68 Ill. 160; *Steckert v. East Saginaw*, 22 Mich. 104; *Wendel v. Durbin*, 26 Wis. 390; *State v. Miller*, 45 Mo. 495.

Illinois, Indiana, Iowa, Minnesota, Missouri, Nevada, New York, North Dakota and Wisconsin have provisions of constitution relative to amendments quite similar to California, and they each submit amendments under general law.

The following states have constitutional requirements similar to California, and submit under special act or special joint resolution, viz.: Georgia, Maryland, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia and West Virginia.

The following states, with different provisions, submit under general law: Alabama, Arkansas, Colorado, Connecticut, Florida, Maine and Nebraska.

In the following states the laws or constitutions provide that proposed amendments be submitted by the governor, viz.: Georgia, Maryland, Oregon, Tennessee and Texas.

In the states of Delaware and Maryland the concurrence of the governor is a prerequisite to proposal.

In the states of Delaware, Kentucky, Louisiana, Massachusetts, Michigan and New Hampshire the machinery for submission is contained in the constitution.

In the following states all amendments are submitted under special acts or joint resolutions, regardless of difference in language of constitution: Georgia, Idaho, Kansas, Louisiana, Maryland, Mississippi, Montana, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington and West Virginia.

In *State v. Grey* (Nev.) 19 L. R. A. 184, the court holds that wide latitude shall be indulged in favor of propositions to amend the constitution.

In *State v. Cunningham*, 17 L. R. A. 145, 88 Wis. 90, the secretary of state of Wisconsin, acting under law almost identical with section 1195, Pol. Code of this state, was restrained from submitting a proposition to the voters because of invalidity of the act to be voted on.

In *Parker v. State*, 18 L. R. A. 567, 183 Ind. 35 L. R. A.

178, in which a voter successfully opposed the submission of a proposition under a general law because the matter to be submitted was invalid, there was no question as to validity of the general law.

See also *Oakland Paving Co. v. Tompkins*, 72 Cal. 5.

The flat question as to the validity of laws for submitting proposed amendments has not in a single instance been called in question.

In *Constitutional Prohibitory Amendment*, 24 Kan. 700, it was claimed that there had not been any provision whatever for its submission, but the decision was based upon the fact that the proposition had in fact been submitted, and had received the sanction of a very large majority of the electors.

This general law must fail, because it is an attempt by the legislature to delegate to other persons the duty imposed upon it by section 1 of article 18 of the Constitution, and such legislative duty cannot be delegated.

*Cooley*, Const. Lim. p. 117; *People v. Parks*, 58 Cal. 645; *Dougherty v. Austin*, 16 L. R. A. 161, 94 Cal. 605; *People v. Johnson*, 95 Cal. 471.

*Harrison, J.*, delivered the opinion of the court:

At the last session of the legislature a proposition for an amendment to section 1 of article 20 of the Constitution was adopted by the vote of the two thirds of the members of each house, in the following terms: "Senate Constitutional Amendment No. 28. Submitting to the people of the state of California an amendment to the constitution, amending section one of article twenty of the Constitution of the state of California, relative to changing the seat of government from the city of Sacramento to the city of San José. The legislature of the state of California, at its thirtieth session, commencing on the second day of January, A. D. one thousand eight hundred and ninety-three, two thirds of all the members elected to each house of said legislature voting in favor thereof, hereby proposes that section one of article twenty (miscellaneous subjects) of the Constitution of the state of California be amended so as to read as follows: Section 1. The city of San José is hereby declared to be the seat of government of this state, and shall so remain until changed by law; but no law changing the seat of government shall be valid or binding unless the same be approved and ratified by a majority of the qualified electors of the state voting therefor at a general state election, under such regulations and provisions as the legislature, by a two-thirds vote of each house, may provide, submitting the question of change to the people; provided, that the state shall receive a donation of a site of not less than ten acres and one million dollars before such removal shall be had. The governor, the secretary of state, and the attorney-general are hereby authorized to approve said site, and upon the approval thereof, and the payment of one million dollars into the state treasury, the legislature shall provide for the erection of the necessary building and the removal of the seat of government." The present action was brought by



the respondent as a taxpayer and citizen of the state, to restrain the defendant, as secretary of state, from certifying the said amendment to the clerks of the respective counties of the state, and from doing any other act with intent to have the said amendment submitted to the electors of the state, and from incurring any expenses in connection with said amendment, or with any attempt to secure a vote thereon by the people, upon the grounds, as contended by him, that, by reason of the failure to comply with certain constitutional requirements, the amendment was never legally adopted, and, also, that, by the terms of the proposition itself, it is inefficient as an amendment to the constitution, and would be inoperative if approved by the people; and that, as a taxpayer and citizen, he is entitled to this relief against the improper expenditure of public moneys. Judgment was rendered by the court below in favor of the plaintiff, and the defendant has appealed.

The court made findings of fact in reference to the adoption of the amendment substantially as follows: On the 11th of March, 1893, while the legislature was in evening session, and after the hour of 10 o'clock in the afternoon of that day, the proposed amendment was introduced and read in the senate, and, after the roll had been called upon a motion for its adoption, the secretary of the senate announced that 28 senators, including Senators Hart and Voorhies, had voted for the amendment, and 7 had voted against it. Immediately upon the announcement of the vote what purported to be a true copy of the proposed amendment was transmitted to the assembly, with the announcement that it had been duly adopted by the senate; and at the hour of 10 o'clock and 15 minutes P. M. the senate adjourned. On the same evening, between the hour of 10 o'clock and 15 minutes and 11 o'clock P. M., the rules of the assembly were suspended, and the amendment was voted upon in that house, and received the votes of 57 members in its favor, and 7 against it. Immediately thereon one of the assemblymen who had voted in favor of its adoption gave notice of his intention to move for a reconsideration of the vote, and at 11 o'clock P. M. the assembly adjourned. On the 18th of March (the intervening day being Sunday) another assemblyman who had voted for its adoption moved the reconsideration of such vote, and immediately thereafter, upon his motion, the motion to reconsider was laid upon the table, and during the afternoon session of that day the copy of the amendment, as sent to the assembly, was returned to the senate, with the announcement that it had been duly adopted by the assembly, and the legislature adjourned *sine die*, without any action by the assembly upon the motion for a reconsideration of the vote by which the amendment had been adopted. When the senate convened on the 18th of March, the journal was corrected so as to show that Senator Voorhies had voted "No" upon the adoption of the amendment, instead of "Aye," as it had been recorded. Thereupon Senator Hart, who had been opposed to the measure, stated that he had voted "No," but had changed to "Aye," because he had ascertained

before the announcement of the vote that 27 votes had been cast in favor of the amendment, and that he had changed his vote for the purpose of giving notice of a motion to reconsider, and that, when the vote was announced, he attempted to make such motion, but an adjournment was had before he could present the motion. He therefore asked to have his vote recorded against the amendment. The matter was referred to the committee on judiciary, which reported that he had earnestly endeavored to defeat the measure when before the senate, and recommended that his personal statement be entered upon the journal. The motion of Senator Hart to have the journal corrected was denied, and the journal was approved, showing 27 votes, including that of Senator Hart, in favor of the proposed amendment, and 8 votes against it. The copy voted on in the assembly differed from that voted on in the senate by the omission of the words "of this state," in section 1, immediately after the words "seat of government," and in having the word "laws" instead of "law" in the first sentence. Upon these facts, the respondent, in his argument, has presented various reasons for the affirmance of the judgment, but the conclusion that we have reached concerning the character and effect of the proposed amendment renders it unnecessary to consider the other propositions presented by him.

Article 18 of the Constitution provides two methods by which changes may be effected in that instrument,—one by a convention of delegates chosen by the people for the express purpose of revising the entire instrument, and the other through the adoption by the people of propositions for specific amendments that have been previously submitted to it by two thirds of the members of each branch of the legislature. It can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred upon the legislature in reference to proposing amendments, as well as to calling a convention, must be strictly pursued. Under the first of these methods the entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the Constitution of the United States. If, upon its submission to the people it is adopted, it becomes the measure of authority for all the departments of government,—the organic law of the state,—to which every citizen must yield an acquiescent obedience. The power of the legislature to initiate any change in the existing organic law is, however, of greatly less extent, and, being a delegated power, is to be strictly construed, under the limitations by which it has been conferred. In submitting propositions for the amendment of the constitution, the legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power, conferred upon it by the people, and which might with equal propriety have been conferred upon either house, or upon the governor, or upon a special commission, or any

other body or tribunal. The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and cannot be extended by the legislature to any other object, or enlarged beyond these terms. The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment, nor can it submit to their votes a proposition which, if adopted, would, by the very terms in which it is framed, be inoperative. The constitution itself has been framed by delegates chosen by the people for that express purpose, and has been afterwards ratified by a vote of the people, at a special election held for that purpose; and the provision in article 18 that it can be revised only in the same manner, and after the people have had an opportunity to express their will in reference thereto, precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision. The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed. Experience may disclose defects in some of its details, or in the practical application of some of the principles or limitations which it contains. The changed condition of affairs in different parts of the state, or the changes of society or time, may demand an enlargement of some of these limitations, or an extended application of its principles. So, too, some popular wave of sociological reform, like the abolition of the death penalty for crime, or a prohibition against the manufacture or sale of intoxicating liquors, may induce a legislature to submit for enactment, in the permanent form of a constitutional prohibition, a rule which it has the power itself to enact as a law, but which might be of only temporary effect.

Section 1 of article 20 of the Constitution is as follows: "The city of Sacramento is hereby declared to be the seat of government of this state, and shall so remain until changed by law; but no law changing the seat of government shall be valid or binding unless the same be approved and ratified by a majority of the qualified electors of the state, voting therefor at a general state election, under such regulations and provisions as the legislature, by a two-thirds vote of each house, may provide, submitting the question of change to the people." The designation of the seat of government of a state may not properly fall within the definition of a constitution, but as it is a matter which

is of public interest, and concerns the entire state, it is frequently made a part of that instrument, with the qualification that it shall so remain until changed by law. This declaration that the city of Sacramento is the seat of government of this state is a part of the constitution, and may be amended in the same manner as any other portion of that instrument. The provision that it shall so remain the seat of government until changed by law, whether such law is to be passed like any other law, or with the limitations prescribed in this section, is immaterial. The section of the constitution in which this provision is contained is not thereby withdrawn from the possibility of amendment. By this section the constitution provides that the seat of government may be changed in the manner therein prescribed, but the mode of effecting such change is not limited to the one thus provided. The legislature might have provided for changing the seat of government to San José by passing a law under the provisions of this section, but, instead of attempting this course, it has seen fit to seek to accomplish the same result through an amendment to the constitution. Either of these courses was open to its choice, and, if the amendment proposed by it were such as is within its power to submit for the approval of the people, the course adopted by it is without objection, for it must be left to the discretion of the legislature to determine which of two methods open to its selection it will adopt. The proposed amendment is, however, ineffective in accomplishing the object expressed in the title of the proposition. Article 18 of section 1 of the Constitution provides that, if a proposed amendment is ratified and approved by the people, it "shall become a part of this constitution." By the terms of the proposed amendment, however, its operative effect is limited upon the donation to the state of not less than ten acres in land and \$1,000,000 in money, and the approval by the governor, the secretary of state, and the attorney-general of the site so donated. The section of the constitution which is to be superseded by the proposed amendment fixes the seat of government at Sacramento, and so long as that section remains a part of the constitution, the seat of government will remain at Sacramento until changed by law. But, if the proposed amendment should be adopted by the people, it would obliterate this section from the constitution without leaving any constitutional declaration by which the seat of government would be located in any part of the state. Although the first section of the amendment is in terms the declaration of an existing fact, the concluding portion shows that the amendment, as a whole, has reference to a future state of facts which may never come into existence. The proviso in the amendment is a limitation upon the declaration that the seat of government is at San José, and postpones the effect of that declaration until the conditions in the proviso have been complied with. Under established rules of construction applicable to constitutions, as well as to statutes, the effect of a proviso to an act is to render the proviso a limitation upon the

body of the act, and to deprive the substantive part of the act of all effect inconsistent with the terms of the proviso. The effect of the amendment, if approved by the people, would be that the seat of government will at some future time be at San José, provided a donation of \$1,000,000 in money and ten acres of land shall be made. Until the donation of money and land shall have been made, and the site donated approved by the designated officers, the removal of the seat of government cannot take place; and the declaration in the first sentence that "the city of San José is hereby declared to be the seat of government of this state" would be ineffectual, for the reason that the amendment would fail to become an operative part of the constitution. The "removal" for which the legislature is directed to provide in the last clause of the proposed amendment is the removal from Sacramento to San José, and not a subsequent removal from San José, as is suggested in one of the briefs filed herein. By the existing constitution the seat of government is fixed at Sacramento, and is to remain there until changed; and by the terms of the proposed amendment there can be no removal except in accordance with the terms of the proviso upon which it is conditioned, and which limits the removal from Sacramento to San José to those terms. This removal is conditioned upon the approval of the site that must be donated before the declarative portion of the section can have any operation, and is the removal which is referred to in the proviso which declares that the donation shall be made "before such removal shall be had." If any additional argument is needed, it is found in the current history of the adoption of the amendment, and also in the entitling of the proposition for the amendment, which declares it to be "relative to changing the seat of government from the city of Sacramento to the city of San José." The provision in the proposed amendment for a law providing for its subsequent change from San José would not, upon its approval by the people, become an operative provision of the constitution, for the reason that that city will not, upon the mere approval of the amendment by the people, become the seat of government, so that the proposition of the legislature, instead of amending the constitution, either by changing any of its terms, or adding thereto some other limitation, would take away the provision which now exists, and place in its stead a provision which is incompatible with the requirement that it shall become a part of the instrument. The legislature was not authorized by the framers of the constitution, nor do the terms of that instrument permit it, to propose any amendment that will not, upon its adoption by the people, become an effective part of the constitution; nor is it authorized to propose an amendment which, if ratified, will take effect only at the will of other persons, or upon the approval by such persons of some specific act or condition. The amendment proposed is neither a declaration by the people of a principle or of a fact, nor is it a limitation or a rule prescribed for the guidance of either of the departments to which the sovereignty of

the people has been intrusted. If adopted, it would have merely the effect to present the option to any one so disposed of making a donation of land and money for the purpose of having the seat of government at San José. Such a proposition is legislative in character, rather than constitutional, and, being conditional in its terms, would be ineffective in accomplishing a change of the seat of government from that already fixed by the constitution. Even if it should be conceded that its approval by the people would incorporate its terms into the constitution, it would take from that instrument the existing declaration fixing the place for the seat of government, and leave the state without any constitutional seat of government until the conditions upon which the declaration rests have been performed. As there is no limitation of the time within which these conditions are to be performed, and no obligation for their performance, it follows that the seat of government would have no established location. But the donation of the money and land does not bring the provision into operation, for, until after the site that may be offered has received the approval of the designated officers, there can be no act of the legislature tending to the removal. Instead, therefore, of there being any declaration by the people of a place for the seat of government, a commission is substituted whose judgment is to be taken instead of the judgment of the people, and to which is assigned a discretion which should be exercised by the people themselves. We do not mean to say that a legislative provision in a constitution that has been ratified by the people would be nugatory. If placed there, it must be observed by courts and citizens; but, for the purpose of determining the extent of the power conferred upon the legislature to propose amendments to the constitution, we must assume that it is only such amendments as may naturally and reasonably belong to the elements of a constitution. The amendment proposed substitutes for, or rather superadds to, the will of the people another will or judgment, without which its own will can have no effect, and which is therefore made the controlling judgment before the amendment can have any operative existence. As the proposed amendment is therefore only a proposition for the people to submit to some other individuals or body to determine whether there shall be a change of the seat of government, we hold that it is not such an amendment as the legislature has been authorized to submit to their votes. If the people shall at any time desire a removal of the seat of government from Sacramento, this result can be readily effected, either by a law passed in accordance with the existing provisions of the constitution, or by a proposal on the part of the legislature for such an amendment to the constitution as will afford them an opportunity to give immediate effect to their desire by a direct vote upon the question.

*The judgment and order of the court below are affirmed.*

We concur: *Beatty, Ch. J.; Fitzgerald, J.; DeHaven, J.; Garoutte, J.*

**Paterson, J.**, concurring:

At the argument it was contended by respondent that the judgment should be affirmed because the proposed amendment was never finally disposed of by the assembly, the whole matter having been laid on the table; that it was not passed in the senate by a two-thirds vote of all the members thereof, the record showing that Senator Hart's vote ought to have been recorded in the negative; that the house did not act upon the measure that was passed by the senate; that the proposed amendment is on its face void, because in contravention of public morals, being an offer on the part of the state to abandon its property at Sacramento, and change its seat of government to San José, for a bribe or consideration of \$1,000,000 and ten acres of land; and that, in any event, it is void for uncertainty, there being nothing to show who is to pay the money or donate the land, or how long the people will have to wait for a tender of the property,—how many propositions may be made and rejected before it can be known where the seat of government is to be permanently located; and that no one can know where the seat of government would be in the event of a failure of the governor, attorney-general, and secretary of state, or a majority of them, to act upon any proposition for a site that might be offered. It must be admitted that there are serious questions involved in some of these contentions. We agree with the majority in holding that the proposed amendment is ineffective on account of the conditions contained therein, but there is another ground upon which we also desire to place our conclusion.

The language of section 1 of article 20 of the Constitution is plain. No law changing the seat of government shall be valid or binding until said law has been ratified by a majority of the qualified electors of the state, voting therefor at a general election; and that law must first receive the sanction of two thirds of the members of each house, and have been approved by the governor. No law has ever been passed by the legislature proposing to change the seat of government from Sacramento to San José, or providing under what regulations or provisions the question of a change of the seat of government should be voted upon. The proposed amendment was not put in the form of a bill. It was neither printed nor read on three several days, nor was the measure declared to constitute a case of urgency. It was not considered by the governor. Therefore it is not a law. It is true the legislature has by a general act provided how proposed amendments to the constitution may be submitted when no other mode is provided by law for their submission (Stat. 1883, p. 53; Stat. 1891, p. 165), and such provisions may be, and doubtless are, sufficient for the submission of proposed amendments generally; but the seat of government cannot be changed by any law, whether it be an ordinary act, or in the form of a proposed amendment to the constitution, unless it has been regularly introduced, taken the regular course, received the approval of two thirds of the members of each house, and been approved by the governor.

25 L. R. A.

Appellant claims that section 1 of article 20 of the Constitution can be amended by proceedings under section 1 of article 18 of the Constitution, and for that purpose the Acts of 1883 and 1891, *supra*, are sufficient legislation to submit the proposed constitutional amendment to the people; that sections 1 and 2 of article 18 are the only sections relating to amendments, and that they contain no limitation as to amendments; that section 1 of article 20 provides for the removal of the state capitol by a law under the constitution as it now exists, while section 1 of article 18 provides for amending any section of the constitution, including section 1 of article 20. It is claimed that the court below and counsel for respondent confounded the question of removal of the state capitol with the question of amending the constitution. A glance at the proposed amendment, however, is sufficient to show that its sole object is a removal of the seat of government from Sacramento to San José. With the word "Sacramento" substituted for the word "San José," the proposed section is identical with the provision of the constitution, down to the condition of removal. If the framers of the constitution intended to permit the seat of government to be removed by the proposal and submission of a constitutional amendment under section 1 of article 18, it is difficult to see why they inserted the provision in section 1 of article 20, requiring the proposal to change the seat of government to be submitted to the people at a general election, under such regulations as two thirds of all the members of each house should provide, by an act regularly introduced, passed, and approved, as other acts of the legislature are introduced, passed, and approved by the governor. If section 1 of article 20 can be amended in the manner proposed, then the seat of government may be removed by a simple resolution, indorsed by two thirds of the members elected to each house, and the regulations under which the question of removal is to be voted upon may be adopted by a bare majority of each house, and submitted to the people at a special election, held at any time. But such was clearly the thing which the framers of the constitution did not intend to allow to take place, when it provided that the question must be voted upon at a general election, and that no law changing the seat of government should be valid until it had received the sanction of two thirds of the members of each house of the legislature proposing the amendment, and the regulations upon which the question should be submitted were provided by the same number of members, and had been approved by the executive. It is intended that a bare majority of the members of the legislature should not have the power to call for an election upon so important a question. The time for voting upon the question was fixed at a general election, for the purpose of giving the people ample opportunity to fully deliberate upon the question of public policy and public economy necessarily involved in the issue, and when the greatest number of electors would probably assemble at the polls. That it was the purpose of the framers of the constitution to make the subject of the

removal of the seat of government an exception to the general rule, and to place a check upon hasty action thereon by requiring the greatest deliberation on the part of those who proposed the amendment, as well as those who should vote upon it, is manifest, not only in the language of the section itself, but in the history of the seat of government in this state, and the debates upon the subject in the constitutional convention. The Constitution of 1849 provided that the Pueblo de San José should be "the permanent seat of government until removed by law; provided, however, that two thirds of all the members elected to each house of the legislature shall concur in the passage of such law." Soon after the adoption of that constitution (November 13, 1849) a proposition was made to the legislature offering a large donation to the state if the seat of government should be located permanently at Vallejo, and an act was passed "to take the sense of the people of California upon the subject to the permanent location of the seat of government." Stat. 1849-50, p. 412. On February 4, 1851, an act was passed providing for "the permanent location of the seat of government" at Vallejo, provided M. G. Vallejo should submit a satisfactory bond for the performance of his proposition, and furnish a state-house for three years. Stat. 1851, p. 430. On February 4, 1853, a resolution was passed by the legislature calling upon Vallejo for payment of his proposed donation of \$370,000, and to state his intentions and wishes respecting the location of the seat of government. Stat. 1852-53, p. 309. Vallejo having asked to be released from his obligation on account of his inability to comply with the condition, an act was passed providing that the seat of government on and after February 5, 1853, should be at Benicia, provided Vallejo should release the state from all claims for damages (Stat. 1853, p. 24); and on May 18, 1853, such release having been given, it was provided by "An act for the permanent location of the seat of government" that the "city of Benicia, situated on the straits of Carquines, shall be and remain the permanent seat of government in accordance with the constitution." Stat. 1853, p. 217. On February 25, 1854, the legislature passed an act repealing the former act, and providing that the permanent seat of government should be and remain at the city of Sacramento. Thus the matter rested until the subject again came up in the constitutional convention of 1879. Meantime, however, that state had spent \$2,500,000 in state capitol buildings and grounds at Sacramento. In the convention Mr. Edgerton, introduced a proposition providing that the seat of government should remain at Sacramento until changed by law, but that no law proposing a change should be effectual until submitted to the electors of the state at a general election, and approved by a majority of two thirds of all the votes cast. But the section (sec. 1, art. 20), as proposed by the committee and finally passed, reads as above quoted. During the argument one member of the convention moved to strike out all of the section after the word "remain;" also to strike out the words "by a two-thirds

vote of each house." To show the temper of the convention in regard to the matter, we quote briefly from some of the speeches made during the debate on these proposed amendments: "Mr. Wicks: It should not be left to the caprice of demagogues and politicians. We were cursed by such fickleness in the earlier history of our state. The state, too, has spent a great deal of money here in Sacramento, and has acquired a valuable property. Mr. Barbour: Suppose Sacramento washes away. Mr. Wicks: There is no danger of Sacramento washing away. This building never will be washed away. Mr. Ayers: I do not see any necessity for the amendment. I think that the section as it is now is conservative enough. It requires a two-thirds vote of the legislature to submit the question. I think that is strong enough to prevent anything like rash action with reference to the removal of the capitol. Mr. Brown: Now, I do not see there is any antagonistic feeling against Sacramento as to state capitol, but to attempt to bind the future entirely to this place I think would be wrong, and when the matter is provided for here that, by a certain action of the legislature, the matter shall be submitted to a vote of the people, it seems to me that that should be sufficient. Mr. Schell: I believe this section is right. I believe that, whenever we seek to tear up the foundations of the state capitol, it should be at the instance of two-thirds of the legislature. At least two thirds of the legislature ought to vote in favor of submitting it to the people first, and then the people may by a majority vote remove it. It is not an ordinary question that ought to be submitted to merely a majority of the legislature. Mr. White: I desire to say that I am going to vote for the amendment of the gentleman from Santa Clara, and that I have no feeling of malice; and if there is any feeling, except by the gentleman himself, I do not know it. We desire merely to give the power to the people to move the capitol at any time they wish. We do not intend to tie down the legislature to a two-thirds vote if we can help it. Mr. Tinnin: The capitol has been located here at immense expense. It is true, I think, that it was a great mistake in placing it here, but it is here; and it has cost the people of the state a great deal of money, and it should not be removed unless some great calamity or misfortune befalls this city which necessitates that removal. Mr. Tully: There has been a good deal said here in reference to lobbying, and I don't know any section that has been adopted or anything that this convention could do to encourage lobbying more than to adopt this amendment. There would be a fight every time the legislature met for a majority to move this capitol, perhaps down to Los Angeles, or some other prominent place." & Const. Conv. pp. 1388, 1389.

It is a rule of construction applicable to constitutions as well as to statutes that general words are qualified by particular clauses, and that effect must be given to all the provisions of the constitution, if possible, that no word or clause may become redundant; and, as said before, if it had been the inten-

tion to permit the removal by resort to the remedy provided in section 1 of article 18, there would have been no necessity for the other and more difficult remedy provided by section 1 of article 20. The only alteration attempted by the proposed amendment is of that portion of the section which fixes the seat of government. No principle of the organic law was in any manner affected, and it would be a clear violation, not only of the spirit, but the letter, of the provision that the seat of government shall not be removed except in a particular way, to hold that the purpose may be accomplished in another and easier way. That which cannot be done by direction cannot be done by indirection. Two rules of procedure have been prescribed by the constitution,—one for amendments of the organic law, and the other for a change of the seat of government. The contention of respondent, if sustained, would result in the nullification of one provision of the constitution by another. While one section of the constitution would provide for removal only in a particular way, another section of the same instrument, relating to general subjects, would authorize the removal in an entirely different manner, and the last clause of the section would accomplish no purpose whatever. It is conceded, of course, that the people may adopt any amendment of the constitution which is proposed in the manner prescribed by the instrument itself, but neither the legislature nor the people can disregard the provisions which limit and prescribe their power. It would be competent, of course, for the legislature to propose, and the people to approve, an amendment of section 1 of article 20 to provide a different

method from that which now exists of changing the seat of government. That power might be delegated to the legislature alone by a majority vote, but, until some other method has been adopted by amendment to the constitution, the seat of government must remain at Sacramento until it has been changed by a law passed, approved, and ratified in the manner now prescribed by the constitution. If the members of the convention had been told at the conclusion of their debate that, notwithstanding all the care they had taken to secure the deliberate judgment of two thirds of both houses, and the approval of the governor, or his reasons for disapproval, before the question of removal could be again submitted for decision, even at a general election, the time would come when the legislature would claim the right to precipitate the question at any time it saw fit, by resolution introduced and passed within an hour, and under resolutions prescribed by a general act, and passed by a bare majority, can any one doubt, in view of the importance they attached to the matter, that they would have declared in express and unmistakable words that the rule prescribed by section 1 of article 18 should not apply to the subject of removal of the seat of government? What could the members of the convention have expected to accomplish by the precautions provided for in section 1 of article of 20? They certainly did not expect those desiring to procure an amendment effecting a change of the seat of government to follow the difficult procedure therein prescribed, when there was an easier way by following section 1 of article 18.

**McFarland, J.:** I concur.

### MISSOURI SUPREME COURT (Div. 1).

Lena DICKSON, *Resp't.*,

v.

OMAHA & ST. LOUIS R. CO., *Appl.*

(.....Mo.....)

**1. A railroad company is liable to an employe for failure to keep its fence in**

**repair, as required by statute, if he is injured without his fault in consequence thereof by collision of a train on which he is employed with an animal upon the track.**

**2. Collision of a train with an animal on the track which derails the front pair of small wheels under the engine is the proximate cause of an injury to the**

**NOTE.—Obligation of railroad company to employe as to fencing track.**

#### *Statutory duty to fence.*

On the question of liability of railroad companies for injuries caused to employes by failure of the company to fence against stock, as required by statute, there is a direct conflict of authority, although there are not many cases as yet directly on this subject. Wisconsin, New York, and Missouri courts have held that the railroad company is liable, while Minnesota, Iowa, and Illinois courts have denied the application of the statute to employes or exonerated the company on account of risk assumed by the employe. The decision in Illinois is based on a New York case which has since been overruled.

In California the railroad company has also been held liable, but the question of statutory requirements was not discussed.

The case of **DICKSON v. OMAHA & ST. L. R. CO.** is 25 L. R. A.

clearly in accord with the weight of authority under Wis. Laws 1881, chap. 193, providing that railroad companies shall be liable for all damages to persons by failure to fence or have cattle guards, an engineer is protected by this statute and does not assume all risks, as he may assume that the company will comply with the law, and the right to damages is absolute under the statute. Quackenbush v. Wisconsin & M. R. Co. 62 Wis. 411.

And under N. Y. General Railroad Act, 1850, section 44, requiring railroad companies to build fences and rendering them liable for damages to stock, it is the duty of the railroad company to see that the track is clear and protected, and it is liable for injuring a brakeman by reason of a horse being on the track where not fenced. (Overruling Langlois v. Buffalo & R. R. Co. 44 N. Y. 468.)

In **Langlois v. Buffalo & R. R. Co.** 19 Barb. 364, it was held, under N. Y. Laws 1850, p. 233, providing

engineer, who, after reversing his engine and applying an air brake, goes out on the running board to the steam chest and is killed by the derailling of the engine as it strikes a switch less than a thousand feet from the point of collision.

**3. Disobedience by an engineer of a rule requiring a train to be kept under control** and prepared to stop in case the track is obstructed does not affect the liability of the company for his death caused by a collision with an animal on the track, where the road was not fenced as required by law, if the most diligent care and careful control of the engine could not have prevented the collision after the danger appeared.

**4. A railroad engineer is not negligent in remaining on his engine** after the front pair of small wheels under the engine are derailed and he has reversed his engine and put on air brakes, even if this is not the safest and most prudent course.

**5. An instruction that a railroad engineer assumes the danger of a defective fence**, if it was known to him "as well as to the company," is misleading, if there was no proof of his actual knowledge, since it might imply an obligation on his part to inspect and ascertain such defects.

(July 9, 1894.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Daviess County in favor of plaintiff in an action brought to recover damages for the alleged wrongful killing of defendant's husband. *Affirmed.*

Statement by Macfarlane, J.:

This action is brought by Lena Dickson, widow of James Dickson, deceased, against

the Omaha & St. Louis Railway Company, to recover the sum of \$5,000 for alleged negligence of the railway resulting in the death of Dickson, near Evona, Mo., on May 16, 1891. The petition avers that on that day deceased was in the employ of defendant as locomotive engineer, and was operating one of its locomotives attached to a freight train. While so operating said engine a collision occurred with a bull which had strayed upon the track through a defective fence, by reason of which collision the engine was thrown from the track and overturned, thereby killing Dickson; that the bull got upon the track, and the accident occurred, at a point where the law required the defendant to erect and maintain the fence; that defendant was negligent, in that, although it was required by law to maintain said fence, it failed to do so, and, by reason of said negligence, plaintiff's husband was killed; and she prayed damages as above. To the petition the defendant entered a general denial, which it supplemented with the allegations that, if the fence was defective, Dickson knew of such defect; that, at the time of the accident, Dickson was violating the rules of the company, in running his engine at a high, forbidden, and dangerous speed; that the injury was not due to the collision with the bull, but was caused by striking a three-throw switch at great distance from the point where the collision occurred; and that, after the collision with the bull, Dickson might have avoided all injury by the exercise of ordinary care. The testimony offered tended to show that on the morning of May 16, 1891, Dickson, then operating one of defendant's

that railroads shall be liable for all damages which shall be done by their agents or engines, to cattle, horses, or other animals, and imposing an obligation to fence, the railroad company is not liable for killing a party employed to ring the locomotive bell where his death was caused by cattle on unfenced track derailling the locomotive.

This and the next case, *infra*, of *McMillan v. Saratoga & W. R. Co.* are virtually overruled by the case of *Donnegan v. Erhardt, supra*.

In *McMillan v. Saratoga & W. R. Co.*, 20 Barb. 449, a complaint, for damages caused by a locomotive being thrown from the track, and killing the engineer, by reason of a horse being on the track, through want of repairs in fence and from defective cow catcher, was insufficient in that it failed to allege actual notice to defendant, and he was more likely to know of defects in fence than the company or officers elsewhere located, and in using such a locomotive he was grossly negligent himself and the complaint was dismissed.

The railroad company is liable where a brakeman and baggage master was injured through defective fence and cowcatcher, and the car was thrown from the track by collision with a bull; the question of plaintiff's knowledge of danger was for the jury. (Denying authority of *Sweeney v. Central Pac. R. Co. infra*.) *Magee v. North Pacific Coast R. Co.* 78 Cal. 452.

The statute is not referred to nor discussed in the opinion.

In *Sweeney v. Central Pac. R. Co.*, 57 Cal. 15, it was held that an engineer supposed to have knowledge of no fence, assumes the risk occasioned from collision with cattle— and there can be no recovery for his death unless (1) caused by neglect to fence; (2) that the defendant did not know of neglect to

fence; (3) that the employé did not know the danger.

But the authority of this case is denied in *Magee v. North Pacific Coast R. Co. supra*.

In *Atchison, T. & S. F. R. Co. v. Reesman*, 60 Fed. Rep. 370, under Mo. Rev. Stat. 1890, § 3311, p. 653, providing that for failure to fence, a railroad company shall be liable in double the amount of damages done by reason of stock escaping from the inclosure, it was held that a brakeman not at his post as required by the rules of the company could not recover for injuries received, but it was stated that if he had been at his proper place he could have recovered where such injuries were caused by derailling of the train from stock on the track.

In *Blair v. Milwaukee & P. du Ch. R. Co.*, 20 Wis. 257, where a passenger was injured, it was said that any person who, without fault on his part, is injured from failure of the railroad company to fence against cattle, as required by statute, may recover for damages sustained without any other proof of negligence on the part of the company.

But in *Fleming v. St. Paul & D. R. Co.*, 27 Minn. 111, it was held a statute providing that a railroad company shall be "liable for all damages sustained by any person" in consequence of failure to fence was construed as limited by the general proposition of law that employés assume the risk of their employment, where fireman was killed by derailling of locomotive from running over a cow, where the road had never been fenced.

In *Patton v. Central Iowa R. Co.*, 73 Iowa 308, where a fireman on a freight train was injured, it was held that a railroad company does not owe to its employés the duty of fencing the road, there being no statutory obligation to fence, and employés assume such risk in taking employment, al-

trains as engineer, was approaching the station at Evona, going east. When the engine was about 950 feet west of the west switch, and moving at from fifteen to twenty miles an hour, it collided with a bull which had strayed upon the track through a defect in the railroad fence along the right of way. The bull was carried on the cowcatcher about 100 feet, and then rolled on the track in front of the engine. The only effect of the collision was to derail the front pair of small wheels under the engine. These kept on the ties, close to the rails. All the rest of the train kept the track for 850 feet, and until the west switch was reached. After colliding with the animal, Dickson reversed his engine, and applied an air brake with which the engine was fitted. He then climbed through the window of his cab out onto the running board of the engine, and, after walking its length, stepped down upon the steam chest, and there stood until the west switch was reached. The engine, when it reached this switch, was running about twelve miles an hour. Upon striking the switch, with its front small wheels derailed, the engine was thrown over; and Dickson, who was then standing upon the steam chest, was also thrown to the ground, and crushed to death by some part of the engine or tender. The fireman jumped off within 60 or 70 feet from the place where the bull was struck. When last seen, Dickson was leaning over, watching the derailed wheel under him, which was moving over the ties. After the application of the air brake on the engine, the train began to slow up until its speed at the switch was reduced to about twelve miles an hour. One of the rules of defendant was as

follows: "Freight trains must be under control when approaching and passing through all stations, and be prepared to stop in case the track is obstructed." At the conclusion of the testimony, defendant unsuccessfully demurred to the evidence. Any other necessary facts will sufficiently appear in the opinion. The case was submitted to the jury upon instructions given by the court, which need not be set out here. Some instructions asked by defendant were refused. They will be sufficiently noticed in the opinion. The judgment was for plaintiff, for \$5,000, and defendant appealed.

**Messrs. Theodore Sheldon and E. E. Aleshire** for appellant.

**Mr. Alexander H. Waller**, for respondent:

Plaintiff's petition states a good cause of action. The Missouri statute is mandatory, and enjoins upon railroad companies the positive duty of fencing their tracks with lawful fences and maintaining the same, and was designed for the protection of persons, including employes operating trains, as well as animals.

1 Rev. Stat. 1889, § 2611, p. 659: *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 424; *Donnegan v. Erhardt*, 7 L. R. A. 527, 119 N. Y. 472; *Magee v. North Pacific Coast R. Co.* 78 Cal. 432; *Blair v. Milwaukee & P. du Ch. R. Co.* 20 Wis. 257; *Stuetgen v. Wisconsin Central Co.* 80 Wis. 499; *Keyser v. Chicago & G. T. R. Co.* 56 Mich. 558, 56 Am. Rep. 405, 66 Mich. 390; *Sherman v. Anderson*, 27 Kan. 333, 41 Am. Rep. 414; *Fordyce v. Jackson*, 58 Ark. 597; *Walkenhauer v. Chicago, B. & Q. R. Co.* 17 Fed. Rep. 186.

Any failure or neglect to comply with the

though this fireman did not know much about the probability of meeting cattle on the road. The Iowa Code, § 1289, provided for double damages for injuries to stock from failure to fence.

In *Dewey v. Chicago & N. W. R. Co.*, 81 Iowa, 373, it was held that where the bars were down in a fence and horses were on the track, and the conductor in the cab directed the engineer to "pass them," and was killed by derailment of the train, there could be no recovery, but it was said it would have been otherwise if the engineer had been killed, as the conductor was the superior officer. That the bars were down would not render the company liable under statute.

And in *Wabash R. Co. v. Brown*, 5 Ill. App. 580, (see also 2 Ill. App. 518), under a statute providing for double damages for injury to stock through failure to fence, it was held that an employé who was injured had no right of action against the railroad company, and that he had no right of action at common law, following *Langlois v. Buffalo & R. Co.* 19 Barb. 364, which has since been overruled.

#### *Liability in absence of statute.*

It seems that a railroad company is not liable to an employé for injuries caused by stock being on the track through failure to fence, where a fence is not required by the statutes to protect the owners of stock. So an engineer injured by a cow on a bridge, causing derailment of engine in the Indian Territory, cannot recover, as he assumed all risk. *Manson v. Eddy*, 3 Tex. Civ. App. 148.

Neither common law nor statute in Colorado re-

quires a railroad company to fence its track, and where there is no obligation there is no liability for the death of engineer caused by the engine being derailed by cattle. *Cowan v. Union Pac. R. Co.* 35 Fed. Rep. 43.

And under Tex. Rev. Stat., arts. 4240-4244, requiring cattleguards at inclosures and rendering the railroad company liable for all damages from failure to construct and maintain, it was held that the only purpose is to protect inclosures, and the law does not require a road to be fenced, nor cattleguards put in because it is fenced, but if not put in the road is treated as not fenced, and the railroad company is not liable to the engineer for injuries caused by such failure. *Ward v. Bonner*, 80 Tex. 168.

But in *Eames v. Texas & N. O. R. Co.*, 63 Tex. 680, it was held that the failure to keep the right of way free from bushes and undergrowth, so as to enable the engineer to see stock near the track, will render the company liable to one in charge of ditching train, engaged in repairing the track, where the defendant had knowledge of the condition of the road. The question of fence was not discussed.

And in *Prather v. Richmond & D. R. Co.*, 80 Ga. 427, it was held that there could be no recovery where an employé disregarding orders in regard to sitting on flat cars, was killed by the car being derailed by a cow suddenly jumping on the track, from a place where she could not be seen. No question was made as to lack of fence or as to any statutory requirements. The decision implies that if the employé had been at his place a recovery would have been allowed.

L. T.



positive requirements of any statute or municipal regulation enacted for the purpose of protecting life and limb is negligence *per se*.

*Schlereth v. Missouri Pac. R. Co.* 98 Mo. 515; *Erwin v. St. Louis, I. M. & S. R. Co.* 96 Mo. 294; *Crumpley v. Hannibal & St. J. R. Co.* 93 Mo. 38; Wood, Mast. & S. § 397, p. 789.

The immediate cause of Dickson's death was the wreck of his engine at the switch.

Beach, Contrib. Neg. 1st ed. pp. 32, 33.

There was no proof of negligence on Dickson's part. This question was submitted to and decided by the jury, however, against appellant.

*Barry v. Hannibal & St. J. R. Co.* 98 Mo. 70; *Wilkins v. St. Louis, I. M. & S. R. Co.* 101 Mo. 106.

Where a person finds himself suddenly exposed to great danger, and does what he thinks best for his safety, he is not guilty of negligence, though he may not have acted wisely.

*Hass v. Chicago, M. & St. P. R. Co.* (Iowa) Feb. 2, 1894; *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 560, 41 Am. Rep. 333; *Siegrist v. Arnot*, 86 Mo. 208, 56 Am. Rep. 424.

The substance of the ninth instruction is that if the defect in the fence "was known to Dickson as well as to the company there can be no recovery in the case, unless," etc. This is not the law. The master and servant in cases like this do not stand on equal footing, and not only must the servant have knowledge of the defect, but of the danger also.

*Waldhier v. Hannibal & St. J. R. Co.* 87 Mo. 46; *Mages v. North Pacific Coast R. Co.* 78 Cal. 432.

There was no evidence, direct or circumstantial, tending to show that Dickson had any knowledge whatever of the defect in the fence or the danger arising therefrom. Instructions must be predicated on the evidence.

*Rodney v. McLaughlin*, 97 Mo. 431; *Stone v. Hunt*, 114 Mo. 74; *Bean v. Western N. C. R. Co.* 107 N. C. 745.

The evidence showed that Dickson had been running over that part of appellant's road several months averaging a round trip every ten days. There was no other testimony whatever from which the jury might infer notice on his part of the defect in the fence. From the face of the entire record the verdict was for the right party and had the instruction in question been given the verdict could not have been different. Hence appellant was not prejudiced by the court's action.

*Fortune v. Fife*, 105 Mo. 433; *Haniford v. Kansas*, 103 Mo. 182; *Fitzgerald v. Barker*, 96 Mo. 661.

**Macfarlane, J.**, delivered the opinion of the court:

1. The only negligence charged, as ground for recovery, is the failure on the part of defendant to observe the statutory requirement to so keep its fence in repair as to prevent cattle from straying on its railroad. Defendant insists that the statute requiring railroad companies to make and maintain fences on the sides of their roads is designed solely to prevent injuries to the domestic animals of adjacent landowners, and does not create a duty from defendant to its employes. The duty of a master to his servant requires

the exercise of reasonable care, not only to provide safe, adequate, and suitable machinery and appliances for his use, but also such care to keep the premises upon which he is required to work in a condition reasonably safe and secure for the performance of the duties required of him. The degree of care must depend largely upon the character of duties required of the servant, the peril to which he is exposed from failure to observe it, and the opportunity he has for avoiding the dangers. There are but few, if any, duties a servant is called upon to perform which are attended with more hazards than those attending the running and management of locomotives and trains upon railroads, and the care the law requires of the master, in respect to providing reasonably adequate and safe engines and cars, is no greater than that required in furnishing a reasonably safe track, and keeping it free from obstructions. The dangers from defects are as great in one as the other, and the care should be commensurate with the dangers. *Henry v. Wabash Western R. Co.* 109 Mo. 498, and cases cited. We are taught by common experience that cattle and other animals, unless restrained, will stray upon the tracks of railroads, and cause serious and dangerous obstructions to the operation of trains thereon; thereby imperiling the lives, not only of persons carried, but, to a greater degree, of each employé engaged in the duty of managing them. We can see no reason why, at common law, the railroad company would not as well be required to use reasonable care to prevent such obstructions as to see that the ties and rails are sound, and the roadbed secure. I can conceive of no more adequate method that could be adopted by a railroad corporation for keeping domestic animals off the track of its road than that of inclosing it by fences. So it has been held that if the want of a proper fence makes a railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjacent landowner. *Burton v. North Eastern R. Co.* L. R. 3 Q. B. 549. It is true that the statute requiring railroad corporations to fence their tracks only, in express terms, gives to the owners of cattle or other animals killed or injured in consequence of a neglect to perform this duty a right of action, yet it has been held in this state that the law was designed likewise for the protection and safety of the traveling public. *Briggs v. St. Louis & S. F. R. Co.* 111 Mo. 173, and cases cited. The United States Supreme Court, in discussing the Missouri fencing law, and its constitutionality under the police power, uses this emphatic language: "In few instances could the power be more wisely or beneficially exercised than in compelling railroad corporations to inclose their roads with fences, having gates at crossings, and cattleguards. The speed and momentum of the locomotive render such protection against accident, in thickly settled portions of the country, absolutely essential. The omission to erect and maintain such fences and cattleguards, in the face of the law, would justly be

deemed gross negligence." *Missouri Pac. R. Co. v. Humes*, 115 U. S. 523, 29 L. ed. 466. Thus, while the statute only imposes upon the corporation, as a penalty for the nonobservance of the law, double damages for animals killed or injured, the duty to fence is made obligatory. The duty is absolute and unqualified, and is reasonably supposed to have been intended for the protection of all persons upon railroad trains, who are exposed to danger by such obstructions, whether they be passengers or employes. The right of a passenger to recover for personal injuries incurred on account of such negligence has been declared (*Blair v. Milwaukee & P. du Ch. R. Co.* 20 Wis. 254; *Forbays v. Jackson*, 56 Ark. 597; *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 871, 11 L. R. A. 486), and also of a parent to recover for the death of an infant child who wandered upon a railroad track, by reason of a defective fence, and was struck by a train. (*Keyser v. Chicago, & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405; *Struetgen v. Wisconsin Central Co.* 80 Wis. 498; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 484; *Singleton v. Eastern Counties R. Co.* 7 O. B. N. S. 287; *Chicago, B. & Q. R. Co. v. Grablin* (Neb.) 58 N. W. Rep. 797). We are of the opinion that a right of action also accrues to an employe, engaged upon a railroad train, for injuries received without his own fault, by reason of the negligence of the corporation in failing to comply with the fencing statute. It has so been held, under a similar statute, by the New York court of appeals. *Donnegan v. Erhardt*, 119 N. Y. 473, 7 L. R. A. 527.

2. It is said, in the next place, that the defective fence was not the direct and proximate cause of the accident. "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces the event, and without which that event would not have occurred. Proximity in point of time or space, however, is not part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation." *Shearm. & Redf. Neg.* § 26. Under this definition, there can be no doubt that the negligence in failing to keep the fence in repair was the immediate cause of the obstruction of the track, which, in a natural and continuous sequence, produced the derailment of the engine, and consequent injury. Without the defective fence, the derailment and injury would not have occurred. The negligence was clearly the direct cause of the injury.

3. It is further insisted that the negligence of deceased in disobeying the plain and positive rule of defendant, which required that "freight trains must be under control when approaching and passing through all stations, and be prepared to stop in case the track is obstructed," was also a proximate cause of the injury, which directly contributed thereto, and which prevents a recovery. It may be admitted that deceased was acting in violation of the rules of defendant at the time the engine collided with the bull, and was in consequence negligent; but we are unable to see any proximate and natural

connection, as a cause, between this negligence and the derailment of the engine, and injury and death of plaintiff's husband. Mere negligence, without a resulting damage, can no more be pleaded as contributory negligence to defeat an action than it can be charged as an original cause of action. The connection, as a producing cause, must be made to appear in either case. "It must appear, in order to defeat the right of action, that but for plaintiff's negligence, operating as an efficient cause of the injury, in connection with the fault of defendant, the injury would not have happened." *Beach, Contrib. Neg.* § 34. It appears impliedly from the rule itself, and directly from the testimony of the superintendent and train dispatcher of defendant, that the purpose of the rule was to avoid collisions, obstructions, and misplaced switches at stations. It appears further that the collision which resulted in the derailment of the train occurred nearly a thousand feet from the first switch of the station yards. It does not appear that the engine could, by the most diligent care, have been held under such control as would have prevented the collision after the danger appeared. But it is said that the derailment did not occur immediately from the collision, but that the wheels ran safely on the ties until the switch was reached,—the distance of nearly a thousand feet,—and the engine was then thrown from the track by reason of coming into the switch in a derailed condition. We do not see how this circumstance changes or shifts the proximate cause of the accident from that of the collision with the bull to that of the violation of the rule in question, or how the disregard of the rule became a direct and contributing cause of the injury. There was no intervening cause between the collision and the final disaster, except the contact with the switches, which there is no pretense that deceased could have avoided. We can speculate and theorize as we may as to what course of conduct might have avoided the disaster, but the fact remains that the direct cause was the obstruction of the track, which was brought about by the negligence of defendant, and the consequences of which could not have been avoided by any degree of care deceased could have exercised. What might have been the result, had the rule been observed, is mere speculation.

4. Again, it is argued that deceased was negligent in remaining on the engine while running a thousand feet with two wheels off the rails. This contention is untenable, for two reasons: First, because it does not appear from the evidence that the course adopted by deceased was not the safest and most prudent, in the circumstances; and, second, when suddenly exposed to great and imminent danger, he was not expected to act with that degree of prudence and wisdom which would otherwise have been required of him. The evidence shows that deceased, as soon as he had reversed his engine, sounded the alarm, and put on the air brakes; got out of the cab onto the running board and steam chest, where he remained until the engine was overturned. According to the evi-

dence, he thus assumed the safest position he could have taken. The evidence further shows that when an engine is running rapidly, with two of its wheels off the rails, and jumping from tie to tie, it pitches and jars to such a degree that it is exceedingly difficult and dangerous to jump therefrom. One witness, an engineer, in testifying as to his own experience in riding an engine under similar circumstances, stated: "It was impossible to jump. The jar of the engine riding the ties was such that a man had no control of himself. If he jumped he would fall under. He would have no use of his limbs at all. I could not gather for a spring." With this evidence we could not say that deceased was negligent in remaining on the engine. Nor can we say in the circumstances, that he would have been chargeable with negligence, though he did not adopt the safest and best course to avoid injury. *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 554, 41 Am. Rep. 333; *Siegrist v. Arnot*, 86 Mo. 208, 56 Am. Rep. 424.

This disposes of the questions raised on the demurrer to the evidence, as well as to complaints made to the rulings of the court in giving and refusing certain instructions.

5. Complaint is made of the refusal of the court to give the following instruction requested by the defendant: "The jury are instructed that if the defect or bad condition of the fence, whereby the bull came upon the track, was known to Dickson as well as to the company, there can be no recovery in this case, unless the evidence shows and the jury believe that Dickson notified the company of such defect in the fence, and was induced to remain in the company's employment by its promise that the fences should be repaired." The instruction evidently intended to inform the jury as to the risks deceased assumed in case he knew of the defective fence, and continued to run trains over the road without objection. But we think the instruction, as asked, was mislead-

ing, and did not properly declare the law, in that it required the jury to find that as a fact the defect in the fence was known to deceased "as well as to the company." The language is susceptible of the interpretation that deceased was under the same obligation to inspect and ascertain existing defects as was required of the corporation. There was no positive proof that either Dickson or defendant had actual knowledge of the defects. It was the duty of the defendant to use reasonable care, by proper inspection, to ascertain whether defects existed. This duty, from the situation of the fence with respect to the track, and from the nature of the employment and duty of an engineer, could not justly have been required of deceased. A proper and careful discharge of his duty required constant watchfulness of the machinery he was operating, and of the track before him; and the rapidity of his movement made it impossible to examine into the condition of fencing 50 feet away, though he had time and opportunity to do it. We think deceased could not have been chargeable with notice of the defect unless it had been shown that such defects were so common and apparent that they could not have escaped his observation while properly attending to his business. It could not be said of him, as of the master, that he would be chargeable with knowledge if he could have known by the exercise of due care. Before he can be charged with having assumed risks of injury from defects in fences, it was necessary to have shown that he had knowledge of them, but knowledge may have been inferred by the jury from the nature of the defects, and the opportunity for observation. The instruction, as asked, was improper; and the court was not required, as in criminal cases, to correct it, or give a proper one on the question intended to be covered.

No error being shown, *the judgment is affirmed.*

All concur.

## MICHIGAN SUPREME COURT.

Adolphus A. ELLIS, Attorney-General, *ex rel.* Henry M. REYNOLDS,

v.

William MAY.

(.....Mich.....)

1. A statute requiring voters to be sworn as to their inability to read English before allowing a person to mark their ballots for them is mandatory and not merely directory in respect to the oath.

2. It is not an unreasonable restriction of the right to vote to require an oath that a voter is unable to read English before allowing another to mark his ballot, on the ground of such inability.

3. Deputy United States marshals have no right to mark ballots, or to see them marked, or to know for whom the electors are voting at a congressional election in a city having a secret ballot.

4. Unidentified illegal votes should be taken away from the total vote proportionally according to the entire vote returned for each candidate.

5. The relator in a quo warranto case to test title to an office has the opening and closing.

(McGrath, Ch. J., dissents from propositions 1 and 2.)

(March 30, 1894.)

**M**OTION for judgment of ouster against defendant in a quo warranto proceeding to

NOTE.—Upon the subject of irregularities in taking ballots under the Australian ballot system, see *Bowers v. Smith* (Mo.) 16 L. R. A. 764, and *note*, 25 L. R. A.

Upon the subject of distinguishing marks or devices, see the authorities collected in the *note* to *Sego v. Stoddard* (Ind.) 22 L. R. A. 468.

test the title to the office of clerk of Wayne County upon the return of the findings of the jury upon issues which had been sent down to the Circuit Court of Oakland County for trial. *Motion granted.*

The facts are stated in the opinions.

**Mr Jasper C. Gates**, for relator in support of the motion:

The burden of proof was on the attorney-general and he had the right to open and close. 1 Greenl. Ev. 15th ed. §§ 74-77; 1 Thomp. Trials, § 287.

Going back to the common-law rule would be of no avail to this respondent, because in all such cases it was well settled that the attorney-general had precedence and the right to reply.

1 Taylor, Ev. 8th Eng. ed. § 890, and notes.

Even if the circuit judge had been wrong in giving us the opening, it was a matter to be governed by his discretion, and no ground for new trial unless such discretion was abused and a manifest wrong and injury was thereby done to respondent.

1 Greenl. Ev. 15th ed. § 76, and notes; 1 Taylor, Ev. 8th Eng. ed. § 883; *Brandford v. Freeman*, 5 Exch. 784; *Bird v. Higginson*, 2 Ad. & El. 160; *Booth v. Mills*, 15 Mees. & W. 671n.; *Edwards v. Matthews*, 11 Jur. 398; *Leeds v. Gresham L. Ins. Co.* 15 Jur. 1161.

Evidence showing the contents of illegal and void ballots, unless forbidden by the statute, was admissible.

McCrary, Elections, § 455, subsec. 457, 459; note to Loring & Russell's Elect. Cas. 150; *State v. Olin*, 23 Wis. 310; *State v. Eilmantel*, 23 Wis. 422; *People v. Cicott*, 16 Mich. 233, 97 Am. Dec. 141; *Harbaugh v. People*, 33 Mich. 241; *People v. McNeal*, 63 Mich. 294.

The statute does not exclude evidence as to the contents of a ballot unlawfully shown after it has been marked and before it is deposited.

Any law which should make the office depend, not on the votes of the electors, but on pieces of paper which may chance to get into the ballot box on election day, would be contrary not only to the spirit, but to the letter of the constitution.

*People v. Maynard*, 15 Mich. 463; *People v. Robertson*, 27 Mich. 116; *People v. Cicott*, supra.

The provision forbidding a ballot unlawfully shown from being either received or deposited is mandatory.

*People v. Onondaga County Canvassers*, 14 L. R. A. 624, 129 N. Y. 395; *People v. Dutchess County Supra*, 135 N. Y. 522; *State v. Walsh*, 17 L. R. A. 864, 62 Conn. 260; *State v. Ellis*, 17 L. R. A. 382, 111 N. C. 124; *Spurgen v. Thompson*, 37 Neb. 39; *Bechtel v. Albin*, 134 Ind. 193; *Re Ballot Marks*, 18 R. I. —.

Our statute is substantially based upon the English Ballot Act of 1872 (35 & 36 Vict. chap. 38), and long before adoption here its mandatory character had been firmly established.

*Pickering v. James*, L. R. 8 C. P. 439; *Hodkin, Ontario Elect. Cas.* 283; *Sproule v. Fredricks*, 69 Miss. 893; *Contested Election of Owen Cusick*, 136 Pa. 459; *Atty-Gen. v. McQuade*, 94 Mich. 439.

This act is constitutional.

32 Am. L. Reg. & Review, p. 102; Binney in American Law Register & Review, pp. 101-25 L. R. A.

125; *State v. Black*, 16 L. R. A. 769, 54 N. J. L. 446; *Bowers v. Smith*, 16 L. R. A. 754, 111 Mo. 45; *De Walt v. Bartley*, 15 L. R. A. 771, 146 Pa. 529; *Re Ballot Marks*, supra; *Miner v. Olin*, 159 Mass. 487; *Simpson v. Osborn*, 53 Kan. 323; *State v. Benton*, 13 Mont. 306; *Atkeson v. Lay*, 115 Mo. 538.

So long as the law does not actually and necessarily shut any class of voters off from the ballot box, the only question for the court is whether it is designed to accomplish the purposes specified in the constitution. All questions of expense, convenience, and practical effect are for the legislative and not for the judicial department.

*Detroit v. Rush*, 10 L. R. A. 171, 82 Mich. 532; *Shields v. Jacob*, 13 L. R. A. 760, 83 Mich. 164; *Chateau v. Jacob*, 88 Mich. 170; *McQuade v. Furgason*, 91 Mich. 438; *Atty-Gen. v. McQuade*, 94 Mich. 439.

Deputy marshals were not entitled to see ballots marked.

*United States v. Gilma*, 3 Hughes, C. O. 549; *Re Deputy Marshals*, 23 Fed. Rep. 153.

When illegal votes are cast sufficient in number to change the result of the election in any district, the party profiting by the election in that district must show for whom such votes were cast or the election in that district will be thrown out.

*Mann's Case*, 2 Phila. 320; *Re Darber*, 10 Phila. 579; *Western Cushing Elect. Cas.* 67, 144; *Knox County Supra. v. Davis*, 63 Ill. 405; *McKinney v. O'Connor*, 26 Tex. 5; *Heyfrom v. Mahoney*, 9 Mont. 497; *Chamberlain v. Woodin*, 2 Idaho, 609; *Jones v. Glidewell*, 7 L. R. A. 831, 53 Ark. 161; *Blus v. Peter*, 40 Kan. 701; *People v. Sackett*, 14 Mich. 320; *People v. Cicott*, 16 Mich. 304, 97 Am. Dec. 141; *Atty-Gen. v. McQuade*, supra; *People v. Hanna*, 93 Mich. 515; McCrary, Elections, §§ 460-463; *People v. Tuthill*, 31 N. Y. 550; *Sudbury v. Stearns*, 21 Pick. 143; *Kings v. Park*, Loring & Russell's Elect. Cas. 155; *Ordway v. Woodbury*, Id. 163; *Stimson v. Boardman*, Id. 171; *Blandford School Dist. No. 3 Trustees v. Gibbs*, 2 Cush. 39; *Daly v. Petross*, 10 Phila. 389; *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *Farrington v. Turner*, 53 Mich. 27, 51 Am. Rep. 83.

**Mr. John B. Corliss** also for relator.

**Messrs. F. A. Baker, Edwin F. Conely,** and **Orla B. Taylor**, for defendant, contra.

**Long, J.**, delivered the opinion of the court:

This is an information in the nature of quo warranto to determine the question whether the relator or the respondent received the greater number of legal votes cast in the county of Wayne at the general election held November 8, 1892, for the office of county clerk. The original election returns, as certified by the inspectors of election and returned to the office of the county clerk, show that the relator received 26,821 votes, and the respondent 26,799, or a majority for the relator of 22 votes. A recount was had under Act No. 208 of the Public Acts of 1887 (3 How. Stat. § 234a), by which it was shown that the respondent received 26,847 votes, and the relator 26,729, or a majority for the respondent of 118 votes; and the board of county canvassers were directed to issue the certifi-

cate to the respondent. *May v. Wayne County Canvassers*, 94 Mich. 505. In the present proceeding eight replications were filed to respondent's plea. Respondent demurred to these replications. The cause was heard on these demurrers at the October term, 1893, and the demurrers overruled, with leave to the respondent to plead over. The decision of these questions is reported in *Atty-Gen. v. May*, 97 Mich. 570. Rejoinders were filed by respondent to these replications, denying the facts therein set forth, and putting himself upon the country. The cause was subsequently sent down to the Oakland circuit court for trial of these issues of fact. Forty-nine special questions were submitted to the jury for their findings, and, by their answer to question No. 46, they have found that Henry M. Reynolds received the greatest number of votes cast for that office, and that he had a majority over May of 1,926 votes. The trial court has returned the proceedings into this court, and relator now asks judgment of ouster against respondent.

The cause has been very ably argued upon both sides, and the issues now to be determined are narrowed down to two or three points. The principal question is raised under the sixth replication, the substance of which is set out in *Atty-Gen. v. May*, *supra*. In that it is alleged that in the fourth precinct of the Fifth ward of the city of Detroit the chairman of the board of inspectors of election illegally and wrongfully received 750 ballots, and illegally and wrongfully deposited the same in the ballot box, said ballots having been marked and shown to persons who were not lawfully assisting the voters or any of them in the preparation of their ballots before said ballots had been deposited, and that the same were shown in such a manner as to disclose to the persons to whom they were shown some or all of the names of the candidates voted for upon said ballots; that said ballots were so deposited unmarked and unchallenged by the board of inspectors; that said votes went to make up the large majority of 553 votes in favor of respondent; that, by reason thereof, the election in said precinct was rendered wholly invalid, illegal, and of no effect upon the election for the office of county clerk; and that, by reason thereof, the said relator was elected by a majority of 565 votes. The objection to this replication was that it tendered an immaterial issue, and that it was not averred that the election in said district was so invalid as to effect the disfranchisement of all the electors therein. It was said by this court in the opinion overruling the demurrer: "It is alleged that 750 ballots were exhibited contrary to law: that the election in said precinct was therefore void, and that, with those votes thrown out, the relator was elected. The allegation is not confined to the canvass and recount, but to the illegality of the vote. If the respondent's position be true, that the replication alleges simply that the canvass and the recount of the votes cast at this precinct were invalid and illegal, the fair import of the language is that it attacks the legality of the entire vote of the entire precinct." Issue was joined upon this replication.

By the respondent, and it became one of the questions of fact to be found by the jury. By the answers to questions 13 and 14, the jury found that Henry M. Reynolds received in all the townships and voting districts of said county, not including the fourth district of the Fifth ward of Detroit, 25,910 votes, and that William May received in such townships and wards, not including the fourth district of the Fifth ward, 23,984. To question No. 46, the jury found that Mr. Reynolds received 1,926 majority over Mr. May. Many questions are raised over the findings under certain other of the replications, but, as the determination of the question arising under the sixth replication must settle the controversy in favor of Mr. Reynolds, the relator, we need not enter fully upon a discussion of the other questions. All of the votes in the fourth district of the Fifth ward of Detroit were discarded by the jury.

The testimony on the part of the relator showed that the inspectors of election in that district were Alois Diemel, Edward Fierz, John Manquin, Bernard Zentowski, Peter Brinker, and John Vandergyp; that no one was designated by the board to assist voters in the preparation of their ballots; that William F. Schneider and John Erhard were United States supervisors of election, and that Joseph Diemel and Peter Knauss were deputy United States marshals for that district; that the greater part of the voters were Poles, Germans, and Italians, and that from six to seven hundred of these voters were assisted in marking their ballots because they could not read English; that none of the voters thus assisted were sworn as to their ability to read English; that the only persons who actually marked the ballots for such voters were Alois Diemel, John Vandergyp, Joseph Diemel, and Peter Knauss; that during the election the marking of ballots for voters in this district as above described was seen and observed by the United States officers of election and the deputy United States marshals above named. On the part of the respondent, it is shown by the testimony, and admitted, that this large number of voters were assisted in marking their ballots, and, as claimed, because they could not read English; and that none of them, thus assisted, had been sworn as to his inability to read English. It is not denied that these deputy United States marshals saw how these ballots were marked, but it is claimed that this method was adopted because it was believed that, on account of the large registration and the great number of voters needing assistance, the proper vote of the district could not be cast if the work of assisting voters were to be done only by Diemel and Vandergyp in company with each other. It was also shown that Diemel and Vandergyp were designated by the board to assist voters in marking their ballots.

1. It is contended by counsel for respondent that the court was in error in its direction to the jury that "if any voter was not first sworn as to his inability to read English, and allowed his ballot to be marked for him, or allowed any one to see his ballot when it was

marked, he thereby lost his right to vote at that election, and that it was unlawful for any inspector of election to mark the ballot of any elector who had not been sworn as to his ability to read English." Upon this point it is contended that the statute under which this portion of the charge was given is not mandatory, but directory merely, and that the provisions requiring assisted voters to be first sworn, as construed by the court below, is unconstitutional, because it puts unreasonable restrictions upon the right to vote. Section 32, Act No. 190, Pub. Acts 1891, provides: "When any elector shall make oath that he cannot read English, or that because of physical disability he cannot mark his ballot, or when such disability shall be made manifest to said inspectors, his ballot shall be marked for him in the presence of at least two of the inspectors by an inspector designated by the board for that purpose, who is not a candidate on said ticket." By section 26 it is provided: "If any elector shall show his ballot, or any part thereof, to any person (other than one lawfully assisting him in the preparation thereof) after the same shall have been marked, so as to disclose any of the candidates voted for, such ballot shall not be received or deposited in the ballot box. In case such elector shall so expose his ballot, his name shall be entered on the poll list with a minute of such occurrence and such elector shall not be allowed to vote thereafter at such election." Section 45 of the act provides: "Any person who shall . . . disclose to any other person the name of any candidate voted for by any elector, the contents of whose ballot shall have been seen by such person. . . . shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the state prison not exceeding two years, or by both such fine and imprisonment in the discretion of the court." These provisions were intended to secure the entire secrecy of the ballot, except so far as was absolutely necessary to enable such elector as could not read English to have assistance in marking it. The only test under this statute which the inspector, who is designated to assist the voter, can apply to determine whether the elector can read English is that the elector shall make oath of the fact. No other test is permissible, and it is unlawful for any inspector to assist in marking a ballot for any elector who claims that he cannot read English until such elector shall have first made oath to the fact. The construction contended for by the respondent cannot be given. Such interpretation would allow a voter to be assisted upon his own mere statement that he could not read English, and give inspectors unlimited discretion to mark ballots. The intention of the legislature was to limit the marking to those who made the oath, or to those who from physical disability could not mark them. This intent is evidenced by the other portions of the statute above quoted, as, by section 26, if the ballot is seen after it is marked by any other than the inspector lawfully assisting, so as to disclose any of the candidates voted for, such ballot shall not be received or deposited in

25 L. R. A.

the box; and, under section 45, a penalty by fine and imprisonment is imposed upon any one so disclosing his ballot. These provisions are mandatory, and the court very properly so charged the jury. These very sections were under consideration in *Atty-Gen. v. McQuade*, 94 Mich. 439, and there held mandatory. Similar provisions were also held mandatory in the following cases: *People v. Onondaga County Cantassers*, 129 N. Y. 395, 14 L. R. A. 624; *People v. Dutchess County Suprs.* 185 N. Y. 523; *State v. Walsh*, 62 Conn. 260, 17 L. R. A. 384; *State v. Ellis*, 111 N. C. 124, 17 L. R. A. 383; *Spurgin v. Thompson*, 37 Neb. 39; *Bechtel v. Albin*, 184 Ind. 193; *Re Ballot Marks*, 18 R. I. —.

Under the proposition that the act is unconstitutional because it puts unreasonable restrictions and regulations upon the right to vote, counsel cites *Atty-Gen. v. Detroit*, 73 Mich. 545, 7 L. R. A. 99. That case arose under a local act of the city of Detroit, passed in 1889, and it was held invalid because its tendency was to disfranchise a large class of voters in the city by unreasonable restrictions upon the manner of registration and of finding that they were entitled to registration. Such claim cannot be made under this act. The regulations are to preserve the purity of the election, and we see no constitutional objections to them as prescribed by the act. Certainly the reasons given by this court for holding the act void in *Atty-Gen. v. Detroit* have no application here. Similar laws have been upheld in many other states. In *State v. Black*, 54 N. J. L. 446, 16 L. R. A. 769, the supreme court of New Jersey, speaking of similar provisions of a statute in that state, says: "Any provision in such an act which is likely to bring about a result which conduces to the purity of popular elections should receive a favorable consideration. It is of course true that, if the effect of any provision is to shut off the voters from the ballot box, such provision must fall before the constitutional guaranty of the right to vote. But in measuring the cases of mere inconvenience, expense, or sentiment, the existence of a salutary purpose and the likelihood of the provision tending to accomplish that purpose must weigh greatly in determining the reasonableness of the statutory regulation." The supreme court of Missouri, in *Bowers v. Smith*, 111 Mo. 45, 16 L. R. A. 754: "The ballot reform law was intended to improve the methods for giving expression to the popular will in the choice of public officers. It should be construed so as to promote, not to destroy, the great object in view in its passage." And the supreme court of Pennsylvania, in *De Walt v. Bartley*, 146 Pa. 529, 15 L. R. A. 771, says: "The law itself may be regarded in the light of an attempt on the part of the people to secure a pure, free, and unintimidated ballot. Every presumption is in favor of the constitutionality of the law." The following cases also uphold the constitutionality of similar acts: *Re Ballot Marks*, *supra*; *Minor v. Olin*, 159 Mass. 487; *Simpson v. Osborn*, 52 Kan. 338; *State v. Benton*, 18 Mont. 306; *Aikesson v. Lay*, 115 Mo. 588. Our Constitution, by article 7, § 2, provides: "All votes shall be given by ballot, except for such township offi-

cers as may be authorized by law to be otherwise chosen:" and by section 6 of the same article it is provided: "Laws may be passed to preserve the purity of elections and guard against the abuse of the elective franchise." The act in question was passed to secure this end; and although it may result in some inconvenience to the voter, the restrictions placed upon the manner of voting, and regulations under which votes may be received and placed in the ballot boxes, are within the province of the legislature under the provisions of the constitution above quoted. The law aims to secure secrecy in the ballot, and does not attempt to disfranchise any voter. At the expense of this secrecy, and in order to enable voters who are physically incapacitated from marking their ballots, the law provides a method for such aid, as well as to those who cannot read the English language. The law does not deprive these voters of any right, but rather secures to them aid in voting intelligently; it is plain and simple in its provisions. Every voter, however illiterate or however much incapacitated physically, has a method pointed out by which he may exercise his right of franchise. The law does not shut off any class of voters from the ballot, and, we think, was designed by the legislature to accomplish the purpose specified in the constitution. Act No. 268 of the Public Acts of 1889, containing provisions to secure purity of elections, was before this court, and held valid in *Detroit v. Rush*, 83 Mich. 532, 10 L. R. A. 171; and the present act was before this court in *Shields v. Jacob*, 88 Mich. 164, 13 L. R. A. 760; *Chateau v. Jacob*, 88 Mich. 170; and *McQuade v. Furgason*, 91 Mich. 438. The questions in these cases referred to other provisions of the act, but in each the provisions of the act were enforced in the furtherance of the purity of the elections.

2. It is contended that the court was in error in directing the jury: "It is unlawful for either United States marshals, challengers, or others except inspectors of election who are lawfully assisting him, to either mark the ballot for voters, or see them marked before they are deposited in the ballot box, and all such votes are void; and it is contrary to law to deposit them in the ballot box or to count them in determining the result of the election." Section 32 provides the only authority by which an elector may have a ballot marked. It has been quoted above. The marking can be done only by an inspector designated by the board for that purpose, and in the presence of at least two of the inspectors. Under this act, no other can lawfully mark ballots, and to no other can the ballot be exhibited, unless United States supervisors of election may see them when a member of congress is to be elected. The court was therefore right in its interpretation of this act, if United States supervisors of election may not witness the marking. But counsel for respondent contends that, inasmuch as members of congress were to be elected at that election, this act must be construed in the light of, and in subordination to, sections 2017, 2019, 2021, 2022 of the Revised Statutes of the United States. Section 2017

provides that "supervisors of election are authorized and required to attend at all times and places for holding elections for representatives or delegates in congress. . . . to be and remain where the ballot boxes are kept at all times after the polls are open until every vote cast at such time and place has been counted . . . and to personally inspect and scrutinize from time to time and at all times on the day of election the manner in which the voting is done." Section 2019 provides that "the better to enable the supervisors of election to discharge their duties, they are authorized and directed . . . whether before or behind the ballot boxes as will in their judgment best enable them to see each person offering himself for registration or offering to vote, as will best conduce to their scrutinizing the manner in which the registration or voting is being conducted." By section 2021 it is provided that United States marshals shall attend, at all times for holding elections, the polls in such district or precinct; and, by section 2022, it is further provided that "the marshal and his general deputies and such special deputies shall keep the peace and support and protect the supervisors of election in the discharge of their duties preserve order at such place of registration and such polls, prevent fraudulent registration and fraudulent voting thereat, and fraudulent conduct on the part of any election officer." Counsel for respondent, it appears, at the close of the testimony asked the court to instruct the jury, in his fifth and ninth requests, as follows: "(6) If you are satisfied from the evidence that the method pursued by Inspectors Diemel and Vandergyp, in company with United States Officers Erhard and Knauss, in assisting voters in preparing their ballots, was pursued in good faith, and the voters in like manner received such assistance, then, in respect to the preparation of them, the ballots must be treated as valid." "(9) Under the Constitution and laws of the United States, the United States supervisors and deputy marshals at the election in question were authorized to put themselves in such place or places as would enable them to see that the ballot of an assisted voter was marked as directed or desired by the voter, and a disclosure of the contents of such ballot to the United States officers under such circumstances does not invalidate it." These requests were refused. Mr. Erhard, referred to in the fifth request, was United States supervisor of election, and Mr. Knauss, a deputy United States marshal. By the finding of the jury, it appears that Mr. Erhard did not mark any of the ballots himself, but he saw others mark ballots of voters, and there were disclosed to him the names of 20 candidates voted for on the ballots so marked; and that the other supervisor of election saw 100 marked, and these were disclosed to him. But we shall not, for the purposes of this case, regard these ballots as irregular. It appears that Mr. Knauss, the deputy United States marshal, marked the ballots of 10 electors, and had disclosed to him the ballots of 100 electors after they were marked, so that he saw the names of the candidates voted thereon. Under the charge of the court, the

jury were directed that it was unlawful for these officers to mark ballots or to see them marked, or for any disclosure of such ballots to be made to them. It is therefore seen that the court below did not discriminate between the United States supervisors of election and the deputy United States marshal.

Whatever may be said in reference to the power and authority of the United States supervisors of election under the federal law to mark ballots, or see them marked, for the purpose of seeing that the election is fairly and properly conducted, it is apparent that the deputy United States marshals have no such right or authority. In *United States v. Gitma*, 8 Hughes, C. C. 549, Fed. Cas. No. 15,209, after citing sections 2017 and 2019 of the Revised Statutes of the United States, above quoted, the court said: "Thus not only does the law in terms empower a supervisor to be in the room with the judges of election, but empowers him to be in any place or position in which in his own judgment he can best perform his duties. The act of congress which is thus specific in defining and complete in conferring these powers on supervisors is the same one which prescribes the duties of deputy marshals. While it is thus express and full in regard to supervisors, it is the reverse in defining the authority of deputy marshals. Section 2021 simply provides that, when required to do so by the supervisors, it shall be the duty of deputy marshals to attend the polls in their districts or precincts. The section gives the deputy marshals no authority except to be present at the polls. The same act of congress which expressly directs supervisors to place themselves before or behind the ballot boxes as they may think proper is silent in regard to deputy marshals, and gives them no such authority." It is said by the court, in reference to section 2022, that that section defines the object of the appointment of deputy marshals, and defines their powers and duties,—that is, to keep the peace, and support and protect supervisors in the discharge of their duties,—and omits to give them authority to go behind ballot boxes and place themselves in any position they please, and that their duties are therefore not those of supervisors of election, but those of conservators of the peace at the polls, and that they have no right to be in the room in which the judges and supervisors of election are performing their duties, or go behind the ballot boxes, unless requested to do so by the judges and supervisors, except to prevent violence, or to preserve the peace when actually disturbed, or to prevent fraud actually attempted in the room. It is evident from the reading of these statutes that the deputy United States marshals, in the present case, had no right to mark ballots or to see them marked, or to know for whom the electors were voting. The court was therefore right in its direction to the jury, so far as the deputy United States marshals are concerned, and therefore right in refusing the request to charge, as the requests coupled the marshals with the supervisors of election. Whether the court was correct in the charge as to United States supervisors of election we need not discuss or

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pass upon, as it is apparent that, if the court was wrong in that particular, the respondent is not in any manner prejudiced by the ruling, as will be made apparent in our further discussion. The jury found, by the thirteenth and fourteenth findings, that the relator received in all the voting precincts of the county, aside from the fourth district of the Fifth ward of Detroit, 25,910 votes, and that the respondent received in the same districts 28,984 votes. The jury also found, by the forty-sixth finding, that the relator had a majority over the respondent in all the districts within the county of 1,926 votes. It is thus apparent that the jury, in arriving at this result, threw out the entire fourth district of the Fifth ward. This was undoubtedly done under the testimony and the charge of the court, in which they were directed as follows: "If illegal votes were received, and the evidence does not show in whose favor the illegal votes were cast, and they are as great in number as the majority received in that voting district, then the election in that district shall be thrown out and disregarded by you. If the evidence does not disclose for whom such illegal votes were cast, and they are less in number than the majority in that voting district, then they shall be taken from the total vote proportionately, according to the entire vote returned for each candidate in that precinct." It is contended that this was error. As to the fourth district of the Fifth ward, the jury found that Alois Diemel and John Vandergyp were designated as inspectors, by the board of inspectors, to mark ballots for electors who made oath that they could not read English. They found that 565 electors were assisted in marking their ballots because they could not read English, and that not one of them made oath that he could not read English. The jury further found that in that district Alois Diemel marked 320 ballots not in the presence of any other inspector; that Joseph Diemel, deputy United States marshal, marked 10 ballots, and saw 100 ballots marked by others, and that the contents thereof were disclosed to him; that Peter Knauss, deputy United States marshal, marked 10 ballots, and saw 100 ballots marked by others, and the contents thereof were disclosed to him; so that the jury found at least 540 illegal ballots cast at that poll, not counting those seen by the supervisors of election. In the fourth district of the Fifth ward, the record shows that the relator received 398 votes and the respondent 858 votes, or a majority for respondent of 560. It appears, therefore, that the jury must have taken into account the ballots marked and seen marked by the United States supervisors of election to make the number of illegal votes equal to the majority received by the respondent; that is, the 20 marked by Erhard and the 100 by the other supervisor, Mr. Schneider. If, however, the whole district should not have been excluded, and the illegal vote had been taken from the total vote, proportionately, according to the entire vote returned for each candidate in that district, it is apparent that the relator would still have a majority of the whole vote of the county, as shown by the finding of the jury, that being that the relator



had 1,926 majority. If it be conceded that the respondent should have had the vote of that district apportioned, then he should be credited with a majority over the relator of 340. If now we take the other districts where the respondent had a majority, and make the same deductions, to wit, the fourth district of the Ninth ward, fifth district of the Eleventh ward, and fourth district of the Twelfth ward, he should be credited with 384 votes more; that is, in the four districts of the Fifth ward, together with these other districts which should have been apportioned, he should be credited with a majority of 724 votes in those districts. But even this leaves the relator ahead 1,202 votes in the whole county. So that, if it be conceded that the court was in error in the charge in permitting the jury to throw out any district, and the districts in which the respondent had a majority be apportioned under the rule laid down by the court, still the relator has a majority. This majority would be increased if the same rule were to be applied to districts where his majority was less than or equal to the illegal vote, as the jury found it was in the ninth district of the Second ward, the first district of the Fourth ward, the first district of the Sixth ward, the third district of the Eleventh ward, and the second district of the Thirteenth ward.

But it is claimed that the court erred in admitting testimony tending to show how many illegal voters voted, and in requiring inspectors of election and United States supervisors and deputy marshals to testify to the contents of ballots which were made known to them only in the performance of their official duties. This testimony is found in the cross-examination of respondent's witnesses, and that given by relator in rebuttal. The first relates to fifteen different districts, and the latter to eleven districts. We have carefully examined that testimony, with the result that ballots of both candidates were shown to have been exhibited so that parties seeing the ballots were able to state for whom the elector was voting; the only difference being that about twenty more ballots were exhibited showing respondent's name thereon than the relator's, so that, if all such ballots were excluded, it could make no possible difference in the result. If, therefore, the court was in error in directing the jury that "if illegal votes were received, and the evidence does not show in whose favor the illegal votes were cast, and they are as great in number as the majority received in that voting district, then the election in the district shall be thrown out and disregarded by you," it could not affect the result. We need not, therefore, pass upon the question whether the court was or was not correct in his instruction. It went beyond the rule laid down in *Atty. Gen. v. McQuade*, 94 Mich. 439. In that case the question was one of fraud affecting the whole poll, and the rule was adopted from the language of the court in *Heyfron v. Mahoney*, 9 Mont. 497, and other cases there cited, that, where the frauds are of such character that the correct vote cannot be determined, the return of the precinct will be rejected. In the present case the inspectors

and other officers of the various districts are not charged with active fraud, but in marking ballots of those who claimed they could not read English, without having first made oath as to that fact. This may have arisen from the interpretation of the statute now claimed by respondent's counsel; that is, that such provisions are not mandatory, but directory merely. And, again, it appears that proofs were obtainable and actually introduced as to the number of electors whose ballots were so marked. This would not, under the facts shown, necessarily taint the vote of the whole district, and it would not taint the whole ballot if the jury were able to determine the correct ballot, as, under such circumstances, it would not destroy the presumption of the correctness of the other ballots cast. But, as said, this question, as it relates to the present case, is of but little moment, for the jury were able to determine the number of illegal votes put in the boxes in the various districts.

3. We now come to the other portion of the charge, where, in substance, the jury were directed that they should take the illegal votes from the total vote proportionately, according to the entire vote returned for each candidate in that district. In this we think the court, under well-settled rules, was entirely correct. It is a fair way to arrive at results. The rule is based upon the proposition that the illegal votes have gone into the boxes without the fault of either candidate. If these illegal votes can be separated from the legal ones, so that the number is substantially ascertained, then the poll is too large by exactly that number, and they must be cast out. In casting them out, the rule laid down by the court below is sustained by *McCrary, Elections*, 3d ed. § 460, where it is said: "Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each." In 6 Am. & Eng. Encyclop. Law, p. 353, it is said: "Where more ballots are found in the ballot box than there are names on the poll list, the statutes of many of the states require the officers of election to draw out enough ballots, without seeing them, to make the number equal to that of the voters. And, where they have not done this, it is probable that no other mode would be preferable to that of deducting from each candidate a number of votes proportioned to his total vote, compared with the aggregate vote of the precinct;" and the following cases are cited: *Gibbons v. Sheppard*, 2 Brewst. (Pa.) 128; *Finley v. Walls*, 4 Cong. Elect. Cas. 387; *Platte v. Goode*, Id. 650. Our statute (How. Stat. § 174), provides: "If the ballots in the box shall be found to exceed in number the whole number of names of electors on the poll list, they shall be replaced in the box, and one of the inspectors shall publicly draw out and destroy so many ballots therefrom unopened as shall be equal to such excess." *Mr. Justice Cooley*, in speaking of this provision of the statute in *People v. Cicott*, 16 Mich. 322, 97 Am. Dec. 141, says: "As each ballot is usually one of a number designed to be allowed to particular cau-

didates, and counted against others given to other candidates, the drawing may still work no injustice, since each candidate will probably lose by it a number proportionate to the relative number of ballots appearing for him in the box, and thus the relative proportions will be preserved." This rule, he says, "is based upon the doctrine of probabilities." While we have no statute directing the mode of apportionment laid down by the court below, yet the rule, we think, is one which does no injustice to either candidate, and in the end carries into effect, as nearly as may be, the will of the people as expressed at the polls.

4. But one further question need be discussed. It is contended by the respondent that the court erred in ruling that the relator had the opening and closing in putting in the proofs, and in the argument to the jury. We think there was no error in this. The burden of proof was upon the relator to establish his title to the office. In the proceeding the relator prosecutes and the respondent defends. We think the rule is that the right to open and close belongs to the party who seeks to alter the existing state of things, as stated by Thompson on Trials, § 237.

*Judgment must be entered, finding the relator entitled to the office, and of ouster against the respondent.*

**Grant, Montgomery, and Hooker, JJ., concurred.**

**Montgomery, J., concurring:**

I cannot assent to any construction of the statute which shall result in nullifying the salutary provisions which were intended as safeguards against the interference with voters in the exercise of their franchise, and were likewise intended to preclude the possibility of improper influences being brought to bear upon the voter, and it seems to me that the statute is so plain that one carefully considering the provisions with a purpose of getting at the legislative intent need not err therein. Section 21 of the Act provides for the erection in all voting precincts of a railing or fence, four feet in height, which is to be placed through and across the room, and for the construction of gates; and provides for a sworn gatekeeper, who shall be "sworn to allow no person to pass through said gate and enter said railing except as otherwise provided in this act, except to vote or assist some elector in the preparation of his ballot as provided in this act;" and provides that "no person shall be allowed to be inside of said railing, except to vote, or to assist an elector in the preparation of his ballot as hereinafter provided." Pub. Acts 1891, No. 190. The only provision made in the act for assisting a voter is section 32, which provides that "when an elector shall make oath that he cannot read English or that because of physical disability he cannot mark his ballot or when such disability shall be made manifest to said inspectors, his ballot shall be marked for him in the presence of at least two of the inspectors by an inspector designated by the board for that purpose." The provision of the law is plainly that no inspector can be in the position to observe the marking of the ballot except in case of physical disability, unless the elector shall make oath

that he is unable to read the English language. No constitutional right is infringed by this provision in the interests of the purity of elections. Its purpose is plain,—to prevent the bartering and sale of votes either through the instrumentality of inspectors of election or of others outside the booths,—and it is only in the exceptional case of a voter who cannot, by reason of his inability to read the English language, and who makes the fact manifest by his oath, that there can be any departure from the usual method. If the requirement is held not mandatory, the inspector can be present in all cases as well as in a single case. But section 26 has made the legislative intent certain. This provides that "if any elector shall show his ballot, or any part thereof, to any person (other than one lawfully assisting him in the preparation thereof), after the same shall have been marked so as to disclose any of the candidates voted for, such ballot shall not be received or deposited in the ballot box." I am aware that many cases may be cited in which provisions relating to the method of conducting elections are held directory. But, certainly, the better authorities and the better reasoning do not justify the counting of a ballot which by the terms of the act it is provided shall not be received. I am not able to distinguish how a provision that a vote shall not be counted would more clearly indicate the legislative intent than does one which provides that it shall not be received or deposited in the ballot box, from which place alone it can be counted. I concur with *Mr. Justice Long*.

**Long, Grant, and Hooker, JJ., concurred with Montgomery, J.**

**McGrath, Ch. J., dissenting:**

I am unable to agree with my brethren in the conclusions reached by them. The original returns, as certified by the inspectors of election, gave May 26, 799 votes and Reynolds 26, 821, leaving a majority for Reynolds of 23 votes. The recount, made under Act No. 208, Laws 1887, by a Republican board of canvassers, gave May 26, 847 votes and Reynolds 26, 729, or a majority for respondent of 118. In his replications to respondent's plea, Reynolds sets forth: First: That 74 ballots cast for respondent bore distinguishing marks, and were therefore illegal and void. Second. That in the township of Ecorse, and in the First and Third wards of the city of Wyandotte, after the votes had been canvassed and returned, and before the recount was made, the votes cast were changed, raised, altered, and mutilated in the interest of respondent, so as to destroy 106 votes, which were cast in favor of relator, and insert in said ballot boxes, instead thereof, 100 false and fraudulent votes. Third. That there was no valid and legal election held or had in the fourth precinct of the Fifth ward, for the reason that 215 ballots were cast by persons who were not registered as electors. Fourth. That there was no valid election in said last-named precinct, for the reason that five outsiders wrongfully, illegally, and with the approval of the chairman of the board of election inspectors went into the polling booths, and worked, and influenced 750 voters, and

marked their ballots, and said ballots were illegally received. Fifth. That in such last-named precinct 750 voters exposed their ballots to persons who were not lawfully assisting them. Sixth. That 215 unregistered voters were not sworn as required by law to justify their registration on election day. Seventh. That in the following named precincts the number of votes enumerated were cast by persons whose names were not entered on the poll lists; that the number of ballots found in the boxes at the close of the poll were in excess of the names on the poll lists; that all of said ballots so cast were canvassed, and that the poll lists were not placed in the ballot boxes, but were concealed or destroyed. to wit: In the second precinct in the Sixth ward, 528 votes; in the third precinct of the Sixth ward, 495 votes; and in the second precinct of the Seventh ward, 601 votes. No further or other charges were contained in the pleadings. Questions were framed, submitted, and sent to the jury, and have been answered. The first nine questions, and the answers thereto, are as follows: "(1) Did any of the ballots containing votes cast in favor of said respondent, William May, when the same were voted, bear distinguishing marks; that is to say, letters, initials, words, or marks so made thereon as to distinguish each of the same, respectively, from the other ballots cast at that election? No. (2) If so, how many, as near as can be estimated? Not any. (3) How many votes were cast in favor of said relator, Henry M. Reynolds, in the township of Ecorse? 248. (4) How many votes were cast in favor of said respondent, William May, in said township of Ecorse? 450. (5) How many votes were cast in favor of said relator, Henry M. Reynolds, in the First ward of the city of Wyandotte? 188. (6) How many votes were cast in favor of said respondent, William May, in the First ward of the city of Wyandotte? 182. (7) How many votes were cast in favor of said relator, Henry M. Reynolds, in the Third ward of the city of Wyandotte? 206. (8) How many votes were cast in favor of said respondent, in the Third ward of the city of Wyandotte? 132. (9) After the votes cast for said parties in said township of Ecorse, and in said First and Third wards of said city of Wyandotte had been canvassed and returned by the board of inspectors of elections thereof, were any of the votes cast therein changed, erased, altered, or mutilated at any time before the meeting of the board of county canvassers? No." (The figures given in answers to the third, fourth, fifth, sixth, seventh, and eighth questions are the exact figures returned by the canvassing board upon the recount). By these answers it will be observed that the charges made in relator's first and second specifications are expressly denied. The charges made in the sixth and seventh specifications were abandoned on the trial. Out of the 215 persons referred to in the third specification, relator's own witness Lempke, found the names of all but 14 on the registration list, and of those found by him, 14 were discovered on the witness stand upon cross-examination. The jury found, not that the inspectors did not find these 14

names, but that they actually found all the other names. This would not affect the result, and disposes of the third specification. There is no pretense that any person went into any booth and worked or influenced a single voter, as charged in the fourth specification. The only other charges made are: (1) That a large number of voters exposed their ballots, and the ballots so exposed were received; (2) that voters were assisted without first having been sworn as to their inability to read English, as required by law. Although the law provides that no election district shall contain more than 500 electors, 1,156 electors actually voted in the fourth precinct of the Fifth ward. There were 300 more votes cast in this district than in any other district in the city. About 42,350 votes were cast in the entire city, which is divided into 102 voting precincts. Thirty-five precincts cast 22,400 votes, or an average of 650 each, while 67 districts cast 19,850 votes, or an average of 296 each. The First ward, where, out of a total vote of 8,299, relator received a majority of 541, is divided into eight districts. The second ward, where, out of a total vote of 2,914, relator received a majority of 484, is divided into nine precincts. The Fourth ward, where, out of a total vote of 3,060, relator received a majority of 498, is divided into eight precincts. The Fifth ward, where respondent, out of a total vote of 3,165, received a majority of 635, is divided into five districts. Relator attacked five other precincts, in each of which there are large numbers of German and Polish voters, and the number of votes cast in each average 700. In these districts the charge was made, and the only charge made in any district except the fourth precinct of the Fifth ward was, that large numbers of voters were assisted without first having taken the oath. Relator's proofs tended to show that there were 700 assisted voters in the fourth precinct of the Fifth ward, 586 in another precinct, 526 in another, 425 in another, and 348 in another. The law provides that the voter shall be assisted by "an inspector," in the presence of another inspector, and that the polls shall continue open 10 hours, or 600 minutes. At the trial, relator introduced the following testimony in support of the allegations relative to the fourth precinct of the Fifth ward: "That in the fourth district of the Fifth ward the registration list made prior to and used at the election, appeared as is set forth in the original registration book, which was introduced in evidence, and which, it is agreed upon by counsel, may be produced by either party at the hearing on this report in the supreme court, instead of having a copy annexed hereto; that all the poll lists made at the election were two in number, and as set forth in the originals, which were introduced in evidence, and which, it is agreed by counsel, may be produced by either party at the hearing on this report, instead of having copies annexed hereto; that the poll lists were written respectively by Casper Hoffman, a German, and Henry Vincent, an American of French descent; that the board of inspectors of election and board of registration in this district can-

sisted of the following named persons: Alois Diemel, Edward Fierz, John Manquin, Bernard Zentowski, Peter Brinker, and John Vandergyp; that this board consisted of four Democrats and two Republicans; that no one was designated by the board to assist voters in the preparation of their ballots; that John Erhard, a Democrat, and William F. Schneider, a Republican, were United States supervisors of election; that Joseph Diemel, a Democrat, and Peter Knauss, a Republican, were deputy United States marshals; that there was one Democrat challenger and one Republican challenger; that two metropolitan policemen were stationed at the door through which voters were admitted from the street, and were in position to observe all that was going on in the room containing the booths; that the greater part of the voters consisted of Poles, Germans, and Italians; that from six hundred to seven hundred of the last-mentioned voters were assisted in the marking of their ballots, because they could not read English; that none of the voters thus assisted was sworn as to his inability to read English; that the only persons who actually marked the ballots for such voters were Alois Diemel, John Vandergyp, Joseph Diemel, and Peter Knauss; that during the election the marking of ballots for voters in this district, as above described, was seen or observed by the United States officers of election and deputy United States marshals above named; that the names set forth in question number 16 were selected by a witness for the relator, one Felix A. Lempke, a German of Polish extraction; that in selecting these names he had before him poll lists, Exhibit 99, and a printed copy of the registration list; that he had examined for the first time original poll list, Exhibit 98, on the Saturday and Sunday before giving his testimony in the case, together with the original registration book; that he had made a careful examination; that he was unable to find, and there was not in the registration book, the following names: No. 58, Q. Gabriel; No. 170, A. Katino; No. 188, Wm. Greataw; No. 224, Louis Tremonte; No. 227, Gus Debold; No. 254, Leo Brichto; No. 290, A. Labasch; No. 310, Geo. Peterson; No. 322, Fred. Ziesse; No. 395, Chas. Stuerwald; No. 433, Frank Schoner; No. 709, Wenzil Ziska; No. 721, John Klaus; No. 726, Fred. Scheffler; No. 774, Jacob C. Land; No. 786, Jacob Wiley; No. 874, John Gaobarino; No. 993, John Gremps; No. 1044, Philip Green; No. 1068, Louis Gencorde; No. 1099, John A. Peters; No. 1103, C. J. Dean; No. 1115, Stephen Sauer; No. 1153, John Oss; No. 1155, Samuel Einick; No. 1161, John Ciescke; No. 1165, Anton Gora; No. 1186, Joseph Slanz [at this point relator's counsel announced that they would confine themselves to the 28 names above given]; that, on cross-examination, Lempke was able to find 14 of the 28 names above given; that during the entire day a Republican challenger was in attendance with a book containing a list of registered persons whose votes might be questioned, which book was furnished by a Mr. Burt, chairman of the Republican city and county committees; that the United States su-

pervisor, from the opening of the polls until about 2 o'clock P. M., was present, and also looked after the matter of voting; that all persons objected to by them and others were not allowed to vote until the matter was investigated, and their right to vote established." There was no testimony introduced tending to show that unregistered voters had voted in the fourth district of the Fifth ward, except the registration book and the poll lists above mentioned.

The testimony of the respondent as to the fourth precinct of the Fifth ward was as follows: "Testimony tending to show that in the fourth district of the Fifth ward the board of registration and the board of inspectors of election for this election were as above set forth; that, by resolution of the board of inspectors, Alois Diemel, Democrat, and John Vandergyp, Republican, were appointed or designated to assist voters who might need such assistance in marking their ballots; that Dr. Kwicinski, a Pole, acted as interpreter; that Inspector Zentowski examined the registration book, Inspectors Fierz and Brinker received ballots, Tally Clerks Hoffman and Vincent kept poll lists, Inspector Manquin initialed and handed out the ballots; that, when the polls were first opened, a crowd of several hundred voters were in attendance; that the pressure of voting was great until about 2 o'clock in the afternoon, when it became easier; that the number of voters who were assisted because they could not read English was about the same as shown by relator's testimony; that a large number of Poles, Germans, and Italians were assisted in making their ballots, because they could not read English; that the number thus assisted was the same as shown by the people's testimony; that none of the voters thus assisted was sworn as to his inability to read English; that in the early part of the day Inspectors Diemel and Vandergyp assisted voters in marking their ballots, always accompanying each other, until the rush or pressure of voting became so great it was thought necessary to assist voters in the following manner: Inspector Diemel accompanied by a Republican United States officer, attended to one voter, while Inspector Vandergyp, accompanied by a Democrat United States officer, attended to another, and thus assistance in marking ballots was rendered by Inspectors Diemel and Vandergyp until, in the latter part of the day, the rush subsided; that no persons other than Inspectors Diemel and Vandergyp assisted any voter in marking his ballot; that no person other than the inspectors designated by the board to assist voters in marking their ballots, and the United States supervisors and deputy marshals on duty at this poll, saw how any ballot was marked; that the method pursued in assisting voters in marking their ballots was adopted because it was believed that, on account of the large registration and the great number of voters needing assistance, the proper vote of the district could not be cast if the work of assisting voters in marking their ballots was to be done only by Diemel and Vandergyp in company with each other." The law provides for a board of election in-

spectors, and places them in charge of the polling place, and gives them authority and control of the conduct of the election. Section 23 of the law provides that a challenger for each party may be present inside the room where the ballot box is kept, and entitles him to the protection of the inspector and police. Pub. Acts 1891, No. 190. Section 25 makes it the duty of each inspector to challenge every person whom he shall know or suspect to be disqualified as an elector. Section 26 provides that if any elector shall show his ballot, or any part thereof, to any person (other than one lawfully assisting him in the preparation thereof) after the same shall have been marked, so as to disclose any of the candidates voted for, such ballot shall not be received or deposited in the ballot box. Section 32 provides: "When any elector shall make oath that he cannot read English, or that because of physical disability he cannot mark his ballot, or when such disability shall be made manifest to said inspectors his ballot shall be marked for him in the presence of at least two of the inspectors by an inspector designated by the board for that purpose who is not a candidate on said ticket." Section 36 provides that, in the canvass of the votes, any ballot which is not indorsed with the initials of the inspector, as provided in this act, and any ballot which shall bear any distinguishing mark or mutilation, shall be void, and shall not be counted, and any ballot or part of ballot from which it is impossible to determine the elector's choice of candidates shall be void as to the candidate or candidates thereby affected. The United States marshals present on election day were there under instructions from the attorney general of the United States that they had the right, and that it was their duty, to be and remain in all places where they can best discharge their duties, whether such places be inside or outside the guard rail, notwithstanding local statutes regulating the number of persons who are to be admitted within the guard rail on election day. The United States supervisors were present, with instructions that it was their duty to put themselves in such a place that they could see that the tickets were marked as directed by the voters. This precinct was manned with six election inspectors, four of whom were Democrats, and two Republicans; two United States supervisors of election, one of whom was a Democrat and the other a Republican; two challengers, one a Democrat and one a Republican; an interpreter; two deputy United States marshals; and two policemen stationed at the inner door. If any of these persons were not entitled to be present, they were there under color of right and authority, and with the knowledge, consent, and permission of the inspectors of election. Two of the inspectors of election were designated by the board to assist voters. A rush, incident to a crowded district, occurred, and in order to facilitate the voting and enable all to exercise the constitutional right of qualified electors, by and with the consent and approval of all present, the United States supervisors and the United States marshal were called upon by the inspectors to assist, and did so. Seven

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Democrats were present, and did not object. Five Republicans were there, and concurred. Inspectors, supervisors, and marshals, all charged by law with the duty of its observance and the prevention of wrongdoing, and with the solemn duty of permitting electors to cast their ballots, all acting in good faith, and solely with the desire of enabling voters to exercise a constitutional right, consent, approve, and concur.

The right to vote for, and be represented by, county and state officers is a constitutional right, which cannot be taken away or destroyed. Cooley, Const. Lim. 616; McCrary, Elections, 13. John Erhard, a supervisor and a Democrat, saw the ballots of 20 of the said voters while they were being marked by a Republican inspector; William Schneider, a supervisor and a Republican, saw the ballots of 100 voters while assisted by a Democrat inspector; Joseph Diemel, a marshal and a Democrat, saw the ballots of 100 voters while being assisted by a Republican inspector; Peter Knauss, a marshal and a Republican, saw the ballots of 100 voters as they were being assisted by the Democrat inspector, and Joseph Diemel and Peter Knauss each, in the presence of an inspector of the opposite party, marked the ballots of 10 of the assisted voters. This occurred in the presence of the board of election inspectors; indeed, it was done with the consent, approval, and procurement of the board. The board, officers of the law, charged with control of the place, and with the instruction and direction of the voter, participated in the work. Supervisors and marshals, there by federal authority, charged with the duty of supervision, participated in the work. Each and every one of these officers was there commissioned to protect, instruct, and direct the voter. No challenge is made by any person. Relator's specification alleges that this was done with the approval of the chairman of the board of election inspectors. To these officers, and to these officers only, did voters expose (?) their ballots. Is it not monstrous to say that, under these circumstances, the voter and this entire precinct, composed of 1,156 qualified electors, shall be disfranchised? The law should not be so construed as to make the machinery of election a snare to entrap the unsuspecting voter. It may be urged that the voter is charged with knowledge of the law, but is he charged with knowledge of the *personnel* of the inspectors, or of those designated to assist him? Inspectors of election are not either uniformed or badged. Is each voter bound to suspect men there by authority, acting in the presence of the power that creates the actors, and to inquire by what authority? Of whom should the voter inquire, if not of the very men who were engaged in and directing this work? These men, whether inspectors, supervisors, or marshals, were there acting in the capacity of instructors or assistants, in the presence of the board of inspectors, the very power under the law that should designate and create assistants or instructors, and were recognized by all as having authority. Were they not, under all the authorities, *de facto* assistants and instructors? Is an elector to be disfran-

chised because one of these *de facto* officers looked upon his ballot? If respondent be ousted from his office, who shall say that no witnesses sworn by him while acting as clerk of the circuit court for the county of Wayne can be prosecuted for perjury, or that every subpoena or summons signed by him is a nullity, because he was not legally elected to the office of county clerk? Suppose that no assistant be actually designated by the board, but that one should act for the day in the presence of the board; would the absence of an express designation disfranchise the voter? *McCrary, Elect.* §§ 105, 214, 216. In *Boileau's Case*, 2 Pars. Sel. Eq. Cas. 503, Brightly, *Elect.* Cas. 268, upon the afternoon of the day of election, one of the clerks of election became intoxicated and unfit for his duties, and, at the request of the inspectors, one Coxe acted as clerk for the balance of the day, and until about 8 o'clock of the morning of the succeeding day, when the clerk, having recovered from his debauch, appeared and signed the returns. Coxe was not sworn, and was a candidate for assessor at this election. Held, that these facts were not such as should induce the court to set the election aside, and the ground of the decision was that the evidence did not disclose any bad faith on the part of the officers, nor any fraud. In the same case, one Harris, a candidate for judge, was occasionally in the room where the election was held, during its progress and after the polls closed; that he opened a few of the tickets, but, being admonished, desisted. Several witnesses testified to his handling tickets, and to his intermeddling, but the court says: "It has not been pretended that this election is in any particular tainted with actual fraud; no evidence has been adduced either showing legal votes to have been rejected or illegal votes received; the election seems to have been honestly conducted,"—and for these reasons the court declined to set it aside. *Anderson v. Winfree*, 85 Ky. 597.

But it is insisted that in this precinct, and in a large number of others, assisted voters were not first sworn. Whatever may be the construction of section 32 of the Act, it is evident from this record that in all but a very few of the districts in the county of Wayne boards of inspectors have construed it to mean that, where the fact that an elector is unable to read English is made manifest, it is not necessary to require the oath provided for by statute. I do not, however, regard this requirement as mandatory. The oath is not required to determine the qualifications of the elector. It will be noticed that our statute does not prohibit the receipt of a ballot unless the voter has been first sworn, or declare that the ballot so received shall be void, but it does provide, by section 36, that ballots not initialed, or which bear a distinguishing mark or mutilation shall not be counted, and that any ballot from which it is impossible to determine the elector's choice shall be void. The rule as laid down in 6 Am. & Eng. Encyclop. Law, p. 825, is as follows: "When the election is fair and honest, courts will not disfranchise the voters, unless compelled to do so by the peremptory requirements of the law. Directory provisions are such as are

not of the essence of the election, but are enacted as a guide to the officers of the elections. As to what requirements are mandatory, and what merely directory, the cases are not all in agreement, and it may be difficult in some cases to determine from the authorities into which class a provision falls; but it may be said that the tendency of the courts, and also of legislative bodies, is not to hold a provision mandatory, unless it is clearly of such a character that its violation will tend to prevent a correct determination of the result of the election, unless it is declared in the law that its violation shall render the election void. This is true even if the language is prohibitory as to the officers, or even if its violation may subject the offending officer to penal liability." *Judge McCrary*, in his work on Elections (sec. 190), states the rule thus: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election. . . . Statutes which simply direct the judges of election to number the ballots, without declaring what consequences shall follow if this be not done, may well be held directory only; but, where the statute both gives the direction and declares what the consequences of neglecting their observance shall be, there is no room for construction." Citing *Ledbetter v. Hall*, 63 Mo. 422; *West v. Ross*, 58 Mo. 350; *Jones v. State*, 1 Kan. 273; *Gilliland v. Schuyler*, 9 Kan. 569. See also *Peard v. State*, 34 Neb. 872.

It is true that a number of cases may be found holding certain provisions of certain statutes to be mandatory. The section in question here was not under discussion in *Atty-Gen. v. McQuade*, 94 Mich. 439. That case came here upon the pleadings, involving grave and flagrant charges. Willful and fraudulent conduct was set forth. The present case, when here upon the pleadings, did not disclose the real facts or issues involved. *People v. Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624, was an application for a mandamus to compel the counting of certain ballots. The court held that the ballots contained distinguishing marks, and were within the prohibition of the statute. The court says, however, that, in the absence of some clear and positive prohibition of the statute against counting such ballots, the tendency of the courts would undoubtedly be in the direction of effectuating as far as possible the intent of the voter. *People v. Dutchess County Suprs.* 185 N. Y. 522, and

*Bechtel v. Albin*, 184 Ind. 193, were both cases of marked ballots. In *Re Ballot Marks*, 18 R. L. —, the governor requested an opinion as to whether a cross placed at the right of a blank space below the names of the candidates on an official ballot, and opposite no name thereon, should be counted for any candidate on said ballot. The court held that a compliance with the requirement was necessary to determine the elector's intention, and that the ballot should not be counted. In *State v. Ellis*, 111 N. C. 124, 17 L. R. A. 382, the court held that the letters O. K. written on the outside of a ballot, are a device within the code providing that ballots shall be "without device," and that any ballot having a "device" on it shall be void. In *State v. Walsh*, 62 Conn. 260, 17 L. R. A. 364, the principal controversy arose over a large number of double ballots and upon the construction of the statute respecting their disposition. Other questions relate to distinguishing marks upon ballots. In *Spurgin v. Thompson*, 37 Neb. 89, it was held that the indorsement of the name of "Eagleham" upon a ballot was within the inhibition of the statute forbidding the marking of the ballot, and in the same case it was held that, while the statute requires that the cross which signifies the preference of the elector shall in ink be placed in a space designated for that purpose, a ballot upon which such preference is indicated by a cross made with a lead pencil, outside the space designated, but opposite the name of the choice of the elector, should be counted according to such manifest intention. None of these cases are opposed to the rule above laid down. The statutes in each case contain provisions similar to those contained in section 36 of our own statute, thus bringing the cases within the rule as stated. In *Bowers v. Smith*, 111 Mo. 45, 16 L. R. A. 754, there is a very able and exhaustive discussion of the Australian ballot laws of England, Missouri, and other states, and of the principle embraced in the rule referred to. The court says: "Undoubtedly, some irregularities are of so grave a nature as to invalidate the whole return of the precinct at which they occur; as for example, the omission of registration (*Zeiler v. Chapman*, [1874] 54 Mo. 502), or of statutory notice, (*McPike v. Pen* [1872] 51 Mo. 63. In determining which are of that kind, the courts aim merely to give effect to the intent of the lawmakers in that regard, aided by established rules of interpretation. If the law itself declares a specific irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. *Leadbetter v. Hall* (1876) 62 Mo. 423. In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise, it is considered immaterial. It has been sometimes said, in this connection that certain provisions of election laws are mandatory, and others directory.

These terms may, perhaps, be convenient to distinguish one class of irregularities from the other. But, strictly speaking, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview. But it does not therefore follow that every slight departure therefrom should taint the whole proceedings with a fatal blemish. Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end; and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voters." In *Woodward v. Sarsons*, 44 L. J. C. P. 293, it was held that where there was no ground for thinking that the electors had been prevented from voting as they wished, and the election was substantially won by ballot, it would not be invalidated because there may have been mistakes or misconduct in the use of the machinery of the ballot act; but that, in order to have this effect, the non-observance of the forms of the act must be so great as to amount to conducting the election contrary to the principle of an election by ballot, and be such that it did affect, or might have affected, the result. The statutes of Illinois provide that no vote should be received if the name of the person tendering same be not registered, unless such person shall furnish to the judges of election his affidavit that he is an inhabitant of the district and entitled to vote therein, and also prove by the oath of a householder and registered voter of the district that he knows such person to be an inhabitant of the district, but nevertheless it has been held in that state that when a person votes without having been registered and without proof of right, and it does not appear that he was challenged, or any objection made to his voting, the presumption must be that he was a legal voter, and so known to the judges of the election. *Dale v. Irwin*, 78 Ill. 170; *Clark v. Robinson*, 88 Ill. 498; *Kuykendall v. Harker*, 89 Ill. 126. In *State v. O'Day*, 69 Iowa, 868, it was held that no objection could be based upon the fact that an informal oath was administered to a legal voter; that an informal oath is no oath; and that, if the voter was a qualified elector, his ballot was lawfully received, even though he had not been sworn at all. There is a conflict in the authorities upon this subject. In the case of *Reg. v. McNeil*, 5 U. C. C. P. 137, where the votes of persons who had refused to take the oath had been received, the court excluded the votes, not because the voters were shown to be disqualified, but because they had refused to take the required oaths of qualification; but the court says that, where the voter has not been challenged, it may well be doubted whether, in the absence of any showing of fraud, the omission of the officers to require the statutory proof rebuts the presumption that the vote received is legal. In Wisconsin, where it is provided that no per-

son whose name is not on the register shall be allowed to vote without furnishing certain proofs, it is held that this prohibition is mandatory, and that all votes received in violation of the provision should be rejected. *State v. Hilmantel*, 21 Wis. 567. In a number of cases it has been held, and *Judge McCrary*, in his work on Elections, upholds this view, that the vote is illegal, but that it may be counted upon proof that the person was a qualified voter. It is not necessary here to determine which rule, in our view, is the correct one, for no such case is here. There is an essential difference between requirements which go to the qualification of the elector and those police regulations relative to the means employed to get the ballots of qualified voters into the ballot box, the enforcement of which regulations is committed to officers designated by law for that purpose.

Intelligent men, familiar with the English language, have not readily grasped the intricacies of this new system or of the prescribed ballot. It is notorious that the class of electors who were assisted are wholly unfamiliar with our language. They comprehend an oath from the signs which attend its administration rather than from the language of such oath. These men were duly qualified electors, under the law. No fraud is charged. The only complaint made is that legal voters, entitled to vote, have voted without the observance of the machinery of the ballot act, — without the observance of a regulation, the enforcement of which was committed to the election officers. Yet those officers directed the conduct of these electors, and, with a full knowledge of the facts, received these votes unchallenged. Under these circumstances, I think the presumption should prevail that these voters could not read English, and that the inspectors of election were satisfied of that fact.

It is, however, urged that, inasmuch as these voters were not sworn, that part of section 26 which provides, if any elector shall show his ballot or any part thereof to any person (other than one lawfully assisting him in the preparation thereof) after the same shall have been marked, such ballot shall not be received or deposited in the ballot box, applies so that an exposure to an assistant vitiates the ballot. I do not think that the

statute is subject to this strained construction. The oath is to be administered, not by the assistant, but before the board. The language of the section refers to the qualifications of the assistant, and not to the observance by the voter of the provisions of another section. If the provision that the elector should be first sworn is directory only, any process that such ballot passed through in the ordinary course did not invalidate it. The question here is not the right of the assistant to refuse to assist, the right of the board to refuse to receive a ballot, or the right of a voter who refused compliance with a requirement, but the right of those who have complied with all that was required of them. The purpose of this act is to secure to the elector an opportunity to exercise a sacred constitutional right, and the expression of the will of the majority, as well as to secure the purity and integrity of the ballot. The right of an elector to vote is the paramount right. The act was not framed to prevent the exercise of this right, nor should it receive a construction which will encourage the packing of voting precincts. The electors, and the other actors involved in the charges here made, were innocent of wrong. No voter has been denied the right to vote. All who voted, except, possibly, the 14, had all the qualifications of electors, and were entitled to vote. The effect of the rulings of the court below is to change a majority of 118 in favor of the respondent to one of 1,926 in favor of relator, and to disfranchise nearly 8,900 voters.

The construction given to this act by the court below leads to gross injustice, and I cannot but feel that there is fault in such construction, and that such a result was never intended or suspected by the legislature in framing the act. As is said by Barclay, J., in *Bowers v. Smith*, 111 Mo. 45, 16 L. R. A. 754: "While it is well enough to insist upon a proper and strict performance of duty by officers conducting elections, we are not of the number of those who imagine that such performance will be promoted by disfranchising the whole body of electors in any locality where errors, such as here charged, occur. The legislature has not plainly declared such a purpose, and we think it should never be imported into a statute by construction."

## COLORADO SUPREME COURT.

AMERICAN WATERWORKS CO. of  
New Jersey, *Pff. in Err.*,

v.

FARMERS LOAN & TRUST CO. *et al.*

(.....Colo.....)

\*1. A corporation is subject to the laws of the state or sovereignty under and by

\*Headnotes by the Court.

virtue of which it has been created, and these laws have a paramount influence over its corporate powers, where it undertakes to exercise them.

2. Where a corporation, in pursuance of the laws of the state where it was created, has been adjudged insolvent, and placed in the hands of a receiver with full powers to control and manage its affairs, and where such corporation, its officers, directors, agents, and attorneys, has been absolutely enjoined from in any

NOTE.—As to rights of receiver in reference to suits outside of the jurisdiction in which he was appointed, see note to *Gilman v. Hudson River Boat & Shoe Mfg. Co.* (Wis.) 23 L. R. A. 52.

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As to the recognition of foreign corporations, see note to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 383.



manner continuing the business of said corporation, or from attempting to use its name, privileges, or franchises for any purpose whatever,—*Held*, that an officer of the corporation could not use its name to prosecute a writ of error in another state against the objection of the receiver.

3. Though the laws of a state do not have extraterritorial force as mere laws nevertheless the general rule is that things done in one state in pursuance of the laws thereof are valid and binding in other states.

(July 2, 1894.)

**M**OTION by the receiver of the American Waterworks Company to dismiss a writ of error to the District Court for Arapahoe County which had been sued out in a suit between it and the Farmers' Loan & Trust Company, on the ground that the affairs of plaintiff in error had been committed to the custody of the receiver, and that the writ of error having been procured at the instance of the vice-president of the company was unauthorized. *Granted*.

#### Statement Per Curiam:

Motion to dismiss the writ of error. The motion was based upon a duly verified petition, which, omitting the formal parts, was as follows: "Your petitioner, E. Hyde Rust, receiver of the American Waterworks Company of New Jersey, respectfully petitions the court and prays that the writ of error in the above-entitled cause be dismissed, and in support of said petition represents unto the court as follows: (1) The American Waterworks Company of New Jersey was incorporated under an act of the legislature of the state of New Jersey, entitled 'An act concerning corporations,' approved April 7, 1875, and the acts supplementary thereto and amendatory thereof, which said act, among other things, expressly provides as follows, to wit: 'Whenever any incorporated company shall have become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, it shall and may be lawful for any creditor or stockholder to apply, by petition or bill of complaint, to the chancellor, setting forth the facts and circumstances of the case, for a writ of injunction and the appointment of a receiver, receivers, or trustees; whereupon, the chancellor, being satisfied of the sufficiency of said application, and also of the truth of the facts and allegations contained in the said petition or bill, by affidavit or otherwise, and upon giving, when so ordered, such reasonable notice, to be served or published, as the chancellor, in an order to be made for that purpose, shall direct, the chancellor may proceed in a summary way to hear the affidavits, proofs, and allegations which may be offered by or on behalf of the parties; and if, upon such inquiry into the matters or cause of complaint, it shall be made to appear to the chancellor that the said company has become insolvent, and shall not be about to resume its business in a short time thereafter, with safety to the public and advantage to the stockholders, it shall and may be lawful for the chancellor to issue an injunction to

restrain the said company and its officers and agents from exercising any of the privileges or franchises granted by its certificate, or by the act incorporating the said company, or from collecting or receiving any debt, or from paying out, selling, assigning or transferring any of the estate, moneys, funds, lands, tenements or effects of the said company until the court shall otherwise order.' (2) Your petitioner represents to the court that the said act is a part of the charter of the American Waterworks Company of New Jersey, and that in said act it is further expressly provided as follows: 'It shall and may be lawful for the court of chancery, if the circumstances of the case and the ends of justice require at the time of ordering the said injunction, or at any other time afterwards during the continuance of the said injunction, to appoint a receiver or receivers, or trustee or trustees, with full power to demand, sue for, collect, receive and take into their possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to said company at the time of their insolvency or suspension of business as aforesaid; and to sell, convey or assign all the said real or personal estate.' (3) And your petitioner further shows that heretofore, and on, to wit, the 8th day of April, 1892, there was exhibited in the court of chancery of the state of New Jersey a bill of complaint by certain stockholders and certain creditors of the American Waterworks Company of New Jersey, including the Denver City Waterworks Company and others, against the said American Waterworks Company of New Jersey, by and in which it was made to appear to the said court of chancery of the state of New Jersey, as the fact then was and still is, that the said American Waterworks Company of New Jersey was insolvent, and was not carrying on its ordinary business for want of funds, and that its liabilities were in excess of its assets, and that the said company was without any legally constituted governing body, and was unable to elect or convene one; and said bill prayed that said company, its officers, agents, directors, and attorneys, and each and every of them, might be enjoined and forbidden from receiving any debts due the said company, from paying and transferring any of its moneys or effects, and from in any manner exercising any of the franchises or privileges of its charter, and from holding any meetings or alleged or pretended meetings at which action might be taken concerning the business of said company, or attempt to use the defendant's name and its privileges and franchises for any purpose whatever, and that said defendant company might be decreed to be insolvent, and that a receiver thereof might be appointed according to the form of the statute in such cases made and provided,—that is to say, the statute of the state of New Jersey,—and that the said complainants in said action might have such further or other relief in the premises as the nature of the case might require and as might be agreeable to equity and good conscience; whereupon, after issue joined and

appearance made by the said defendant the American Waterworks Company of New Jersey in its own name, as well also as of certain of its stockholders defending and opposing said application, including among such stockholders Clarence H. Venner, who was then, and still is, one of the vice-presidents of said the American Waterworks Company of New Jersey, the said court of chancery of the state of New Jersey did, on the 20th day of July, 1892, make and enter the following decree, to wit: 'Upon opening the matter this day to the court by Lindley M. Garrison, of counsel for the complainants, in the presence of Flavel McGee, of counsel for Clarence H. Venner and others of the directors who were permitted to interpose for the defendant by order of the chancellor, and due proof being made of the service of the order to show cause heretofore granted herein, and it appearing to the court that the said defendant corporation is insolvent, it is on this 20th day of July, A. D. 1892, ordered that the said order to show cause be made absolute, and that an injunction do issue against the said defendant according to the prayer of the said bill. And it is further ordered that E. Hyde Rust, Esq., of Jersey City, be, and he is hereby, appointed receiver, with full power to demand, sue for, collect, and receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description belonging to the said the American Waterworks Company, and to perform all the duties imposed upon him and required by law, and especially by an act entitled 'An act concerning corporations,' approved April 7, 1875, and the acts supplementary thereto and amendatory thereof. And it is further ordered that the said E. Hyde Rust, Esq., before entering upon his duties, take the oath prescribed by law, and give bond to the chancellor for the sum of twenty thousand dollars, conditioned for the faithful performance of his duties, to be approved, as to form and security therefor, by John W. Heck, Esq., one of the masters of this court. [Signed] Alex. T. McGill, Chancellor.' (4) Your petitioner further shows unto the court that he, the said E. Hyde Rust, did, on the 22d day of July, 1892, duly file his bond as receiver as aforesaid, in the sum of twenty thousand dollars; that the said bond was duly approved, as in said order provided, and your petitioner qualified as such receiver, and entered upon his duties as such, and since then has been, and is now, receiver of said the American Waterworks Company of New Jersey. (5) Your petitioner further shows that an injunction was duly issued in said cause as prayed for in the complaint therein filed, and in accordance with the order of said chancellor, wherein it was provided as follows: 'The said defendant company (meaning the American Waterworks Company of New Jersey), its officers, directors, agents, and attorneys, and each and every of them, shall absolutely desist and refrain from receiving any debts due to it, and from paying and transferring any of its moneys

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and effects, and from in any manner continuing its business, or exercising any of the franchises or privileges of its charter, and from holding any meetings, or alleged or pretended meetings, at which action might be taken concerning any business of the said company, or attempting to use its name and its privileges and franchises for any purpose whatever,'—which said injunction is still in full force. (6) Your petitioner further shows unto the court that one Clarence H. Venner was, at the time of the institution of said suit in the court of chancery of New Jersey, as above mentioned, one of the two vice-presidents of said the American Waterworks Company of New Jersey; that he, as permitted by order of said chancellor, personally appeared and defended said cause in the name of the American Waterworks Company of New Jersey, notwithstanding which said defense the orders and decree of said court as hereinbefore set out were, after hearing and argument, duly made and entered as the action of said court. That since the entry of the order appointing your petitioner as receiver as aforesaid, the said Clarence H. Venner has had no right or authority in any manner whatsoever to use the name of the said the American Waterworks Company of New Jersey for any purpose whatsoever, and that your petitioner, as receiver of said company, alone has authority to institute or continue suits in the name or on behalf of said the American Waterworks Company of New Jersey. (7) Your petitioner further shows that the writ of error heretofore sued out in this case in the name of the American Waterworks Company of New Jersey was so sued out at the request and at the instigation of the said Clarence H. Venner, without the consent or authority of your said petitioner, and in violation of the injunction so issued as aforesaid by the court of chancery of the state of New Jersey, and without any action or direction of the board of directors or other governing body of said the American Waterworks Company of New Jersey. That in the opinion of your said petitioner, as receiver as aforesaid, it is not to the interest of said the American Waterworks Company of New Jersey to prosecute said writ of error. Wherefore, your petitioner prays that the said writ of error be dismissed."

An answer to the foregoing petition, and also an agreed statement of facts in writing, signed by the attorneys of Rust and Venner, respectively, were filed herein, and thereupon the motion to dismiss was submitted.

*Messrs. Wolcott & Vaile* for E. Hyde Rust, receiver in support of the motion to dismiss.

*Messrs. Teller & Oranhood* for plaintiff in error *contra*.

#### Per Curiam:

By the petition to dismiss the writ of error, the answer thereto, and the agreed statements of facts filed in connection therewith, all matters essential to the determination of this motion are admitted.

1. A corporation is a creature of the law. It is always subject to the law of its charter,

or, if it has no special charter, then to the incorporation laws of the state or sovereignty under and by virtue of which it has been created; and though it may transact business in other jurisdictions, yet its charter or the laws to which it owes its existence have a paramount influence over its corporate powers wherever it undertakes to exercise them. Hence, to determine the capacity or disability of a corporation in a given case, regard must primarily be had to the laws of the state or sovereignty from which it has derived its franchises. See *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020. Also *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 585, 10 L. ed. 306 *et seq.*, and cases there cited.

2. It appears that plaintiff in error is a corporation duly organized under and by virtue of the laws of the state of New Jersey. From the agreed statement of facts it appears that plaintiff in error, prior to the suing out of the writ of error in this cause, had become an insolvent corporation, and had been so adjudged by a court of competent jurisdiction in the state of New Jersey; that by the judgment of said court under the laws of said state the petitioner, E. Hyde Rust, had become the duly appointed and qualified receiver of said corporation, with full powers to control and manage its affairs; and, further, that plaintiff in error as a corporation, its officers, directors, agents, and attorneys, and each and every of them, had been absolutely enjoined from in any manner continuing the business of said corporation, or from attempting to use its name, privileges, or franchises for any purpose whatever. There is nothing in the petition, answer, or agreed statement of facts to show that plaintiff in error, or Mr. Venner as one of its vice-presidents, has ever been relieved from the disabilities of said injunction, or that they, or either of them, have any power or authority to prosecute the writ of error herein. It seems clear that Mr. Rust, as receiver of the plaintiff in error, is justified in pleading the laws of New Jersey relating to insolvent corporations, and the decrees of a court of competent jurisdiction of that state based thereon, in support of this motion to dismiss the writ of error herein. Such laws and decrees are admitted to be correctly set forth in the petition.

3. Against the granting of this motion to dismiss it is urged that the laws of a state have no extraterritorial force. It is also urged that the receiver of a corporation cannot exercise his powers as such beyond the jurisdiction of the court appointing him. Conceding that the laws of a state do not have any extraterritorial force as mere laws, nevertheless the general rule is that things done in one state in pursuance of the laws of that state are to be regarded as valid and binding in other states. Moreover, Mr. Rust by his petition to dismiss this writ of error, is not seeking to transact business or do any affirmative act by virtue of his authority as receiver of the corporation. On the contrary, he seeks to prevent the corporation of which he has been invested with exclusive control from doing an affirmative act contrary to the laws of the state from which such corporation has 35 L. R. A.

derived its powers, and contrary to the judgment of a court having full jurisdiction in the premises; in other words, he seeks to prevent Mr. Venner from making an unauthorized use of the name of such corporation. In taking this course Mr. Rust is undoubtedly acting within the scope of his authority as the duly appointed and qualified receiver of plaintiff in error. *Life Assn. of America v. Rundie*, 108 U. S. 235, 26 L. ed. 339; *Bookover v. Life Assn. of America*, 77 Va. 85.

An extended discussion of the legal questions involved in this motion seems unnecessary. Whatever may be the grievances of Mr. Venner, it is clear that he is not entitled to use the name of plaintiff in error in the further prosecution of this writ.

*The motion to dismiss must be sustained.*

James CONNOR *et al.*, *Piffs. in Err.*,

PEOPLE of the State of Colorado.

(15 Colo. 372.)

1. Persons cannot be convicted of conspiracy to commit larceny if they merely adopt a scheme which is suggested to them by a detective and which has received the approval of the owner of the property.
2. Evidence of statements of a witness for the state made to third persons in the absence of defendants is not admissible to corroborate his evidence against defendant's mere denial of its truthfulness.

(May 1, 1893.)

NOTE.—*Instigation or consent to crime for the purpose of detecting criminal as a defense to prosecution.*

The law governing this question is well illustrated by the above case and the succeeding one of *COMMONWEALTH v. HOLLISTER*, post, 342.

While the true line of distinction is not as clearly marked as it might be, and there are cases in which it seems to have been lost sight of entirely so that the decision is apparently on the wrong side, the following propositions are fairly well sustained by the decided cases:

1. If the criminal design originates with the accused and the intended victim does not actively urge him on to the commission of the crime, the mere fact that he facilitates the execution of the scheme, and that his agents appear to co-operate in its execution will be no defense to the accused. *People v. Hanselman*, 76 Cal. 400; *Reg. v. Bannen*, 1 Car. & K. 285, 2 Moody, C. C. 300; *King v. Whittingham*, 3 Leach, C. C. 912; *King v. Eggrington*, 2 Bos. & P. 603, 2 East, P. C. 494, 668, 2 Leach, C. C. 913; *Com. v. Nott*, 135 Mass. 299, and many of the other cases which will be found stated in the various subdivisions *infra*; *State v. Jansen*, 22 Kan. 496.

Michigan seems to make an exception to this rule in so far as the consent or apparent connivance is on the part of police officers. *Saunders v. People*, 38 Mich. 314; *People v. Murphy*, 38 Mich. 41. And a case which apparently overlooks all rights of the accused is *Reg. v. Lyons*, Car. & M. 217.

2. If the design is originated by the one who apparently becomes the victim or by his agent, and is suggested to the accused and merely adopted by him, he cannot be convicted. *Pigg v. State*, 48 Tex. 108; *O'Brien v. State*, 6 Tex. App. 605; *Johnson*

**ERROR** to the District Court for Arapahoe County to review a judgment convicting defendants of conspiracy to commit larceny. *Reversed.*

Statement by **Goddard, J.:**

On the 8th day of June, 1889, James Connor, Charles Connor, and James Marshall were indicted in the district court of Arapahoe county for a conspiracy to rob the Denver & Rio Grande Railroad Company. The indictment contained five counts, charging the offense in various forms. On the 5th day of October, 1889, the cause came on for trial, and upon the 28th day of October, 1889, a verdict of guilty against the defendants was

returned upon all the counts of the indictment. Motions for new trial and in arrest of judgment were filed and overruled, and they were sentenced, under the verdict upon the first count of the indictment, to imprisonment in the county jail, and to pay a fine and costs. They bring the case here for review, and present numerous assignments of error as grounds for reversal of such conviction and sentence.

*Messrs. Rhodes & Carpenter and Charles Hartzell* for plaintiffs in error.

*Messrs. Eugene Engley, Joseph H. Maupin, and John G. Taylor* for the People.

v. State, 3 Tex. App. 583; *People v. McCord*, 76 Mich. 200.

As part of this rule it may be stated further that to convict the accused he must himself have done all that was necessary to constitute the offense. He cannot be made answerable for acts of the agent of the victim. *Spelden v. State*, 3 Tex. App. 155, 30 Am. Rep. 128; *State v. Douglass*, 44 Kan. 618; *State v. Hayes*, 105 Mo. 76; *State v. Jansen*, 22 Kan. 406; *People v. Collins*, 53 Cal. 135; *Williams v. State*, 55 Ga. 391.

So when the commission of the offense is procured by the prosecutor for some purposes of his own there would seem to be no ground for holding the accused guilty, and such is the rule where the offense can in a sense be regarded as committed against the prosecutor and absence of his consent is a necessary element of the crime. *King v. McDaniel*, Foet. C. L. 121, 2 East. P. C. 665; *People v. McCord*, *supra*; *People v. Clough*, 59 Cal. 438.

But there is a class of cases in which the commission of the offense is solicited for the express purpose of furnishing cause for prosecution in which the fact of solicitation is held to be no defense. These cases seem to embrace offenses which may be regarded as more against the public generally than against the prosecutor. Such a distinction does not, however, furnish a sufficient basis for the application of a different rule. The true reason for the difference would seem to be that the offense following the solicitation is merely one of a kind habitually committed and the solicitation merely furnished evidence of the course of conduct. It cannot, therefore, be said to be the cause of it as it was in the case of *King v. McDaniel*, *supra*. In fact in some of the cases of this class there was nothing more than a facilitating of the commission of the offense, bringing the case within the rule 1, *supra*. Of this class are illegal sales of liquor, taking or answering decoy letters, etc. See cases *infra*. A careful discrimination between the necessary elements of the different crimes will usually account for the application of different rules in the different cases.

#### *Burglary.*

The fact that the owner upon being advised of the intended burglary makes no effort to prevent it, but provides a force to secure the arrest of the burglars, will not change their liability to punishment. *Thompson v. State*, 18 Ind. 386, 61 Am. Dec. 364.

Where one to whom persons who had planned a burglary of a store communicated their plan, informed the police and was advised to continue in the plot and keep the police informed, and they with the consent of the owner of the property secreted themselves in the store on the night when the burglary was to take place and captured them, it was held that there was no conspiracy to entrap defendants into committing the crime and no in-

ducements were offered to them to commit it, nor were they encouraged to do it; and that the mere consent of the owner of the property to have the officers occupy the store in order to arrest defendants did not constitute a consent to the crime. *People v. Morton*, 4 Utah. 427.

If the lock was broken by accused and an entry effected by him he cannot escape conviction because part of the fastenings were not in place at the time and the owner of the property and officers were waiting within to arrest the criminal in reliance upon information furnished them by a detective. *State v. Stickney* (Kan.) May 5, 1894.

But if the entry is made by means of a key furnished by the master to his servant for the purpose of furthering the scheme to entrap the burglar, there can be no burglary. *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 477.

So where a servant after being approached to aid in robbing his master's house pretended to consent and then informed the police who told him to proceed and he went out and found the defendants and took them to the house letting them in through the door, it was held that they could not be found guilty of burglary, but one was convicted of stealing from a dwelling house, and the other for being an accomplice before the fact. *Reg. v. Johnson*, Car. & M. 218.

Where the proprietor of a store and three other persons by appointment with a fifth who was acting as a private detective for the purpose of apprehending a criminal, stationed themselves in the store and left a window unfastened through which the defendants and the detective entered when defendant was arrested, the court said if the crime was instigated by the detective with the acquiescence of the proprietor of the store he would not be guilty of burglary, and if defendant was merely aiding and abetting him he could not be guilty, and the prisoner was discharged on the ground that the evidence which had been offered did not justify the submission of the case to the jury. *People v. McCord*, 76 Mich. 200.

Where the one who had informed the sheriff was the only one who entered the building, it was held that no burglary had been committed for the aiding of which the one sought to be entrapped could be convicted. *People v. Collins*, 53 Cal. 135.

If the one to whom a burglary is suggested and who becomes informer and acts with the police to capture the other party is the only one who enters the building and does so with no felonious intent his companion cannot be convicted of burglary, although if he attempts to carry away property which is taken from the building he may be guilty of larceny. *State v. Hayes*, 105 Mo. 76.

In *Sanders v. State*, a Tennessee case decided in 1879 and stated in 25 Alb. L. J. 115, the court held that if the breaking of the house and removal of the property was the act of the owner's servant with the owner's consent and accused only aided

Goddard, J., delivered the opinion of the court:

We omit the discussion of many of the errors assigned, not because we regard them as without merit, but because those considered are more important, and are decisive of the case. The vital and important question presented by the record is whether, under the evidence, any crime is shown to have been committed. The crime charged is a conspiracy entered into by the defendants below (plaintiffs in error here), to rob the Denver & Rio Grande Railroad Company. The statute defines a conspiracy as follows: "If any two or more persons . . . shall agree, conspire, or co-operate to do, or aid in do-

ing, any other unlawful act," etc. To constitute the crime there must be not only an agreement to co-operate to do a certain act, but that act must be unlawful. The unlawful act to be done in pursuance of the conspiracy as charged in the indictment was the commission of larceny in taking the property of the Denver & Rio Grande Railroad Company. The evidence introduced on the trial to sustain the fact of confederation between the plaintiffs in error was the testimony of the witness Holliday, *alias* Ward, which in effect is that he was in the employ of Thiel's Detective Agency, of St. Louis, Mo., and was sent to Kansas City on a special mission to find out if one James Marshall

and abetted the servant they would not be guilty; but if the plan or plot was only to detect the crime and not to bring it about, the accused would be guilty if in fact they feloniously broke and entered or without the owner's consent and with a felonious intent they removed any part of the stolen property.

In *Rex v. Bigley*, 1 *Crawf. & D. C. C.* 202, the persons in waiting went to the extent of opening the door in response to the burglar's knock, and a conviction was upheld. In that case since the intention was to secure admission by fraud which would not deprive the offense of the burglarious character it may be that the owners pretending to be defrauded would not defeat a conviction, but the case is very close to the line.

Where detectives who were working up a case against defendant went into a bank and then went out and told defendant that they wanted more help and solicited him to go in to help them and then he followed them in, it was held that he was not a burglar. *Speiden v. State*, 3 *Tex. App.* 156, 30 *Am. Rep.* 120.

#### Robbery.

It is no defense to a prosecution for robbery that one having heard of the practice of a highwayman to rob a certain stage accompanied it in a post-chaise for the purpose of apprehending him, and when he came up and presented a weapon and demanded money gave him some, and then with a weapon which he carried for that purpose and with the assistance of the passengers of the stage captured the robber. *Norden's Case*, *Fost. C. L.* 120.

But where several persons arranged among themselves that others should be procured to rob one of them who should be stationed at a designated place in the highway for that purpose, with a view to obtaining the reward offered for the apprehension of robbers, the court held that no robbery could be held to have been committed. *King v. McDaniel*, *Fost. C. L.* 121, 2 *East, P. C.* 665.

No robbery can be held to have been committed if the victim and a third person had arranged that the former should meet the latter and defendant at a certain place and go through the form of being robbed for some purpose of their own. *People v. Clough*, 59 *Cal.* 438.

In *Rex v. Fuller*, *Russ. & R. C. C.* 406, it seems to have been held that giving a man money for the purpose of apprehending him will prevent the offense from being robbery.

#### Larceny.

The taking of property from a building is not changed from the offense of larceny in a building by the fact that a police officer has been stationed there to watch and see the thief when he took the property. *Com. v. Nott*, 135 *Mass.* 239.

Where, for the purpose of determining who had

been committing some crimes, a police officer feigned drunkenness and pretended to fall in an alley in a drunken stupor, and while so lying in a perfectly conscious condition defendant came up to him and took some money out of his pocket, he making no resistance, it was held that there was no such consent as to prevent the taking being larceny. *People v. Hanselman*, 76 *Cal.* 460. In that case the court says: "We do not think there is such consent, where there is mere passive submission on the part of the owner of the goods taken and no indication that he wishes them taken, and no active measures of inducement employed for the purpose of leading into temptation."

Merely furnishing opportunities to commit larceny for the purpose of entrapping the one who proves guilty will not prevent his conviction. *Varner v. State*, 72 *Ga.* 745.

The mere presence and pretended assistance of a detective will not relieve one from the result of his acts, if he himself does all that is necessary to constitute the crime, although he may not be chargeable with what is done by the detective. *State v. Jansen*, 22 *Kan.* 496.

Where one has been notified of a design to steal his goods, which he neither ratified nor suggested, he may in order to detect the thief direct an agent to encourage the design and afford facilities for the completion of the crime; and such facilities will not affect the criminality of the thief. *State v. Duncan*, 5 *Rob. (La.)* 562.

If one pretending by way of artifice to be an accomplice but believed by the accused to be a real accomplice performs, at the instance of the owner of the goods, acts amounting to the physical constituents of larceny, the pretended accomplice represents the owner and not the accused, although the accused may have concurred in the acts and thought he prompted them, and therefore for them the accused cannot be held guilty. *Williams v. State*, 55 *Ga.* 301. In that case the court says: "Should not the owner and his agent after making everything ready and easy wait passively and let the would-be criminal perpetrate the offense for himself in each and every essential part of it? To stimulate unlawful intentions with the motive of bringing them to punishable maturity is a dangerous practice."

Where a slave was sent with some money to a certain place where the owner of the money and others were lying in wait, and the slave was approached by a third person, who was seized by the owner and the money found lying on the ground, without any evidence to show that such person intended to take it, the court held that even if it had been found in his possession it would not be larceny because the owner had consented to its passing into his possession. *Dodd v. Hamilton*, *Taylor's N. C. Term Rep.* 31.

If the property is delivered by a servant to the defendant by the master's directions the offense

corresponded with the police department of Denver, and also to find out if he knew anything about the First National Bank robbery. That he met Marshall, and learned from him that the chiefs and heads of the police department in Denver were his friends, and would co-operate with him, or any one he should introduce, in any unlawful scheme, and, upon obtaining promise of a letter of introduction to them from Marshall, he (Holiday), returned to St. Louis to report to his superiors what he had done. That his superiors suggested that he devise a scheme to rob an express company, planning such robbery like one that had taken place in Missouri. On the 9th day of April he returned

to Kansas City, and, on meeting Marshall again, he told him that he had a friend in New York who knew a messenger who ran out of Denver, and from whom he could get a letter to such agent; that he had written for the letter, and it would be in Denver in a few days. That Marshall expressed a hope that it was on the Denver & Rio Grande. That he obtained the letter of introduction to James Connor, and agreed with Marshall to let him know where he was stopping in Denver, and to wire him before the robbery, so he could come on and take part. On his arrival in Denver, and on the 12th of April, he presented his letter of introduction to James Connor, and stated to him the same

cannot be larceny. *Reg. v. Lawrence*, 4 Cox, C. C. 438.

If the owner of goods consents that his slave shall deliver them to a third person, such person cannot be guilty of larceny. *Dodge v. Brittain*, Meigs, 84.

If the design is originated by the owner there can be no theft, but if it is originated by the accused and the owner merely affords an opportunity and provides for a discovery of the thief, the guilt will be complete. *Pigg v. State*, 48 Tex. 103.

A servant who appropriates to his own use money which his master has marked and given to a third person to purchase goods at the master's shop is guilty of a breach of trust within the statute, 39 Geo. III., chap. 85; *King v. Whittingham*, 2 Leach, C. C. 912; *King v. Hedges*, Id. 1083. But he is not guilty of larceny, because the money cannot be said to have been taken from the possession of the master. *King v. Bull*, 2 Leach, C. C. 841.

In *Saunders v. People*, 38 Mich. 218, in which in obedience to a request made to an officer to leave the court-room unlocked in order that certain papers might be taken from it, the police made a plan to capture the would-be thieves, the court makes some very forcible remarks about what it calls the reprehensible character of the acts of officers who upon being notified of a purpose to commit crime, instead of taking steps to prevent it, assist and encourage it for the purpose of arresting the offender.

In *Reg. v. Williams*, 1 Car. & K. 195, defendant having made propositions to a bar-tender to rob the master's till, the matter was communicated to the master who directed the servant to send for defendant and carry out the design. The defendant came to the shop and according to agreement pretended to purchase drinks and was given an excess of change by the bar-tender, a part of which was marked coin. He was immediately afterwards arrested and the marked money being found on him he was convicted of stealing.

If the owner of property on being informed by his servant that he has been solicited to take part in a robbery of the master's house, tells the servant to carry on the business and consents to his opening a door leading to the premises, and also marks property and lays it in a place where the robbers are expected to come with a view to apprehending them, his consent will not be a defense to an indictment against the robbers. *King v. Eginton*, 2 Bos. & P. 508, 2 Leach, C. C. 913, 2 East, P. C. 494, 668. In that case, however, the offense was held not to be burglary, because it was not committed in a place capable of being burglarized, and the discussion of the effect of the owner's acts did not therefore extend to the question of whether his acts prevented the offense from being burglary, but whether they prevented it from being felony at all, and although one of the justices doubted whether it could be said to be done *in loco domus*, the others

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thought that the owner's consent did not take away the criminal character of the offense and the prisoners received the punishment to which they would have been liable for larceny. The court said: "The design originated with the prisoners and all that the owner did was to prevent the design from being carried into undetected execution. Which differed the case greatly from what it might have been if he had employed his servant to suggest the perpetration of the offense originally to the prisoners."

It is no defense to an indictment for soliciting a servant to rob his master, that the servant sought out the defendant with the express purpose of receiving a solicitation that the defendant might be convicted. *Reg. v. Quail*, 4 Post. & F. 1074.

#### *Stealing slave.*

There seems to have been some difference of opinion upon this branch of the question. In Tennessee it was held that one cannot be guilty of stealing a slave who is the whole time under the control of his master carrying out a plan to entrap the supposed thief. *Kemp v. State*, 11 Humph. 320.

But in South Carolina it was held that the fact that the owner of a slave consented to the slave's apparently consenting to go with one who was trying to steal him, for the purpose of apprehending the thief, is not sufficient consent to deprive the act of its criminal character. *State v. Covington*, 3 Bail. L. 560.

Likewise in Texas it was held that the mere fact that the owner of a slave who learns of an intent to steal him directs the slave to appear to go with the thief for the purpose of procuring his arrest, will not prevent the thief's conviction if he actually appears to take possession of the slave and carry out his purpose. *Alexander v. State*, 12 Tex. 540.

In *State v. Jernagan*, Taylor's N. C. Term Rep. 44, which was an indictment for stealing a slave, it was said that there could be no stealing of the slave if the owner through his agent consented, for the purpose of apprehending the thief. But that if the accused brought a stolen slave to a particular place after the assent of the owner had been given, but in pursuance of a plan matured and partly executed before that time, they might be convicted.

#### *Trading with slave.*

A prosecution for illegally trading with a slave will not be prevented by the fact that the owner of the slave gave him the goods and then went along to see the transaction, that he might procure evidence against the guilty party. *State v. Anone*, 3 Nott & McC. 27.

That the master gives the slave property for the purpose of being carried to the defendant for sale or barter, will not prevent his conviction of trading with a slave. *State v. Sonnerkalb*, 3 Nott & McC. 235; *State v. Stroud*, Id. 24.

in reference to a letter to an agent. That he (Connor), expressed the hope that it was over the Denver & Rio Grande. That on the 18th of April he met Farley, who was then resident manager of Thiel's Detective Agency in Denver. "Told Farley I had a talk with Connor. . . . Up to this time I had done what I did from instructions from the St. Louis office. After this I was under instructions from Farley. Question. When did you first discuss the plan of the robbery, and with whom did you first talk about the plan of operations to rob this road? Answer. I think it was with Mr. Farley at 31 and Curtis. We discussed the D. & R. G. road, when I told him what I had learned from the defend-

ants." That a letter was prepared in Mr. Farley's office, with the consent of the officers of the company, purporting to be written by one William S. Buell, of New York, to Icon, an express agent in the employ of the Denver & Rio Grande Express Company, introducing to him Mr. Holliday as Joe Ward. That plans were devised between Holliday and Connor to carry out the robbery. Mr. Farley testifies that on the night of the 18th of April, after meeting Holliday, he saw Mr. Gillooly, treasurer of the Denver & Rio Grande Railroad Company, and told him what Holliday had said; and, it appears from the evidence, from that time on, the company, through its officers, not only con-

#### *Offering bribe.*

The offer of a bribe upon the suggestion of an officer that he will accept it is not punishable. *O'Brien v. State*, 6 Tex. App. 665.

#### *Counterfeiting.*

In *Reg. v. Bannen*, 1 Car. & K. 295, 2 Moody, C. C. 303, after an order had been given for the construction of dies from which shillings could be struck, the one receiving it communicated the fact to the officers of the mint, and they told him to proceed and fill the order which was done, and then the one giving the order was convicted of felony.

#### *Receiving stolen goods.*

There is an English case upon this subject which perhaps meted out justice, but looking at the facts of the case it is difficult to see upon what ground the conviction was had.

A boy stole brass from his master and having been detected it was taken from him, but restored to him for the purpose of permitting him to sell it to one to whom he had previously sold such things, in order to prosecute the latter. After he had purchased the property, he was arrested, convicted, and sentenced for feloniously receiving property which he knew to have been stolen. *Reg. v. Lyons*, Car. & M. 217.

In *Reg. v. Dolan*, 6 Cox, C. C. 449, however, it was held that if stolen goods are restored to the possession of the owner and he returns them to the possession of the thief for the purpose of enabling him to sell them to a third person, such person although he buys the goods cannot be convicted of receiving stolen property. By that case *Reg. v. Lyons*, supra, was overruled.

So where a boy was searched by a policeman at the instance of his master and a cigar, the property of the master, found on him, and then five other cigars were given him and he was directed to give them to accused which he did, and then accused was arrested for receiving stolen property, the court held that he could not be convicted on the charge. *Reg. v. Hancock*, 14 Cox, C. C. 119, 28 Moak, Eng. Rep. 554.

#### *False pretenses.*

It is no defense to an indictment for obtaining money by false pretenses that the one from whom it was obtained had laid a plan to entrap the defendant into the offense. *Rex v. Ady*, 7 Car. & P. 140. In that case a clergyman having received a letter purporting to come from James Laurie, which promised valuable information for certain compensation, took the letter to defendant who falsely represented himself to be a partner of Laurie and to be entitled to receive the money. The money was given to him and the information received which proved valueless, and defendant was then prosecuted for obtaining the money by false pretenses. The trap seems to have been in showing the letter to defendant in order to give him an op-

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portunity to claim the compensation, but whether this is so or not is not clearly brought out in the report of the case. The report upon this point is in fact very unsatisfactory.

#### *Putting away forged instruments.*

An indictment for disposing of and putting away forged bank notes cannot be defeated by showing that the notes were purchased by persons who knew them at the time to be forged and procured them at their own solicitation as agents for the bank for the very purpose of bringing the offenders to justice. *Rex v. Holden*, 2 Leach, C. C. 1019, 2 Taunt. 384, Russ. & R. C. C. 154.

#### *Obstructing railway track.*

Where an employé of a railway company, for the purpose of entrapping a third person into the commission of a crime which would send him to the penitentiary, invited him to go up the track with him, in the meantime informing another employé of the design and then after procuring liquor the two went along the track and were followed by the other employé and an officer who found a railway tie on the track and arrested the defendant, it was held if the tie was placed on the track by the employé the fact that the defendant consented to it would not constitute an offense for which defendant could be convicted. *State v. Douglass*, 44 Kan. 618.

#### *Conspiracy.*

A conspiracy to commit burglary is committed when the agreement is made, and the conspirators may then be convicted unless it is shown that the owner of the property or the detective created the original intent or agreement to commit the offense. *Johnson v. State*, 3 Tex. App. 593.

There can be no conspiracy between one contemplating a crime and one who has undertaken to entrap him and enters into the plan for that purpose. *Woodworth v. State*, 20 Tex. App. 375.

#### *Selling obscene prints and lottery tickets.*

It is no defense to an indictment for selling obscene prints that the buyer requested to have them shown him and purchased some for the purpose of prosecuting the seller. *Reg. v. Carlie*, 1 Cox, C. C. 229.

In *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 123, a person bought a lottery ticket for the purpose of securing the conviction of the seller of a violation of the statute against selling them. The defendant did not rely upon the fact that the offense had not been committed because of the facts, but did rely upon the contention that the purchaser was an accomplice, upon whose uncorroborated testimony a conviction could not be had. But the court overruled this contention.

sented that their property might be taken, but co-operated with the witness Holliday, through Farley, in perfecting plans by which such taking might be accomplished. Mr. Gillooly testifies that "Holliday was in the employ of Thiel's Agency. Thiel was in our employ. Whatever Mr. Holliday did was being done with the full knowledge and consent of the company. This scheme was being worked for nearly a month."

To constitute the crime of larceny at common law there must be a trespass,—that is, a taking of property without the consent of the owner,—coupled with an intent to steal the property so taken. It is therefore evident that the crime is not committed when, with the consent of the owner, his property is taken, however guilty may be the taker's purpose and intent. This is the accepted doctrine, as laid down by the various text-writers on criminal law. Mr. Bishop, discussing this principle in the fifth edition of his work on Criminal Law (sec. 262), says: "The cases of greatest difficulty are those in which one, suspecting crime in another, lays a plan to entrap him. Consequently even if there is a consent, it is not within the knowledge of him who does the act. Here we see, from principles already discussed, that supposing the consent really to exist, and the

case to be one in which, on general doctrines, the consent will take away the criminal quality of the act, there is no legal crime committed, though the doer of the act did not know of the existence of the circumstance which prevented the criminal quality from attaching." 2 Archbold, Crim. Pr. & Pl. 1181; 2 Russell, Crimes, 190; 3 Chitty, Crim. L. 925; 1 Whart. Crim. L. § 914. To the same effect is the uniform current of the decisions. In the case of *Reg. v. Johnson*, Car. & M. 218, it was held that, where a servant pretended to concur with two persons who proposed to rob his master's house, and acting under the advice of the police he opened the door for them to enter, there could be no conviction of burglary. Of the same purport is the case of *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 476, wherein it is said: "Where the proof showed that the prisoner proposed to a servant a plan for robbing his employer's office by night; that the servant disclosed the plan to his employer, by whom it was communicated to the police; that the master, acting under the instructions of the police, furnished the servant with the keys of his office on the appointed night; that the servant and the prisoner went together to the office, where the servant opened the door with the key, and they both entered through the

#### *Selling liquor.*

It is somewhat surprising that so few cases have arisen in which prosecutions for illegal liquor selling have been defended on the ground that the liquor was procured for the purpose of supporting a prosecution.

In a New York case it was held that the fact that the board of excise hired persons to purchase liquor for the purpose of determining violations of the law will not prevent the prosecution of the seller if he violates the law by selling to them. *Onondaga County Comrs. v. Backus*, 20 How. Pr. 83. In that case the board of commissioners were prosecutors, and the defense was that they could not recover because they were *particeps criminis*. The court says this is not a good defense, and while the question of the solicitation to commit the crime was not distinctly raised as a defense, the court says of that question: "Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian, ethics, it never will."

A city is not estopped from prosecuting a liquor bond by the fact that the evidence of the violation of it was procured by a police officer who was sent by the chief of police to ascertain if the defendant was selling unlawfully and to purchase some liquor if he was so doing, which instructions were obeyed. *Tripp v. Flanigan*, 10 R. I. 123.

The fact that the liquor was purchased by one who was hired to procure it for the purpose of a prosecution will not prevent a conviction if no public officers were concerned in sending to the defendant for the liquor. *People v. Murphy*, 98 Mich. 41.

Wharton in a note in 10 Fed. Rep. 92, cites two cases on the subject which seem to take opposite

sides of the question. In *Rex v. Titley*, London Law Times, July 30, 1881, a conviction was sustained where the sale was induced by the adroitness of the detective, while in *Blakie v. Linton*, 18 Scott, L. R. 533, a similar conviction was set aside, on the ground that the offense was the production of the solicitation.

#### *Offenses against the mails.*

Decoy letters have been so largely used to detect the commission of offenses against the mails that cases have become numerous in which the question of their effect has been considered.

The use of decoy letters by government inspectors is justifiable for the purpose of ascertaining depredators upon the mails. *United States v. Dorsey*, 40 Fed. Rep. 752.

The fact that a letter which is stolen from the mail was a decoy letter is no defense. *United States v. Cottingham*, 2 Blatchf. 470.

A mail carrier cannot escape prosecution under the United States statute prohibiting the stealing of letters committed to the post, by the fact that the letter for the taking of which he was indicted was placed in the mail by the post-office authorities as a decoy to determine who was responsible for the disappearance of letters while passing over that route. *United States v. Foye*, 1 Curt. C. C. 364.

The fact that circulars concerning lotteries are sent in response to decoy letters will be no defense to the one sending them. *United States v. Moore*, 19 Fed. Rep. 30.

The fact that letters containing information as to where lewd pictures can be obtained were sent in response to inquiries by government detectives does not relieve the act of its criminal character if the inquiries did not solicit defendant to send the information through the mails. *United States v. Grimm*, 50 Fed. Rep. 523.

But a conviction for sending unmailable letters through the mails cannot be had when they are sent in answer to a decoy letter written by a government detective which invited correspondence and enclosed stamps for a reply. *United States v. Adams*, 59 Fed. Rep. 674.



door, and were arrested in the house by the police,—held, that there could be no conviction of burglary." In the case of *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126, the defendant was indicted for burglary by breaking into a bank with intent to commit theft. The court says: "In the case at bar the detectives cannot be considered in any other light than as the servants and agents of the bankers, Adams & Leonard. They (the detectives) had the legal occupancy and control of the bank. Two of them made arrangements with defendant to enter it, and defendant, when arrested, had entered the bank at the solicitation of those detectives, who were rightfully in possession, with the consent of the owners. This cannot be burglary in contemplation of law, however much the defendant was guilty in purpose and intent." In *Dodge v. Brittain*, Meigs, 83, it is said: "Receiving goods, with the owner's consent, from his servant, is not larceny, it being of the essence of the offense that the goods be taken against the will of the owner, *ex vi domini*." Of the same purport are *Kemp v. State*, 11 Humph. 320; *State v. Chambers*, 6 Ala. 855; *Zink v. People*, 77 N. Y. 114, 33 Am. Rep. 589; *United States v.*

*Whittier*, 5 Dill. 35; *State v. Covington*, 2 Bail. L. 569; and numerous other cases that might be cited.

Counsel for the people concede the soundness of the doctrine as above announced, but seek to escape its application upon the ground that the plaintiffs in error were not prosecuted for stealing from the railway company, and therefore the attitude of the company made no difference. In other words, it is contended that the conspiracy to do an act constitutes a crime, although the act to accomplish which the conspiracy is formed would not be unlawful if committed. To state the proposition is to refute it. We think the law applicable to this case is clearly and correctly stated in the case of *Johnson v. State*, 3 Tex. App. 598. The court says: "The fact of such conspiracy once being established, the subsequent consent of the owner (or those acting for him) for the conspirators to enter the building will not affect their guilt in the least, unless the evidence shows that Higgins and Garwood, or the detective employed by them, suggested the offense, or in some way created the original intent or agreement to commit the offense as charged." In the case of *Saunders v. People*, 88 Mich.

There has been some dispute as to how far a letter directed to a fictitious address was within the protection of the statutes.

In *United States v. Denicke*, 35 Fed. Rep. 407, it was held that a letter addressed to a fictitious address was not within the provisions of the United States statutes.

But the weight of authority upon that question is the other way.

In *Bates v. United States*, 11 Biss. 70, it was held that the mere fact that the letters to a person who had assumed a fictitious name were addressed to such name was no defense, but the effect of the decoy letters which were used to induce them to do so is not stated.

The case is within the provisions of the statutes although the letter was a decoy and was addressed to a person having no existence. *United States v. Bethea*, 44 Fed. Rep. 803.

In *Reg. v. Gardner*, 1 Car. & K. 623, to test the honesty of a post-mistress an officer of the post-office placed marked money in an envelope and directed it to a fictitious address, the post-mistress took the money and was indicted for larceny and for stealing a post letter contrary to the statute, and it was held that the count for stealing a post letter would not lie, but that she was guilty of larceny. That case, however, seems not to be in accord with that of *Reg. v. Newey*, stated in a footnote to page 623, in which money was put into a folded paper and directed to a fictitious address and not postmarked. It was stolen by the defendant and he was given a punishment greater than the indictment for larceny would have warranted. And in *Reg. v. Young*, 2 Car. & K. 466, 1 Den. C. C. 194; *Reg. v. Gardner*, *supra*, was overruled, and it was held that a letter would not be prevented from being a post letter because it contained a fictitious address.

The latter case further held that a letter regularly dropped in a box with postage paid is a post letter within the protection of the English statutes.

There has also been considerable uncertainty as to when a letter was a post letter within the meaning of the statutes.

Where, while an employé who was engaged in sorting letters had turned away for a moment, a decoy letter was placed in the package and he subsequently took it, it was held that he could not be convicted of stealing a post letter, but that he could be convicted of larceny of the money contained in it. *Reg. v. Rathbone*, Car. & M. 220, 2 Moody, C. C. 310.

Where the letter was passed into the post-office by inspectors in an irregular way for the purpose of testing the honesty of an employé and secretly put in his way, it was held not within the protection of the English statutes. *Reg. v. Shepherd*, 2 Jur. N. S. 96, 25 L. J. M. C. 83, Dears. C. C. 606.

A decoy package which is not intended to be mailed, but to be put into a receptacle for unmailed matter which it was the duty of employés to examine and forward to the dead-letter office if it contained anything of value, is not within the provisions of United States statutes relating to the punishing of offenses against the mails. *United States v. Rapp*, 30 Fed. Rep. 813.

The letter is not intended to be conveyed by mail within the meaning of the statute, when the postal authorities acting in co-operation with the sender intended after the letter was put into the mail to resume possession of it themselves or to permit the sender to do so before it reached the hands of any carrier or messenger, or other postal employé for delivery to the proper person. *United States v. Matthews*, 1 L. R. A. 104, 35 Fed. Rep. 890.

But if there is no intention to intercept a letter before it is delivered to the one to whom it is addressed, it is immaterial that it was not posted at the office where it is postmarked, but was delivered by the inspector at the delivery office and placed by the postmaster with other mail to be sorted. *Walster v. United States*, 42 Fed. Rep. 891.

In *United States v. Whittier*, 5 Dill. 35, 18 Alb. L. J. 110, it was held that the provision of the United States statute which prohibits the use of the mail for sending obscene literature was not violated by sending addressed to a fictitious person in reply to a decoy letter, information as to where could be obtained the means of preventing conception, but which on its face gave no information as to what such means were. The decision is, however, expressly put upon the ground that the particular act charged in the indictment did not come within the language of the statute.

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218, the defendant was convicted of breaking and entering by night a court-room, and feloniously taking therefrom certain bonds. The defendant Saunders was a lawyer, and it was shown in evidence that he asked Webb, a policeman, to leave the door of the court-room unlocked in order that he might get the bonds, and that Webb, after consulting with his superior officer, consented, and then lay in wait, and caught one Moylan removing the papers. The supreme court of Michigan, composed of *Judges Campbell, Cooley, Marston, and Graves*, reversed the conviction, and severely denounced the conduct of the officers in conniving with persons suspected of criminal designs, for the purpose of arresting them in the commission of the offense. *Judge Marston*, concurring in a separate opinion (pages 221, 222), says: "The course pursued by the officers in this case was utterly indefensible. Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his further debasement. Some courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals, but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing. The mere fact that the person contemplating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification, for the course adopted and pursued in this case." *Campbell, Ch. J.*, also concurring (at page 223), said: "Assuming that there is not in the record full evidence of such an invitation to enter the clerk's office as would conclusively show there was no breaking, the encouragement of criminals to induce them to commit crimes, in order to get up a prosecution against them, is scandalous and reprehensible." We feel warranted in quoting thus fully from these opinions because the views therein expressed are specially pertinent to the facts in this case, and because of the universally recognized learning and ability of the eminent jurists who announced them. In the case under consideration, the only evidence of the inception of the scheme to rob the express company is that of Holliday, who states that it was instigated by his superiors at St. Louis, and by him suggested to the plaintiffs in error. It further appears that before the consummation of the conspiracy the officers of the express company were informed of and consented to the scheme; hence, under the foregoing authorities, the prosecution cannot be sustained. We do not wish to be understood as intimating that the services of a detective cannot be legitimately employed in the discovery of the perpetrators

of a crime that has been, or is being, committed, but we do say that when, in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime, and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked, rather than encouraged, by the courts. And, accepting the version of the witness Holliday as true, it shows a state of facts that can have no place in the decent administration of justice.

The witnesses Farley and Newcome were permitted, over objection, to testify to statements made to them by the witness Holliday, not made in the presence of plaintiffs in error, or either of them. This was hearsay evidence, and clearly inadmissible. Counsel for the people attempt to justify the admission of this testimony upon the ground that the testimony of Holliday was attacked on cross-examination, and his credibility questioned, and therefore the people had a right to corroborate him in this manner; asserting that such procedure was in conformity to well-established authorities. No authority is cited, and upon a full and careful research we feel safe in asserting that no authority can be found that will sanction the admission of this evidence. In the language of *Buller, J. (King v. Parker, 3 Dougl. 244)*, "It is now settled that what a witness said, not upon oath, would not be admissible to confirm what he said upon oath." *Greenleaf*, in his work on Evidence (volume 1, § 409), says: "But evidence that he has, on other occasions, made statements similar to what he has testified in the cause, is not admissible." In *Robb v. Hackley, 23 Wend. 50*, *Bronson, J.*, in a very exhaustive opinion on this subject, says: "But as a general, and almost universal, rule, evidence of what the witness has said out of court cannot be received to fortify his testimony. It violates a first principle in the law of evidence to allow a party to be affected, either in his person or his property, by the declarations of a witness made without oath. And, besides, it can be no confirmation of what the witness has said on oath, to show that he has made similar declarations when under no such solemn obligation to speak the truth. It is no answer to say that such evidence will not be likely to gain credit, and consequently will do no harm. Evidence should never be given to a jury which they are not at liberty to believe." The only exception to this rule, as stated by *Greenleaf* in the section above cited, is "where a design to misrepresent is charged upon the witness in consequence of his relation to the party or the cause, in which case it seems it may be proper to show that he made a similar statement before that relation existed." At the time of the admission of the testimony the plaintiffs in error had made no attempt to impeach the witness Holliday, nor did they at any time do more than to deny his statements, when on the stand as witnesses in their own behalf. The witnesses Farley and Newcome testified that they had no personal knowledge of the facts stated by

Holliday, and were simply repeating the story told by him. The harmfulness of this can be readily seen. The witness Farley was at the time holding an important official position. He was a respectable citizen, and possessed the confidence of the community, and the repetition by him of Holliday's story might give it a weight and credibility greater than would have attached to it when told

alone by Holliday. However this may be, the admission of this testimony was so violative of every rule of evidence that in itself it would compel a reversal of the case, and it becomes unnecessary to notice the further objections so fully argued by counsel.

For the reasons given, *the judgment will be reversed.*

## PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania

Herschel H. HOLLISTER, *Appt.*

(187 Pa. 13.)

1. **Active participation in planning a felonious taking of money** followed by an actual taking by a part of the confederates in pursuance of the plan will warrant a conviction of larceny, although accused was not present when the crime was actually committed.
2. **A conviction of larceny will not be prevented** by the fact that one of the supposed confederates in the plan had informed the police and the intended victim and was acting with them for the purpose of detecting and punishing the guilty parties, if the latter had no knowledge of it and performed all the acts necessary to consummate the crime.
3. **The testimony of one who pretended to act** with others in the commission of a crime for the purpose of detecting and punishing them is alone sufficient to sustain a conviction.

(October 2, 1893.)

**A**PPPEAL by defendant from a judgment of the Court of Oyer and Terminer for Lackawanna County convicting him of the crime of larceny. *Affirmed.*

Defendant and three other persons were put on trial under an indictment charging them with larceny. Two of the defendants pleaded guilty, and defendant and his brother pleaded not guilty. The brother was acquitted and defendant convicted. The facts of the case are sufficiently stated in the charge given to the jury by the court below, which, after stating the general law on the subject of presumption of innocence continued with a statement of the evidence as follows:

"At high noon, on October 17, last, an attempt was made upon the pay office of Spencer Brothers, at Dunmore, in this county. The purpose was to secure the money which was then there ready to be paid out to the men that afternoon. The plan, as arranged and carried out, was a daring one. The office, according to the evidence, is somewhat removed from the rest of the works, and from other points in the borough. Charles Engle, a former employé of the firm, that day first approached the office to see that the way was

clear, and that there was only the one man in charge of the office, as was expected. It was found that there was but the one man there, — Mr. Brady. Brown and Snow followed Engle for the purpose of actually committing the robbery, Brown, however, according to his own testimony, and the testimony of the police and Mr. Spencer, being merely there as an informer, participating only for the purpose of bringing the others who were involved in the crime to conviction. They entered the office, Brown and Snow masked. Snow pointed his revolver at Brady, who was in charge, and ordered him to throw up his hands. That they seized, bound, blinded, and gagged him, and took the money lying out upon the table, and put it into bags and left, going from there to Engle's for the purpose of disposing of their plunder. The police, who have been all the while informed, and on the watch, closed in upon them, and arrested the three offenders with the plunder in their grasp. The charge is made by the commonwealth here that others were involved in this offense, and not alone those who were there immediately participating in it; that the commission of this crime was incited and planned by the present defendants, E. B. and H. H. Hollister. If this be true,—if it be established by the evidence,—the defendants here are just as guilty of an offense against the law as if they were actually present and participated in it. While in such a case they are not called 'principals,' but only 'accessories before the fact,' yet they may, under our law, be tried and convicted on the present indictment, which charges them as principals. Morally, we are inclined to feel that men who incite and plan a crime, and allure others into it, pushing them forward into the actual commission of the offense, while they keep themselves behind and away from it, are, in fact, the greater villains than those whom they make merely their instruments and tools.

"At this point we may as well dispose of a question with regard to the nature of the offense, which I have said to you I will discuss later on. It is claimed by the defendants that whatever was done that day was not a robbery. Robbery is the felonious taking of personal property of another by violence or putting in fear; or, perhaps, we may say, it is the felonious taking of the personal property of another by subduing him by actual violence, or a show of it. It is not simply stealing from the person of another, and it is different from all stealing. We

**NOTE.**—As to consenting to crime for the purpose of detection, see note to the case immediately preceding this one.

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might steal from the person of another,—for instance, from one who was asleep. That would be larceny, and not robbery. If the person were awake, and violence were threatened or actually inflicted upon him, and in that way property was taken from his person, that would be robbery. I hope that illustrates the distinction. In this case with which we are now dealing there is one element of robbery wanting. The evidence is that the commission of the offense was known in advance, and preparations made to meet it. The money which was there at that office was divided, only sufficient being put in sight to make a proper showing, and the rest being away under the table. Brady, the man in charge, was told that these men were coming, and that he should make no resistance, and he made none. There was such an understanding between the owners of the property, the Spencers, and the party who was in charge of it, Brady, and Brown, one of the participants, as reduced the offense from robbery to either mere larceny or an attempt to commit a robbery. In this connection I will read the defendant's sixteenth point: 'That there is not sufficient evidence in the case to support a verdict of guilty of robbery.' Answer of the Court: That I affirm. You are not, however, gentlemen, to mistake the effect of what I say in this immediate connection. That there was not crime there I do not instruct you, but I only say that the crime there committed was not what is technically known in the law as 'robbery.' Morally, we may feel that there was just as much guilt as if there was an actual robbery, and that the offense is just as deserving of punishment, though it amounted merely to an attempt to commit the crime. The precautions taken merely relieved the case of one element peculiar and essential to the crime of robbery. In popular saying there was a robbery, but in legal sense not.

"Turning, now, to the indictment, we find that there are four counts in it. The first and second counts charge that a robbery was committed with a weapon; with an offensive weapon,—a revolver. The weapon on that occasion, which was in the possession of Snow, according to the evidence, was furnished by Brown, and was not essential to carry out the plans which had been previously made, although not unnatural to it. But as the offense was planned by the Hollisters, according to the evidence of the commonwealth's witnesses, the robbery was not to be accomplished by means of arms, and for that reason, and out of abundant caution, I instruct you that there can be no conviction on the first and second counts of this indictment, which charge a robbery as committed upon Brady with an offensive weapon. The third count in the indictment charges a simple robbery. The fourth count charges a larceny. Now, although I have said to you that there was no robbery committed there that day, yet upon the third and fourth counts, if you are satisfied by the evidence to that effect, you may convict the defendants on the third count of an attempt to rob, and on the fourth count of a larceny, according as you are satisfied and convinced by the evidence in the case.

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You are merely, then, to confine yourselves to considering the third and fourth counts in the indictment, and you are to remember that there can be no conviction, in any case, of robbery, although there may be a conviction of an attempt to rob.

"Engle says that he was first approached with regard to the commission of this robbery by 'Squire E. B. Hollister, as they were together on the Erie and Wyoming train coming from Maplewood some time late in the winter of last year. He says they sat in the seat together in the smoking car, sitting in the front seat. That on the first occasion no one was in front of them. Hollister approached the subject by asking Engle about the place of the Spencers at Dunmore. He asked whether Engle had not worked there, and then expressed the idea that it was quite an easy place to rob. He asked how it was protected, and Engle said there was a small building and only one paymaster, and generally only one there when they paid; that they generally paid on the 17th of each month. Hollister then said he could get a couple of men to do the job, and ended the conversation by saying that he would see Engle later. They had a second meeting and conversation upon this same subject on the cars at another time, and from this time on there were several interviews between the witness Engle and E. B. Hollister upon the subject. Once Hollister came to Engle while he was cutting ice at the Maplewood pond, merely saying on that occasion that he had heard nothing from the parties who had been approached with regard to actually doing the robbery. Then from time to time, at one time E. B. Hollister, and at another time H. H. Hollister, came to him at Dunmore, and discussed this question. On the first occasion H. H. Hollister came there, and professed a knowledge with regard to it, although prior to that, according to Engle's story, he had not talked with H. H. Hollister at all. H. H. introduced the subject as though he knew about it, although before that the only conversation had been with E. B. Hollister. Once an unnamed stranger was brought to Dunmore, and was introduced as some one from Philadelphia by H. H. Hollister. This matter was talked over, and the man without any name was introduced as one who had been brought there to arrange for the robbery. H. H. said at that time that he was the one who was going to make the arrangements in place of 'Squire Hollister, whom the men did not trust. It was on that occasion, I believe, that this stranger said something about his partner not being free, being in jail at that time, and I don't know whether it was then, or at another time, that there was some discussion about not undertaking it until there was a particular phase of the moon. Finally, we come down in Engle's story to the point where Wallace Snow was brought up to Dunmore by H. H. Hollister, and they went out by night into the field. Then, after that, Snow and Brown came with Hollister. This was within a week of the time that the offense of the 17th of October was committed. After this there were several meetings of importance, according to Engle's statement. On one occasion

they met at Harris' saloon, although this amounted to nothing, as one of the parties was not there, but H. H. Hollister, Snow, and Engle were there. Probably some time along here there was a meeting which Engle speaks of, and which the others also speak of, as occurring on Sunday at a place called 'The Delmonico', on Spruce street, when H. H. Hollister, Snow, and Engle were present. The final meeting, according to Engle's testimony, was at Harris', on Friday night, I think, just before the robbery. H. H. Hollister, Snow, Engle, and Brown were all there. The whole detail of how the robbery was to be committed was gone over, and also the division of the plunder spoken of, and in that connection H. H. Hollister said that there was another party who would have to come in for a division of the money, and mentioned his brother, 'Squire. H. H. Hollister then and there said that he himself would not be present at Dunmore when the robbery was committed, but would be somewhere else, so that he could prove an alibi, leaving his shop at twelve or half-past twelve o'clock, noon. Now, we have the further testimony of Wallace Snow upon this subject. It, of course, covers all the points that Engle testifies to when Snow was present, as well as others, of course, when Snow alone was there, and Engle not. We find from the testimony of H. H. Hollister that he first became acquainted with Snow at Dunnings, some four years ago, and that he saw him gambling there; that is to say, when Snow testifies that Hollister first approached him with regard to this subject, he knew that Snow was a gambler. He knew somewhat of the nature of the man, at least to the extent that his being a gambler was involved and drawn in it. Snow says that he was approached by Hollister one Sunday, as he was standing upon the street along in September. That he had a pitcher of hot water which he was carrying to a sick friend. The temptation was there held out to him in an adroit way, if his story be true, and Hollister pictured how he and Snow were getting too old to make their living by day's work, and that he knew where some money could be very easily made, and that it was the easiest and prettiest thing that he had ever seen. An appointment was then made for the next night at the Forest House stoop, and the parties met according to appointment, and walked around the streets talking about it. This time more particulars were given. The place was mentioned as a little building, a short way off from others, and that only one man was in charge. Snow said that he had never undertaken such business, but, having listened to the tempter, we may feel and see from the sequel, if his story be believed, that he was in his power. On this occasion, according to Snow's testimony, he wanted him to get some one to assist, so that there might be two, and at this point Denny seems to come in, because we find that Snow saw Denny, and arranged for a meeting with H. H. Hollister, and introduced Hollister to him, according to Denny's statement. Just when this was is not clear from the evidence, but the two parties or three parties took a

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walk together, and, among others, came up here to this court-house square, and sat down on one of the settees here, and, if this testimony is believed, right here, almost in the shadow of these walls, discussed and planned this robbery. The matter was explained and pictured to Denny in the same way Snow says it was pictured to him, and he promised to take it under consideration, but at a subsequent time, fortunately for him, he refused to go into it. Then the matter ran along for some time, as Snow says, until it came along to the 10th of October, and on that occasion H. H. Hollister came to Snow's house, and left word with his wife to come to his (Hollister's) house on Sunday. On Sunday, Snow did go to Hollister's and Hollister there said that he was anxious not to have the matter go over another month. They talked the whole thing over from the beginning. Snow told him that the other party—I presume meaning Denny—had dropped out, but Hollister said he had another man. Next we have an interview on the Forest House steps, and then again we have a meeting at Dunmore, when Engle was present, corresponding in that to the testimony of Engle himself. Then we have a meeting at Harris' on Thursday night, when H. H. Hollister, Engle, Brown, and Snow were present, and where there was a discussion of how the robbery was to be accomplished,—the whole thing talked over and arranged. Friday they met again at the same place; the same parties there, and the arrangements gone over and discussed very much as Engle testifies.

"We have the testimony of Brown.

"He does not begin in this offense where Engle did nor where Snow did, because he says that he was approached upon the 13th of October, a few days before the crime was committed; but he does say that, when he was approached, he was approached by H. H. Hollister, who was introduced by Snow, and the place was in front of Charles Tropp's former saloon. He says, further, that they met again the next night at Harris' saloon, and there the particular point of attacking a pay office as the offense to be committed was discussed. On Wednesday night Brown says he went up to Dunmore with Snow and Hollister, or at least Snow and Hollister and Engle were there when he got there, and while they were together the whole matter in regard to this robbery was talked over, and the witness agreed to take it up with the others. He even went out with one party, and walked around to the office. The next day he met Snow and Hollister at Harris' again, and arranged for a further meeting on Friday night, the night before the day of the crime. On Friday he met Snow, Hollister, and Engle. Then it was that Hollister spoke about going to Blatter's saloon at the time the crime was to be committed, so that he could prove an alibi, and Brown says he objected to this, and said that all must go to the one place, up there in Dunmore. The division of the money was also spoken of, and there Hollister spoke of there being three besides Snow and Brown, and said that 'Squire' Hollister was the fifth one of the party. Brown says, however, after he was

spoken to, the night of the first meeting at Harris', where some of the details of the crime were first developed to him, that he reported the matter to the chief of police, and from that time until the crime was actually committed he kept the chief informed of what was being planned, and, between Wednesday night and the Friday night meeting, Brown says he went to Dunmore with the chief of police to look over the ground. He says that he took part in the robbery on the day that it was committed, not as an accomplice in the crime, but merely as a decoy, or words to that effect. Now, if Brown is believed, he does not stand at all in the light of an accomplice, and we have in his evidence corroborating evidence of the testimony of Snow, so far as it implicates H. H. Hollister, and of Engle, so far as it implicates H. H. Hollister. In fact, Brown's evidence of itself would be sufficient to convict H. H. Hollister of complicity in this crime. The defendants, however, call and put him in the light of an accomplice, and in that way seek to destroy the effect of his evidence, and they point to an indictment which has been produced, and which has been found against him, and pending in this court. They say that he has the same motive to pervert the truth, and to put off this offense in which he was caught, upon somebody else, so that he may escape by apparently joining in with the prosecution started by the commonwealth. It is, however, very difficult to my mind, gentlemen, to reconcile any such suggestion as this with the other clear facts in the case. How could the chief of police lay the effective counterplan to catch these parties, unless some information was furnished, as he says—as Brown says he gave? And we have not only the testimony of Brown upon this; we have the testimony of Mr. Spencer and the chief of police. Now, Mr. Spencer is a man whose testimony will hardly be assailed or impeached, and he swears that he met Brown and Chief Simpson on Thursday night, and heard that this robbery was proposed, and was hardly able to believe it. We see, also, what Mr. Spencer swears that he did on the strength of this information, how he gave notice to Brady, and how he and Chamberlain put up and arranged the money, all upon the strength of information which he testifies he received in this connection through the medium of Brown. . . . The chief's conduct is also made the subject of criticism. I must say I cannot see that this is warranted. You may judge about him differently, and your judgment must be independent of mine, but I cannot see that he has done other than what is discreet and satisfactory, in that which he has been called upon to do in this case, and in any event his conduct, however you may view it, however adversely you may regard it or criticise it, only affects his own credibility. . . .

"Now, as to H. H. Hollister. He says that he first met Engle at Kinback's, and interested him in the model of a harrow which he had, and which he produces here. He next says that he went to see Engle at his home in Dunmore, to get him to take an interest and operate a stone quarry, which belonged to L. R. A.

to a certain Mr. Mitchel, near Wimmer's Summit. Engle said, according to Hollister, that he would see about it, and would have a talk with George Watson, with whom he was associated in the stone flag business. Upon a later occasion H. H. Hollister says that he met Engle at Harris', and went in and took a glass of lager with him there. On a still later occasion Hollister says that he was inside Harris' saloon, sitting by a table reading, and that he met Engle there, and talked about the stone business and about the harrow, and, while they were there talking, Snow and Brown came in, and they asked Engle upstairs, and himself. He hesitated about going up, but finally went, and they had some beer there together. He said he never saw Engle or Brown at any other time; that he did not meet Snow or Denny; never saw Engle or Brown at any other time; that he says that at these times when he admits that he met these parties nothing but what was natural and innocent was spoken of. He denies that the robbery, or any robbery or crime, was ever spoken of or discussed.

"I should not pass from the testimony of H. H. Hollister without referring to that part of his testimony which goes to trace his conduct at the time of the actual commission of this crime. If the evidence of the commonwealth was that H. H. Hollister was present, had participated in the commission of the offense, then the evidence as to where he was at the time would be important, because it would go to establish what we know in the law and commonly speak of as an alibi. But this is not the character of the offense against him. The commonwealth does not pretend to say that he was right there where the crime was committed. This evidence, therefore only has a legal bearing upon the case, so perhaps furnishes a basis for the argument that at the time when this offense was going on, when he, if he was near, must have known that it was, that he was about his ordinary and natural business, and that would not be likely of a man who was really interested, with his mind intent upon that which was happening at a distance. It is said, on the other side, that this would be just what a guilty man would do, if his purpose was to shield himself, and make out an alibi, and they point to the testimony of Brown and Snow, who swear that Hollister suggested that he would go to Blatter's saloon, and would not be present, but would go to Blatter's saloon for the purpose of making out an alibi. We also find, as a mere circumstance, — scintilla, — that Chief Simpson went to Blatter's to see if Hollister was there, which would be quite natural if he had received this information from Brown with regard to Hollister's purpose. On the other hand, it may be said on the part of Hollister that a complete alibi could have been made out, perhaps the best of all, by his keeping steady at his work, rather than by his leaving it."

*Measures. W. G. Ward, J. F. Scragg, and George S. Horn, for appellant:*

There was no felonious taking, since the whole scheme was arranged by the owner of

the money, and the taking was with his connivance.

*Bass's Case*, 1 Leach, C. L. 251.

If the evidence is believed, defendant was guilty merely of an attempt to commit larceny, which is a misdemeanor, not a felony.

Act March 31, 1860, § 103, Purdon, 435; Act March 31, 1860, § 50, Purdon, 437.

*Messrs. H. M. Edwards and John P. Kelly, Dist. Attys.*, for the Commonwealth:

A person acting as a detective, is not an accessory before the fact to the commission of a crime, although he counseled and encouraged its commission.

*Campbell v. Com.* 84 Pa. 187; *State v. McKean*, 36 Iowa, 848, 14 Am. Rep. 580; 1 Greenl. Ev. § 382.

*Sterrett, Ch. J.*, delivered the opinion of the court:

The indictment on which appellant and his brother were tried contains four counts, respectively charging the defendants therein named with (1) aggravated felonious assault and robbery; (2) aggravated felonious assault with intent to rob; (3) robbery; and (4) larceny. Two of the defendants—Engle and Snow—had pleaded "Guilty." Appellant and his brother, protesting their innocence, went to trial. The latter was acquitted. The former was found "guilty of larceny as charged in the fourth count of the indictment," and recommended to the mercy of the court. The circumstances attending the commission of the alleged crime, as shown by the testimony, are fully stated in the charge of the court. It is unnecessary for us to do more than refer to a few of them incidentally. If the learned president of theoyer and terminer was correct in his view of the law applicable to the undisputed facts, there cannot be any doubt that the crime of larceny, at least, was committed. It was not shown that appellant was present when the money was taken. On the contrary, the proof of an alibi appears to have been very clear and uncontradicted. If, however, the taking, in the circumstances disclosed by the commonwealth's testimony, amounted to larceny, and the evidence tending to prove that appellant was an accessory before the fact was believed, the jury was warranted in finding as they did. The substance of that evidence is that a robbery was adroitly planned by him, but the execution thereof was intrusted to Engle, Snow, and Brown. The latter informed the chief of police and Mr. Spencer, one of the intended victims, of the contemplated robbery, and they arranged with Brown that he should co-operate with the others in the commission thereof, and report to them. Part of that arrangement was that Spencer should put up \$500 in several envelopes, and place them on the paymaster's desk in the pay office, and notify the paymaster that Snow and Brown would attempt to take the money, but without injuring him; that he should submit to being bound, blindfolded, and gagged, and not forcibly resist the taking of the money. Spencer explained this to the paymaster, and the latter acted his part accordingly. At the time set for commission of the robbery, Engle went to the pay office to see that the way was

clear. Finding that the paymaster was there alone, Brown and Snow, following him, entered the office masked. Snow covered the paymaster with a revolver, and ordered him to hold up his hands. Then Brown and Snow seized, bound, blindfolded, and gagged him, and, taking the money from his table, put it in bags and carried it in the direction of Engle's stable, for the purpose of there disposing of it, as had been prearranged by the confederates. At that point the police, who meanwhile had been waiting developments, closed in on and arrested Engle, Snow, and Brown with the money in their possession.

This mere outline of the more prominent facts which the commonwealth's testimony tends to prove will be sufficient for the purpose of disposing of the specifications of error, the first and second of which complain of the following extracts from the learned judge's charge: (a) "You may convict the defendants on the third count of an attempt to rob, and on the fourth count of a larceny, according as you are satisfied and convinced by the evidence in the case." (b) "As to the third count, you will say whether the defendants are guilty or not guilty of an attempt to commit a robbery, and, on the fourth count, whether they are guilty or not guilty of a larceny." The remaining specification charges error generally "in submitting to the jury the question of defendant's guilt or innocence of the crime of larceny as charged upon him in the fourth count of the indictment, there not being sufficient evidence to warrant the submission of that question." The first and second counts of the indictment were practically eliminated from the case by instructing the jury that there could be no conviction on either of them, and the third was disposed of by the verdict. That left nothing of which appellant could possibly complain except the instruction as to the charge of larceny contained in the fourth count, on which, alone, he was convicted and sentenced. As to that his counsel, in their brief of argument, say: "The vice of all the specifications of error is in the learned court submitting to the jury the question of larceny, as set forth in the fourth count of the indictment." That alleged error is grounded on the unwarranted assumption that there was no evidence in the case to justify a conviction of larceny. If believed by the jury, as it evidently was, the testimony tending to show appellant's active participation in planning a felonious taking of the money, and what was done in pursuance thereof by some of his confederates, was quite sufficient to warrant his conviction under the fourth count. While, as stated by appellant's counsel, "the evidence, if believed, is full and clear to the effect that Brown had informed the chief of police of the purpose and plan of the alleged confederates, and of the time they had fixed for the consummation of the offense, and that Brown and the chief had fully informed Spencer of the whole matter," etc., and further, that Brown was co-operating with the police and the intended victims of the plot for the purpose of detecting and punishing those engaged therein, etc., it does not follow that Engle and Snow, two of said

confederates, were any the less guilty of feloniously taking and carrying away the packages of money. It does not appear that they had any suspicion that Brown was acting the part of detective and informer. The jury was properly cautioned as to the danger of convicting on the testimony of accomplices. But the case did not rest on the testimony of Engle and Snow alone. They were corroborated by other witnesses. Brown was a competent witness, and, if believed, his testimony alone was sufficient to warrant the jury in finding that a larceny was committed. In *Campbell v. Com.*, 84 Pa. 187, we held that one who joins a criminal organization for the purpose of exposing it and bringing criminals to punishment, and honestly carries out that design, is not an accessory before the fact, although he may have encouraged and counseled parties who were about to commit crime, if in so doing he intended that they should be discovered and punished; and his testimony, therefore, is not to be treated

as that of an infamous witness. See also *Taylor, Ev.* § 971; *Whart. Crim. Ev.* § 440. So far as Engle and Snow participated in taking the money, the testimony all tends to show that they did so *animo furandi*, in pursuance of the preconcerted scheme to rob, etc., and were therefore guilty, at least of larceny. *Com. v. Eichelberger*, 119 Pa. 254.

The case against appellant turned upon questions of fact which were exclusively for the determination of the jury. To them it was fairly submitted, with very full and adequate instructions. If there was any error, it was on the part of the jury, and the only remedy for that was in the court below. Neither of the specifications is sustained.

The sentence of the Court of Oyer and Terminer is affirmed, and the record is remitted to the court for the purpose of fully executing said sentence; and to that end it is ordered that appellant do forthwith surrender himself into the custody of the sheriff of Lackawanna county.

## WASHINGTON SUPREME COURT.

STATE of Washington, *ex rel.* Edward M. HUNT *et al.*,

SUPERIOR COURT OF CHEHALIS COUNTY *et al.*

(3 Wash. 210.)

**A sheriff's right to the possession of property under attachment is not lost by the subsequent appointment of a receiver.**

(*Dunbar, Ch. J., dissents.*)

(February 7, 1894.)

**A**PPPLICATION for a writ of prohibition to prevent defendants from interfering with the possession which had been acquired by the sheriff of certain property of a corporation under a writ of attachment. *Writ granted.*

The facts sufficiently appear in the opinions. *Messrs. Greene & Turner*, for relators:

Creditors in whose suits the sheriff holds for them by virtue of attachments or executions a possession acquired prior to the appointment of the receiver have an absolute right to have the sheriff retain possession and sell and apply the proceeds to the satisfaction of their judgment notwithstanding the receiver demands and claims to have possession surrendered to him.

*Rutter v. Tallis*, 5 Sandf. 610; *Farmers Bank of Delaware v. Beaton*, 7 Gill & J. 421, 28 Am. Dec. 226; *Re North American Gutta Percha Co.* 17 How. Pr. 549; *Bergin v. Deering*, 70 Hun, 879; *Van Alstyne v. Cook*, 25 N. Y. 489; *State v. Snohomish County Super. Ct.* 7 Wash. 77.

If under such circumstances the receiver

takes possession and sells, the sheriff is entitled to the proceeds to apply on the executions.

*Re North American Gutta Percha Co. supra*; *Rich v. Loutrel*, 18 How. Pr. 121; *Artisans Bank v. Treadwell*, 84 Barb. 553; *High, Receivers*, § 188.

A receiver's title is only from the date of his appointment.

*Steele v. Sturges*, 5 Abb. Pr. 442.

A receiver cannot maintain replevin for property which has been levied upon and reduced to possession by attaching creditors prior to his appointment.

*Conley v. Deere*, 11 Lea, 274; *High, Receivers*, § 188.

For a receiver forcibly to take possession of property from a stranger holding under claim of right is misconduct.

*Parker v. Browning*, 8 Paige, 888, 4 L. ed. 473, 35 Am. Dec. 717; *High, Receivers*, §§ 145, 150.

The court cannot lawfully authorize a receiver to take possession even from a defendant so claiming.

*Cassilear v. Simons*, 8 Paige, 273, 4 L. ed. 426.

Much less from a stranger.

*Levi v. Karrick*, 18 Iowa, 844; *Gelpcke v. Milwaukee & H. R. Co.* 11 Wis. 454; *Coleman v. Salisbury*, 53 Ga. 470; *High, Receivers*, § 149.

A receiver is not entitled to possession of a fund or property held by a creditor whose possession by agreement with a debtor was acquired prior to the appointment of the receiver as security for certain liabilities of the debtor to the creditor.

*Brady v. Furlow*, 23 Ga. 613; *High, Receivers*, § 157.

It is only in case of actual interference with the receiver's actual possession, or with his power when in constructive possession to take actual possession, that contempt will lie.

**NOTE.**—As to how far appointment of receiver disturbs possession which has been acquired by third persons at the time of the appointment, see note to *Re Schuyler's Steam Tow-Boat Co.* (N. Y.) 20 L. R. A. 201.

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*Albany City Bank v. Schormerhorn*, 9 Paige, 873, 4 L. ed. 736, 38 Am. Dec. 551, 10 Paige, 263, 4 L. ed. 970; *Richards v. People*, 81 Ill. 553; High, Receivers, § 171.

*Meera. M. J. Cochran and J. B. Bridges* for respondents.

**Hoyt, J.**, delivered the opinion of the court:

Only one substantial question is presented by the return of the respondents to the alternative writ of prohibition heretofore issued in this cause, and that is as to the respective rights of the relators as attaching creditors of a certain corporation, and a duly appointed receiver for said corporation. The relators obtained a lien upon the property in question by virtue of attachment proceedings, and have maintained such lien by causing the sheriff to retain the actual possession of the property in question from the date of the initiation of such lien. The receiver was appointed in a suit instituted by a stockholder of the corporation for the purpose of winding up its affairs. Such suit was commenced long after the lien of the relators to the specific personal property had attached, and they were not made parties thereto. Under this state of facts, the relators contend that their right to have the sheriff retain possession of the property, and subject it to the payment of their judgment, is not affected by the appointment of the receiver. This question was before this court in the case of *State v. Snohomish County Super. Ct.*, 7 Wash. 77, and, after able argument and careful consideration, a decision in accordance with such contention was reached. The question, having been once decided in this court, should not be reopened until it is made affirmatively to appear that such decision was not in accordance with correct legal principles. We have carefully investigated all the authorities cited by the respondents, and the result of such examination has made it unnecessary that we should bring to the aid of our former decision any of the numerous authorities cited in the able brief of the attorney for the relators. The respondents contend that the authorities cited by them establish the doctrine that, whenever a receiver is appointed, he is entitled to the possession of all the property of the corporation for which he is appointed, regardless of the question as to whether the actual possession of such property is in such corporation or in that of a third person, a stranger to the suit in which such receiver had been appointed. We are unable to find anything in any of the cases so cited which warrants this contention. The general proposition is laid down in *Gluck & Becker on Receivers*, *Beach on Receivers*, *High on Receivers*, and in the *American & English Encyclopedia of Law*, that a receiver only takes such rights in the property of the corporation as it had at the date of his appointment, or at most at the date of the commencement of the action in which the appointment is made; and the author of each of these works cites abundant authority to sustain such general proposition. Among the numerous cases cited by respondents we have been unable to find a single one which

goes to the extent of holding that a receiver, without other authority than that of the order appointing him, had the right to interfere with personal property in the actual possession of third persons under claim of right. There are some cases which hold that, by making such persons parties to the suit in which the receiver was appointed, they may be compelled to surrender the property to him and adjudicate their rights in that action; and in some cases the order appointing the receiver has directed him to take possession of certain specifically designated property, and in such cases it has been held that the person holding such property could not question the authority of the receiver under such order; but none of these cases aid the contention of the respondents. The order in this case, in general terms, directed the receiver to take the property of the corporation, and required such corporation to surrender possession thereof, but said nothing as to any specific articles, or as to the rights or duties of those not parties to the action; hence, under the general rule referred to, the receiver only took such rights as the corporation had, and, as the corporation had no right to interfere with the property in question, it must follow that the receiver could not rightfully assert any claim thereto not subject to the lien of relators, and the right of the sheriff to retain possession, and proceed in the enforcement of the process in his hands.

There are many cases which hold that a receiver once in possession of property cannot be disturbed in such possession, even by one who has a superior lien thereon. Not only are there many cases which establish this doctrine, but, so far as we know, there is an unbroken line of authority going to that extent. The reason why the possession of a receiver must not be disturbed is that it is the possession of the court, and its dignity will not allow any one, without its permission, to interfere with that of which it has possession. But the research which we have been able to give to the subject has not brought to our notice a case in which it has been held that property in the actual possession of a third person, under claim of right, came into possession of the court upon the appointment of a receiver in a suit to which the person in possession of the property was not a party. The case most relied upon by respondents, and which comes nearer to sustaining their contention than any other that has been brought to our attention, is that of *Wierall v. Sampson*, 65 U. S. 14 How. 52, 14 L. ed. 822. An examination of that case, and of the briefs of counsel, will show that it went no further than to establish the well-recognized doctrine that a court will brook no interference with property in the actual possession of its receiver. It is contended on the part of respondents that, in the case just cited, the possession of which the court speaks in its decision was simply the constructive possession in the receiver, growing out of the fact of his appointment. But it appears clearly, from the briefs of counsel, that the property was in the actual possession of the receiver. This also appears from the opinion of the court, as the follow-

ing quotation will show: "The receiver was appointed on the 27th June, 1845, and on the same day Ticknor, who was in possession of the premises, attorned to him, who held possession until the sale was made in pursuance of the decree. . . . At the time, therefore, of this sale, the receiver was in the possession of the premises under the decree of the court of chancery." Such being the status of the property as to which the court was speaking in deciding that case, it has little weight in support of the contention of respondents. Besides, there was another reason given by the court for its decision, aside from that growing out of the actual possession of the property by the receiver, and that was that the parties attempting to assert a legal right as against his title had been brought into the action; and from what is said by the court it is probable that the case would have been decided differently if the one claiming the adverse title had not been made a party to the suit in which the receiver had been appointed. Upon that subject the court speaks as follows: "We agree that the person holding the prior legal lien or incumbrance must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund, before his legal right can be affected; and the proper way is by summons or notice upon the order or direction of the court." In a similar manner, every case cited by respondents can be analyzed, and abundant reasons for the decisions found, without invoking the harsh rule contended for by respondents,—that one in the actual possession of property under claim of legal right may be deprived of such possession without any opportunity to be heard in defense of his rights. That the affairs of a corporation can be so changed, by the appointment of a receiver at the instance of one of its own stockholders, as to take a legal right from one claiming property adversely to it, without his being brought into court for the purpose of having his right thereto adjudicated, is so contrary to our understanding of what constitutes due process of law that we cannot yield assent to such a doctrine. It is laid down, by the text-writers to whom we have referred, that under such circumstances a receiver must resort to an action at law to obtain possession. The corporation could only assert its rights to the possession of property thus situated in an action at law, and, except when aided by statute, the receiver can do no more. In many states there are express statutory provisions which require all those claiming property of a corporation to yield the same to a receiver or assignee when proceedings for the appointment of such receiver or assignee have been instituted by or on behalf of such corporation; but we have no such statutory provision in this state, and without some aid of this kind we are unable to see any sufficient reason for holding that the appointment of a receiver should authorize him to take possession, without legal process, of property in the adverse possession of another under claim of right. We are satisfied with what we held in the former case, and, applying it to the facts in this one, it

follows that the receiver was not justified in interfering with the possession of the property in controversy, nor with the right of the sheriff to proceed against the same, as required by the process in his hands.

*The alternative writ must be made perpetual.*

**Anders, Scott, and Stiles, JJ., concur.**

**Dunbar, Ch. J.:**

I am unable to agree with the conclusion reached by the majority. I think, in the first place, the demurrer to the petition should have been sustained; and, in the second place, the answer of the receiver and the return of the court conclusively show to my mind that no injury or damage was threatened to the petitioners by the court or the receiver. The opinion of the majority starts out with the proposition that the receiver only takes such interest in the property of the corporation as it had at the date of his appointment, or, at most, at the date of the commencement of the action in which the appointment was made; and the case of *State v. Snohomish County Super. Ct.*, 7 Wash. 77, is cited to sustain this proposition. The decision of this point was not necessarily involved in the case above referred to, and the opinion expressed in that case, in my judgment, was wrong, and not borne out by the authorities, and is not consistent with the orderly administration of courts of equity in settling insolvent estates. This question was, however, before this court in the case of *Meeker v. Sprague*, 5 Wash. 242, and there it was flatly decided that the party having a mortgage lien must foreclose his lien in the court having jurisdiction of the settlement of the insolvent estate, even where the mortgagee alleged that the property upon which he had a first lien would be charged with a greater proportion of the expenses of the receivership than would be just. In that case all the right that the receiver could take, according to the doctrine announced in the majority opinion in this case, was the right of the equity of redemption, which was all the right that the insolvent corporation had under the law. It is true that the property involved there was real estate; but the doctrine that the receiver only takes the right to the property that the corporation had at the date of his appointment, if tenable at all, must be applied to all the property. Nor was there any attempt made, in *Meeker v. Sprague, supra*, to distinguish this lien from the lien on personal property, but the decision was based upon the theory that the court would respect the lien, and that it would do exact justice in the premises. "It cannot for a moment be presumed," said the court in that case, "in aid of the contention of the appellant, that the lower court will not do as full and exact justice to each person or corporation claiming a lien upon any of the property of the defendant corporation, when presented in such original suit, as it would when presented by means of an independent action. It would be the duty of such court to determine each of the claims presented in said original action by the same rules, and grant to them the same rights, as it would if each of the claimants

were the plaintiff in an independent action. While each of them will be adjudicated in the original action, they will be so adjudicated upon the facts of the particular claim, as related to the entire property of the corporation. And in the adjustment of the expenses incident to such suit, and of the services of the receiver, the principles of equity will, of course, be applied; and if any of the liens are upon property over which the receiver has but a nominal control, it will, of course, be the duty of the trial court to see that the holders thereof are protected from having their security in any material degree decreased by the costs and expenses incident to the receivership. And, upon the question of the effect of the deed from the corporation to the receiver, it seems to us clear that it can in no manner affect the rights of the appellant. Such corporation could not convey to the respondent any of its rights, and the court will see to it that, in the final adjustment of the rights of all the claimants, the appellant, together with all others like situated, is protected against any diversion, or attempted diversion, of the property upon which he had a first lien, to the payment of subsequent liens, of whatever nature or kind they may be." The reading of the return of the court to the alternative writ issued in this case would seem to justify the action of the court, considered with reference to the opinion of this court just quoted. A portion of the return is as follows: "And respondent further says that it was not, nor is it now, doing the things complained of for the purpose, and with the intent, of destroying and making worthless the said executions of the relators, but that the same should be respected by the said receiver; that the receiver should take and hold the said property subject to whatever right, title, and interest in and to the said property the relators had or have by virtue of such executions; that the said receiver should take the said property subject to any and all liens or levies; that the property of the said company should be sold under the direction of this court, and managed, under its direction, by said receiver; and that any and all moneys coming to the said receiver from or out of the said property should go towards discharging and satisfying the executions of relators, if the court should finally decide that the said executions were valid and prior liens thereon." The doctrine announced in *Meeker v. Sprague*, *supra*, is in harmony with the doctrine that the creditor has no vested right in methods or remedies. In this case the creditor has a right to make his money out of the property which is the subject of the lien, but he has no right whatever in the particular manner in which the money is to be made. Taking the return of the court to be true (which this court must do), it is seen that the method is all that is contended for here by the petitioners; and it is elementary that the writ of prohibition should not issue unless some right is invaded or threatened; and all the right the petitioners have here is the right to be paid out of the first proceeds of the sale, which right will not be denied them by a court of equity. The court will simply di-

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rect its receiver to act in the premises, and this court will not, as it said in *Meeker v. Sprague*, *supra*, assume that the property upon which the first lien exists will be charged with a greater proportion of expenses by reason of its settlement by a court of equity. The receiver is appointed for the benefit of all concerned,—the judgment creditor, as well as the other creditors, and the corporation itself; and it is the duty of the court, in the interest of all of the creditors, as well as in the interest of the corporation which is deprived by the law of the right to settle its own estate, to see that the property is sold in such a way that the best results will be obtained. So, in this case, the creditor is not threatened with loss of any right, but the court, merely to prevent harmful confusion and additional costs, which would be the inevitable result of clashing acts of authority, and for the benefit of all parties concerned, proposes to prescribe the method which in its judgment will obtain the best results. The citation of authorities on this proposition by the majority I do not think fairly sustains their contention. The rule laid down by Gluck & Becker on Receivers (page 180) is as follows: "Persons having liens upon the property, acquired before the receiver's appointment, have no right to interfere with its possession by the receiver, and, without any application to, or adjudication of, the court, sell and dispose of it; and sale of property so made is illegal and void."—citing *Wiswall v. Sampson*, 55 U. S. 14 How. 53, 14 L. ed. 322, a case of which I will hereafter speak. It is very plain, from an investigation of the authorities, that the possession of the receiver referred to is a constructive, and not an actual, possession, the theory of the law being that, when the receiver is appointed to administer upon the estate, the possession immediately vests in him. The same author (on page 184) says: "The title to property in the hands of a receiver is not in him, but in those for whose benefit he holds it. Nor, in a legal sense, is the property in his possession. It is in the possession of the court, by him as its officer." And again, in section 45: "The receiver of an insolvent corporation, while, as a general rule, he is to be regarded as the representative of the corporation, asserting its rights, taking its title, and subject to its liabilities, in one respect occupies a broader position, and represents, not only the corporation, but also the creditors; and when, in any proceeding, he occupies exclusively the latter status, he may do, and under some circumstances must do, many things which, if his acts were strictly limited to those of a representative of a corporation, he could not do." It is plain that, if he represents the corporation as well as the creditors, he represents all the interests, and must necessarily have possession of all the property.

It is contended that, if possession is yielded up to the receiver, the result will be that the lien will be destroyed; and the establishment of the truth of this proposition is really the only logical ground upon which the writ in this case can issue. But I think that the

doctrine cannot be established, either on reason or authority; especially it cannot obtain here, where the answer of the court affirmatively shows that the lien will be respected and maintained until the question of priority is adjudicated. There is, in my mind, a great deal of fanciful importance attached to this idea of possession. It is true that, under our statutes, an attachment levy creates a lien. But it is not the object of the lien to create any right of possession in the creditor. The sole object is to keep the property *in statu quo* to prevent the debtor from disposing of it, or any one else obtaining it, until it can be made to respond to the judgment. When the creditor is sure of this result, he has no cause for complaint whatever, and should not be allowed to interfere with the orderly procedure of the court by captious or arbitrary insistence upon any particular method or mode of procedure. *Wiswall v. Sampson*, *supra*, is a well-considered case, which, in my opinion, sustains the contention of the respondent. It does not very clearly appear in this case whether the court is speaking of the actual or constructive possession of the receiver, but it does appear that the court intended to lay down the broad doctrine that the estate of an insolvent debtor, where a receiver had been appointed, must be administered by direction of the court, and that, where a lien had been obtained, it was not necessary for its perpetuation that the property be sold by legal process, but that such lien would be protected by the court having jurisdiction of the settlement of the estate; and the court lays down the doctrine that the party having a lien must apply to the court for the protection of his rights. "The effect of the appointment," says the court, "is not to oust any party of his right to the possession of the property [and here it must evidently appear that the court was not referring to property in the possession of the receiver at the time he was appointed but in the possession of the other party], but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and, when the party entitled to the estate has been ascertained, the receiver will be considered *his* receiver, and the master will usually be directed to inquire what incumbrances there are affecting the estate, and into the priorities, respectively." The italics in the quotation are my own. If the receiver is to be considered the creditor's receiver, then it is all folly to talk about a creditor's losing his lien by reason of the possession of the receiver. "When," the court, continuing, says, "a receiver has been appointed, his appointment is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel v. Smith*, 9 Ves. Jr. 835, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment or to permit him to be examined *pro interesse suo*. And the doctrine that a receiver is not to be disturbed extends even to

cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests; and the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court, either for liberty to bring ejectment, or to be examined *pro interesse suo*; and this, *though their right to the possession is clear*,"—citing *Bryan v. Cormick*, 1 Cox, Ch. 422; *Anonymous*, 6 Ves. Jr. 287. It would seem that this expression by the Supreme Court of the United States was sufficiently convincing that it was not attaching any great importance to the question of physical possession. Further, quoting Chancellor Kent in *Codwise v. Gelston*, 10 Johns. 507, the court says: "But, when the law gives a priority, equity will not destroy it; and especially where legal assets are created by statute, as in case of a judgment lien, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery." And still further, showing that the question of possession was not the basis of this opinion, the court, proceeding, says: "It has been argued that the sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that a sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made; and, in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation; otherwise, the whole fund would have passed out of its hands before the final decree, and the litigation become fruitless. It is true, in administering the fund, *the court will take care that the rights of prior liens or incumbrances shall not be destroyed*; and will adopt the proper measures, by reference to the master, or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?" There can be but one interpretation of this case, and that is that the court, under all circumstances, is entitled to the possession of all of the property of the estate; that the receiver, as an officer of the court, represents not only the creditors, but the estate; and that the whole settlement of the estate, both property that is subject to liens and that which is not, devolves upon the receiver as an officer of the court; and that all priorities will be ascertained and protected by the court.

This was also the doctrine announced by

he court of appeals of New York. *Walling v. Miller*, 108 N. Y. 178. This was a case where the property involved was personal property, and levy was made under execution on the 13th day of May. Two days thereafter a receiver was appointed. On the day of his appointment he took possession of the property. According to the theory of the majority, if the sheriff had yielded up the possession of the property to the respondent, the lien would have been lost; but the court there seemed to be of a different opinion, for it says: "The lien of the execution was not destroyed by the appointment of a receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the court which appointed the receiver; and the property could not be taken out of the possession of the receiver, and sold upon the execution, without leave of the court. The execution creditor could bring his lien to the attention of the court in the action in which the receiver was appointed, and ask to have the execution satisfied out of the proceeds of the property; but persons having liens upon the property had no right to interfere with its possession by the receiver, and, without any application or adjudication of the court, sell and dispose of it, and thus dissipate it, and deprive the court of jurisdiction to administer it." So that it will be seen that the court, instead of holding that the yielding up of the possession to the receiver would destroy the lien, hold exactly the reverse, viz., that the creditor had no right to retain the possession, thus interfering with the possession of the receiver, but, by yielding up to the receiver, the lien of the execution would be protected. In this case the court went so far as to hold a sale of the property made under an execution void, where the levy was made prior to the appointment of the receiver. But that is just what the petitioners in this case are striving to do, and what this court has said by the majority opinion they have a right to do, viz., to interfere with the possession of the property by the receiver, and sell and dispose of it without any application by the court. "When a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. The rule that the possession of a receiver is not to be disturbed extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior estates, and the individuals having such prior estates must, if they wish to avail themselves of them, apply to the court either for liberty to bring an ejectment, or to be examined *pro interesse suo*; and this, although their right to take possession is clear." 3 Dan. Ch. Pl. & Pr. p. 2057. That author states that the same rule applies where an estate has been sequestered. Turning to section 1269, we find the rule laid down thus: "The proper course to be pursued by any person who claims title to an estate or to property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the

plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. . . . The mode of proceeding is the same where the property is in the possession of a receiver. *Anonymous*, 6 Ves. Jr. 287. . . . An order for the examination of a party *pro interesse suo* may be obtained as a matter of course by the party claiming, but it cannot be granted till after the sequestrators have made their return, because, till then, it cannot appear to the court what is sequestered. *Ibid.*"

The whole theory of the law and of the authorities simply is that a court of equity which has jurisdiction of the settlement of the estate will protect the liens and priorities of every kind, when they are brought to its attention, but that it will do it in the manner best calculated to preserve the interests of all parties concerned; and this doctrine is expressed very concisely in *Glines v. Supreme Sitting Order of Iron Hull*, 50 N. Y. R. R. 743, where it was decided that the fact that one, before the appointment of a receiver, levies an attachment upon certain funds, does not give him a preference enforceable generally against the receiver as to the judgment obtained, but only a preference in the funds themselves. A recent case cited from the supreme court of Texas (*Ellis v. Vernon Ice, Light & Water Co.* 86 Tex. 109), very fully and forcibly sustains the respondent's contention. The court there said: "It is well established, we think, that, after property has been placed in the hands of the receiver, it is not subject to levy and sale under execution. Being in the custody of the law through the appointment of a receiver by a court of competent jurisdiction, it cannot be interfered with by process from another court. A party having a claim upon it must intervene in the court of the receivership, and in the case in which the receiver has been appointed, and establish his right in that tribunal, or must obtain leave of that court to bring an independent action. But the question here is, Can the sheriff who has made a levy upon real estate before the appointment of a receiver over it proceed to sell, and pass the title, after the receiver has been appointed?" The very statement of this case shows that it is the constructive possession of the receiver that the court is talking about, and that his possession is presumed to follow his appointment. After reviewing some cases where it was held, as the majority hold in this case, that the receiver only took such title as was conveyed to the receiver by the deed of the party over whose property he was appointed, and that this conveyance passed the property subject to the lien of the judgment under which it was sold, and that, therefore, the purchaser at execution sale took the superior title, the court sums up as follows: "However that may be, we think *Wissall v. Sampson* lays down a doctrine that is founded upon good reason and sound policy. To permit the control of the receiver to be interfered with by virtue of process from another court would be a practice fraught with injustice and productive of confusion; and that remark applies with especial force to

the receivers of insolvent corporations. After all the assets of a corporation have been taken from the hands of its managers, and placed under the control of a receiver, is it just to allow the property to be sold under execution? The court, having deprived the corporation of the power of paying the debt and of avoiding the sale, should, in the interest of all concerned, protect its property from the sacrifice. The receivership does not destroy any liens that may have been acquired before the appointment, but the remedy for their enforcement should be sought in the court in which the whole estate is being administered." In view of the logic of this case, and of the others which we have cited, it must be seen that the question of actual physical possession cuts no figure whatever, but that the broad and equitable doctrine is

that the interest of the insolvent corporation, the interest of the unsecured creditors, and the interest of the attaching creditors must all be taken into consideration (giving due consideration to the rights of priority), and equitably protected, by the court administering upon the estate; and that it is not the policy of the law, and that no good reasons can be given for the division of the settlement into the hands of different tribunals or officers; and in the case at bar all the interest that the petitioners can have is the interest in the fund which is to be obtained from the sale of the property upon which they have a lien, and that the procedure or manner of obtaining that fund, and of applying it, can be safely intrusted to the discretion of the court. The writ should be denied.

### ALABAMA SUPREME COURT.

Sylvester FESTORAZZI *et al.*, Exrs., etc.,  
of Joseph Peter, Deceased, *Appts.*,

ST. JOSEPH ROMAN CATHOLIC  
CHURCH OF MOBILE *et al.*

(...Ala....)

A bequest to a church "to be used in solemn masses for the repose of my soul" is invalid.

(November —, 1893.)

**A**PPEAL by complainant from a decree of the Chancery Court for Mobile in favor of

defendants in a proceeding brought to obtain construction of the will of Joseph Peter, deceased, and to have certain clauses therein declared invalid. *Reversed.*

The particular clauses which were alleged to be invalid were as follows: (2) I give and bequeath to the Roman Catholic Cathedral in the city of Mobile the sum of \$8,000, the same to be used in solemn masses for the repose of my soul. (3) I give and bequeath to the Roman Catholic Church of St. Joseph in the city of Mobile the sum of \$2,000, also to be used in solemn masses for the repose of my soul.

The further facts sufficiently appear in the opinion.

#### NOTE.—Validity of bequest for masses.

In England bequests and devises for the purpose of having masses said for the soul of the deceased are void as superstitious use, or as creating perpetuities. *Atty-Gen. v. Flashmongers Co.*, 2 Beav. 151, 5 Myl. & C. 11; *Atty-Gen. v. Vivian*, 1 Russ. 238; *Peile's Case*, 4 Coke, 113b; *Read's Case*, and *Tate's Case*, 4 Coke, 113b; *Caley's Case*, and *Gregory's Case*, 4 Coke, 114a; *Colborn v. Dale*, Duke, 89, 4 Coke, 116a; *Adams & Lambert's Case*, 4 Coke, 104a; *Re Fleetwood*, L. R. 15 Ch. Div. 594; *Heath v. Chapman*, 3 Drew. 417, 23 L. J. Ch. 947.

So a deed of trust providing that the income should be paid to the officiating priest of the church of C—for masses for the soul of grantor, was void. *Re Blundell's Trusts*, 31 L. J. Ch. 52, 30 Beav. 380.

So a devise by a Chinese woman for the purpose of having a memorial house maintained where the family at certain periods could place before a memorial tablet savory food for the spirit of the departed was held void, as creating a perpetuity and akin to devises for masses, although not a charitable use. *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 304.

But in *Re Michel's Trusts*, 23 Beav. 32, 6 Jur. N. S. 573, 29 L. J. Ch. 547, it was held that a devise by a Jew to pay to three persons chosen by the executors out of testator's family "to learn in their Beth Hammadras or college, two hours daily forever, and on every anniversary of my death, to say the prayer called in Hebrew 'Candish,'" not indicating that it is for the soul of the dead, was valid.

In this country the doctrine seems to be that a bequest to a definite person or to a definite church for masses will be sustained, but not if it is simply a request to the executor to have the money ex-

pended without naming a definite pastor or church, but in the case of *FESTORAZZI v. ST. JOSEPH CATHOLIC CHURCH*, while the bequest named a particular church, the court refused to uphold it on the ground that "the form of the bequest repels the idea that a gift to a church for its own general uses was intended."

In Pennsylvania a bequest to a definite pastor or church for masses for soul of testator, has been sustained as valid. *Seibert's App.*, 18 W. N. C. 276; *Dougherty's Estate*, 5 W. N. C. 555; *Power's Estate*, Id. 50.

And it was said in *Shriber v. Rapp*, 5 Watts, 322, that a grant of a Roman Catholic to purchase post-mortem masses would not be necessarily fraudulent in Pennsylvania, but this was not the question involved in the case.

But under Penna. law, Act 1885, section 11, providing that a devise in trust for religious or charitable use, made within a month prior to decease of testator, shall be void, a bequest to a church, to be expended in masses for his soul, is for a religious use, and is void if made within that time. *Rhymer's App.*, 93 Pa. 142, 39 Am. Rep. 733.

A devise to B. and H. in trust for the benefit of the Catholic church on my farm in T county to be invested for said church, "and that service be held in said church for my soul yearly" is not void as it is not conditioned on the services, and the beneficiary is definite although not incorporated. *Seda v. Huble*, 75 Iowa, 429.

A devise being to L. "for funeral expenses, and the residue for charitable purposes, masses, etc." where the trustee L. died before the will was proved, this did not defeat the trust. Masses are religious ceremonies and come within the religious

**Messrs. Overall & Bester**, for appellants:  
The legacies to the churches are void because they contain no element of a charitable use.

The uses in the bequests, being the soul of a deceased person, is not such a use or trust as any court can enforce and is void in law.

*Nichols v. Allen*, 180 Mass. 231, 39 Am. Rep. 445; *Carter v. Balfour*, 19 Ala. 829; *Williams v. Pearson*, 88 Ala. 307; 8 Jarman, Wills, 379, 490; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397; 2 Pom. Eq. Jur. 599; *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 380, 67 Am. Dec. 160; *Holland v. Alcock*, 108 N. Y. 313; *Atty-Gen. v. Fishmongers Co.* 2 Beav. 163; *Re Blundell's Trusts*, 30 Beav. 363; *West v. Shuttleworth*, 2 Myl. & K. 684.

The cases which have been enforced by the court as cases of charitable uses for the benefit of some living person or object, or some benevolent enterprise.

*Schouler, Petitioner*, 184 Mass. 426.

The testator not having defined the trust sufficiently to enable the court to execute it, the next of kin must take the property by way of resulting trust.

*Nichols v. Allen*, *supra*.

A use or trust must be for some valid purpose clearly defined.

8 Jarman, Wills, 490; *Atty-Gen. v. Fishmongers Co.*; *Re Blundell's Trusts*; *West v. Shuttleworth*, and *Owens v. Missionary Soc. of M. E. Church*, *supra*.

or pious uses which are upheld as public charities, "etc." means other purposes of like character, and another trustee was appointed to take the fund and apply it as devised. *Schouler, Petitioner*, 184 Mass. 426.

It was held in *Kehoe v. Kehoe*, in chancery, in circuit court of Cook county, Ill. 13 Abb. N. C. 427, note, that a deed of personal property with oral directions to use the fund for masses for the soul of donor was not invalid,—following *Read v. Hodgkins*, 7 Ir. Eq. Rep. 17, *infra*.

In New York it was held that a bequest to be expended for masses was void as there was no beneficiary in existence or interested. *Holland v. Alcock*, 108 N. Y. 313; *O'Connor v. Gifford*, 117 N. Y. 275, affirming 6 Dem. 71; *Schwartz v. Bruder*, 6 Dem. 109. See also *Re O'Hara's Will*, *infra*.

But in *Gilman v. McArdle*, 90 N. Y. 451, 53 Am. Rep. 41, reversing 13 Abb. N. C. 414, where the undertaker before the death of the donor received a sum to be used in funeral expenses and the balance for masses, the court refused to interfere with the use of the remainder after death.

In the case of *Re Howard's Estate*, 5 Misc. 295, it was held that bequests to designated persons for masses for donor's soul were not invalid on the grounds of a dictum in *Holland v. Alcock*, *supra*; but that the trust failed as to one of the priests as he had died before performance, and the other was not entitled to any until he had showed performance, as the soul of the deceased had been without solace for four years.

In *Holland v. Smyth*, 40 Hun, 372, a bequest to be applied for masses was sustained as akin to funeral expenses.

And in *Re Hagenmeyer's Will*, 13 Abb. N. C. 434, a definite bequest to a definite church for masses was sustained, adopting the doctrine in *Read v. Hodgkins*, 7 Ir. Eq. Rep. 17, *infra*.

Since the case of *Holland v. Alcock*, 108 N. Y. 313, it was held in *Vanderveer v. McKane*, 26 Abb. N. C.

Our supreme court holds that English statutes passed before the emigration of our ancestors to this country and not inconsistent with our institutions constitute a part of the common law and are in force in all the states.

*Carter v. Balfour*, *supra*; *Williams v. Pearson*, 88 Ala. 299.

When the charity which is appointed is superstitious, the court will not carry it out, and it stands on the doctrine of *cy pres* and the prerogative of the crown to enforce indefinite charities, those principles not being in force in this country.

*Williams v. Pearson*, 88 Ala. 307.

The English cases clearly place this bequest among those defined to be for superstitious uses, and where it is of that character our supreme court says the courts of this state will not carry it out.

The "soul of the deceased," being a use not recognized in law, and the donor and use being the same and not in life, the bequest should be held void.

*Holland v. Alcock*, 108 N. Y. 313; 2 Pom. Eq. Jur. 599; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397.

**Messrs. Gaylord B. Clark & F. B. Clark, Jr.**, for appellees:

In this country of religious liberty any form or act of worship, or the solemnization of any religious rite or sacrifice, is lawful unless its character and manner of execution be such as would interfere with rights and privileges be-

105, and in *Ruppel v. Schlegel*, 55 Hun, 183, without referring to *Holland v. Alcock*, that definite bequests to a definite church or pastor for masses was valid. In the case of *Ruppel v. Schlegel*, the request for masses was held to be only a suggestion in a general way and was included with other requests.

In *Read v. Hodgkins*, 7 Ir. Eq. Rep. 17, a bequest of a residue to be expended in masses for the soul of testator was held valid, on the strength of *Charitable Donations and Bequests Comrs. v. Walsh*, reported in the opinion, decided in 1823, holding that such a bequest was valid.

And in *Dillon v. Reilly*, 1 R. 10 Eq. 153, a bequest to a clergyman conditioned on saying masses was sustained as a personal gift to the clergyman.

But in *Dorrian v. Gilmore*, L. R. 15 Ir. 60, it was held that a residuary bequest to be divided between two priests as long as they officiate at K for the purpose of having masses said for testator's soul, was void as a perpetuity, and not for charitable purposes, and not for the benefit of the clergyman, but for the performance of a religious duty, and the court questions the case of *Dillon v. Reilly*, *supra*.

This case of *Dorrian v. Gilmore*, *supra*, is directly in conflict with *Read v. Hodgkins*, *supra*, and now it is very questionable whether such a bequest would be sustained in the Irish courts.

*Secret trusts to use for masses.*

A devise made absolutely to the devisee, but in reality in connection with a secret trust requiring masses to be said for the testator's soul, are void as superstitious. *Bax v. Pordington*, 1 Bal. 162, 1 Eq. Cas. Abr. 96.

Or as creating perpetuities. *Re O'Hara's Will*, 98 N. Y. 408.

And a will with letters intending to be construed all together directing that masses should be said for decedent, was held invalid for want of proper execution. *Smart v. Prujeau*, 6 Ves. Jr. 550. L. T.

longing to other citizens of the commonwealth or be contrary to good morals or the public welfare.

No religious exercise which is not in its conduct a public or private nuisance, or immoral or treasonable in tendency, can be held as illegal; and it cannot be doubted that money given for any such religious purpose is, under American law and American institutions in general, and the constitution of Alabama in particular, a gift or donation for a lawful purpose, whether made to take effect during the lifetime or upon the demise of the donor.

Section 4 of the Bill of Rights of the Constitution of Alabama declares that "no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled to attend any place of worship nor to pay any tithes, taxes, or other rate, for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles."

Gifts to procure masses to be said for the souls of the dead were condemned by the Statute of Henry VIII., and held void by the common law of England because obnoxious to the doctrines of the "state church," but in America have been sustained as valid trusts irrespective of state statute.

2 Perry, Tr. 715; Beach, Wills, 129.

In *Gass v. Wilhite*, 2 Dana, 170, 26 Am. Dec. 446, after holding that the trusts under discussion would not since the revolution be obnoxious to the public policy and statutes of England, says: "With much less reason, therefore, could it be denounced here as a superstitious use, where we have no established religion, and where, by our constitution, all religions are viewed as equally orthodox."

It is neither for the legislature nor the judiciary, in this state, to discriminate and say what is a pious, and what is a superstitious use. To do so would necessarily infringe upon the great constitutional guaranty of a perfect freedom and equality in all religions.

In *Shoulder, Petitioner*, in equity for the construction of a will, 184 Mass. 426, the court sustained a similar bequest.

In *Re Hagenmeyer's Will*, 12 Abb. N. C. 434, the judge said: "It appears to me that such bequests cannot be said to be for superstitious uses when we find that it is one of the articles of the Roman Catholic faith, which has been adopted by millions of people through the civilized world as a part of their religious belief."

In *Read v. Hodgins*, 7 Ir. Eq. Rep. 17, it was held that the bequest for masses for the testator's soul was valid and not void as a superstitious use.

The opinion in the above case was based upon the decision of Lord Manners in the case of *Charitable Donations and Bequests Comrs. v. Walsh*, 7 Ir. Eq. 84 note.

In *Kehoe v. Kehoe* (11), 23 Am. L. Reg. N. S. 656, the trust was created by deed to take effect *ante mortem* and was for the purpose of

procuring masses to be said for the soul of the decedent and for the soul of his mother then also deceased.

The court said, p. 660: "In the United States, where no discrimination is made in law between the professions of any particular religious creeds, where there is an absolutely free toleration of all religious opinions and modes of worship, can any such thing as superstitious use be said to exist? Who is to decide whether or not a use, as connected with the religious belief of the donor, is or is not superstitious? Must it be decided according to the sectarian views of the chancellor?"

In *Sibert's App.*, 18 W. N. C. 276, it was held that a bequest to the pastor of a church for masses for the repose of testator's soul is valid, and that it was the duty of the executors to pay it to the legatee who had full discretion as to the number of masses.

The bequest could not fail because of any inability on the part of the church, as taker, to perform the conditions annexed to the trust in accordance with the ritual of the church. There can therefore be no failure because of the inability of the donee to fully perform its duty according to the exact wishes of the testator.

This court will judicially know that the money appropriated for the so-called purpose of masses in reality is used and expended in the maintenance of the church and its priesthood, and is a source of revenue for the support of the church.

9 International Encyclopedia, p. 565, title *Mass*.

In the case of *Gilman v. McARDLE*, 99 N. Y. 451, speaking of a trust created by contract for the expenditure of money for masses for the soul of the testatrix and her husband according to the ritual of the Roman Catholic Church, of which the testatrix and her husband were members, the court says, p. 460: "There was no indefiniteness about this contract and it was easy of performance. There certainly can be no legal objection to a person contracting in his lifetime for his funeral, his coffin and his monument and even for the solemnization of masses, and paying for them in advance, and if so, what reason can there be for denying him the power of paying a sum of money to a third person on his agreement to procure these things."

This is a legal and pious use and as such can be sustained as a direct trust without regard to the doctrine of charitable uses.

Under English chancery jurisprudence prior to the Statute of Henry VIII., the court did have ample jurisdiction to enforce this as well as other trusts; and moreover, not only was such a trust valid and enforceable in chancery, but its violation was the predicate for a legal distraint or action for damages.

Co. Litt. 95 B, §§ 135, 137.

*Holland v. Alcock*, 108 N. Y. 312, fails wholly to sustain appellant's contention in any respect.

Head, J., delivered the opinion of the court:

The validity of the bequest brought to our view, in this case, must be upheld, if at all, upon one of three propositions, viz.: (1) That it is a direct bequest to the church for its



general uses. (2) That it creates a charitable use. (3) That it creates a valid private trust.

1. The form of the bequest repels the idea that a gift to a church for its own general uses was intended. The bequest is to the church "to be used in solemn masses for the repose of my soul." Similar bequests have been many times before the courts in England and this country, and in all the cases, so far as our research extends, they were treated as having the form and nature of the declaration of a use or trust, and not as direct gifts to, and for the general uses of the church. An application of the fund to other uses than securing masses to be said for the repose of the donor's soul would contravene the intent and purpose of the testator. In England, by statute, as well as the general policy of the law, uses or trusts like this were denounced as superstitions, and held void accordingly. Under our political institutions which maintained and enforced absolute separation of church and state, and the utmost freedom of religious thought and action, there is no place for the English doctrine of superstitious uses, and if such dispositions could be otherwise supported, under recognized rules of law, they would not be assailed here as giving effect to the religious superstitions of the donor. But the authorities, whether English or American, are potent to show that these bequests partake of the nature of trusts, and cannot be treated as gifts to the churches themselves.

2. Charitable uses whether arising out of the English statute of charitable uses, in force, in a qualified sense, in Alabama, or sustained upon the general principles of equity, (*Williams v. Pearson*, 88 Ala. 307) do not include dispositions of the kind in question. To constitute a charitable use it must confer a public benefit

open to an indefinite number of persons. 8 Am. & Eng. Encyclop. Law, pp. 123, 126, 127, 130; 2 Perry, Trusts, 3d ed. §§ 693, 697, 710. In an extended note to the case of *Daniel v. Atty-Gen.*, 9 Am. Dec. 577, will be found a full disposition of the whole subject, collating the authorities. We need only to refer to what is there said. The bequest in the present case is, according to the religious belief of the testator, for the benefit alone of his own soul, and cannot be upheld as a public charity without offending every principle of law by which such charities are supported.

3. It is not valid as a private trust for the want of a living beneficiary. A trust, in form, with none to enjoy or enforce the use, is no trust. Argument is unnecessary to show that there is no imaginable being possessing power to enforce the use declared in this bequest. The executor cannot do it, for he succeeds only to the property rights of the testator. His powers and functions do not, and cannot extend to the well being of the soul of his testator. As said by appellant's counsel, "if the church should receive this bequest and apply it to paying its debts, repairing its building, supporting its priests and paying the expenses of their ceremonies, the purpose of the bequest would be clearly violated. But what living person is authorized to call the trustee to an account for the misuse of the fund?"

The authorities upon the several propositions discussed will be found in the briefs of counsel which will be reported.

Upon no principle are we able to sustain this bequest. The decree of the chancellor must be reversed and the cause remanded.

*Reversed and remanded.*

*Brickell, Ch. J., dissents.*

## NORTH DAKOTA SUPREME COURT.

Samuel D. FLAGG, *Resp't.*,

v.

SCHOOL DISTRICT NO. 70 OF BARNES COUNTY, *App't.*

(.....N. Dak. ....)

"1. An instrument providing for the payment of exchange on a point other than the place of payment, in addition to principal and interest, is not a negotiable instrument; and one who purchases the same before maturity, for value, and without notice of any defense thereto, nevertheless takes it subject to the defense of want of consideration good as between the original parties to the instrument.

2. Defendant was authorized to issue bonds to fund its outstanding indebtedness in case certain statutory prerequisites were complied with. A record of the proceedings culminating in the decision to issue bonds

\*Headnotes by CORLISS, J.

**NOTE.**—As to rights of bona fide purchasers of municipal bonds, see in connection with the above case, *Suffolk Sav. Bank v. Boston (Mass.)* 4 L. R. A. 516; *Bainburg v. Ryan (Pa.)* 4 L. R. A. 536; *Brownell v. Greenwich (N. Y.)* 4 L. R. A. 635.

25 L. R. A.

was to be made in the district, and a certified copy thereof was to be filed with the county clerk, and preserved as a record in his office. It was made the duty of the county clerk to examine such record in his office, and if satisfied, from such examination, that all the requisites of the act with respect to the preliminary proceedings had been complied with, and that the bonds were authorized to be issued as provided for in the act, he was to register the bonds, and indorse upon each of them his certificate in the form prescribed in the statute. The bonds in question were so registered and certified. *Held*, that a purchaser of such bonds, for value, before maturity, and without notice that any of the conditions of the statute relating to proceedings to authorize the issue of the bonds had not been complied with, could rely upon the certificate of the county clerk as finally settling all such matters, and that the court below did not err in rejecting defendant's offer to prove that such conditions had not been complied with.

3. By an amendment to the act it was provided that no district, in which the title to the school site was not in the school board, should bond its debt until it had obtained such title. But it was declared in such amendment that, after the bonds had been registered and certified, their validity should not be questioned in any tribunal, but should be and remain valid

and binding. *Held*, that this provision made it the duty of the county clerk to pass upon this question of title before registering and certifying the bonds, and that, therefore, his decision, evidenced by registering and certifying the bonds, that such condition as to title to the school site has been complied with, was final on the point, as against the district, in favor of one who purchased the bonds in good faith, for value, without notice that this condition had not been complied with.

4. The right of a bona fide purchaser of municipal bonds to rely upon a recital or certificate as to facts which the person making the same had authority to determine does not depend upon the bond being a negotiable instrument. It exists in the case of a bona fide purchaser of a non-negotiable bond as well.

5. The statute declared that a committee should audit the claims against the district, and determine the amount of indebtedness to be funded. *Held* that the auditing by the committee of claims against the district, and the vote of the district to bond to pay such claims, and the issue of bonds accordingly, would preclude an inquiry as to the validity of such claims as a consideration for such bonds, as against a bona fide purchaser of such bonds; that, as against such purchaser, the district could not show, to prove a want of consideration between the original parties, that the bonds were in fact paid for by the one to whom they were originally issued by the district, by the surrender of void claims held by him against the district, provided such claims had in fact been audited and canceled, and bonds voted and issued under the provisions of the statute.

(*Wallin, J., dissents from proposition 1. Corliss, J., dissents from proposition 5.*)

(March 19, 1894.)

**A**PPEAL by defendant from a judgment of the District Court for Barnes County in favor of plaintiff in an action brought to enforce payment of interest coupons which had been attached to certain bonds issued by defendant. *Reversed.*

The facts are stated in the opinions.

**Mr. G. K. Andrus**, for appellant:

Is the recital of the county clerk on the back of these bonds sufficient to estop the district from now setting up that these conditions had not been complied with?

The recital simply says that this bond is issued in accordance with law and by authority of the majority of the legal voters of said district.

When the holder relies upon a recital, the recital must be clear and unambiguous.

*Independent School Dist. of Steamboat Rock v. Stone*, 106 U. S. 183, 27 L. ed. 90.

The public can act only through its duly authorized agents, and it is not bound until all who are required to participate in what is to be done have performed their respective duties.

*Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005; *Merchants Exch. Nat. Bank of New York v. Bergen County Freeholders*, 115 U. S. 384, 29 L. ed. 430.

All persons taking securities of public corporations having only special powers must see to it that the conditions prescribed for the exercise of the power existed.

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*Marsh v. Fulton County Supra.* 77 U. S. 10 Wall. 676, 19 L. ed. 1040.

If upon the face of the bonds the law authorizing their issue is referred to, a purchaser is bound to take notice of the statute, and of all its requirements.

*Whiteside v. United States*, 93 U. S. 247, 23 L. ed. 8-9; *Davies County v. Dickinson*, 117 U. S. 657, 29 L. ed. 1026; *Cagwin v. Hancock*, 84 N. Y. 532.

A corporation is not estopped from setting up a total want of power to issue bonds.

*Steines v. Franklin County*, 48 Mo. 176, 8 Am. Rep. 87; *Ray County v. Vansycle*, 96 U. S. 688, 24 L. ed. 801; *Pendleton County v. Amy*, 80 U. S. 13 Wall. 306, 20 L. ed. 530; *Burr v. Carbondale*, 76 Ill. 455.

Under the supplementary act it was the duty of the purchaser of these bonds to ascertain as to (1) whether a site had ever been designated for the building of a schoolhouse; (2) whether the land upon which the schoolhouse was situated had been conveyed to the school board or school district by a good and sufficient warranty deed, without which the act gave the school officers no authority to act.

It was the duty of the bondholder to know what the records of the district showed, and to also know that there was sufficient evidence in the office of the county clerk to authorize him to make the certificate which appears on the face of the bond.

*Brown v. Bon Homme County*, 1 S. Dak. 216; *Portsmouth Sav. Bank v. Ashley*, 91 Mich. 670.

The recitals of a bond issued by a public corporation, as a school district, are neither prima facie nor conclusive evidence of the required authority to issue the same.

*Heard v. Cathoun School Dist.* 45 Mo. App. 660.

Recitals in municipal bonds do not extend to or cover matters of law.

*Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360; *Northern Nat. Bank of Toledo v. Porter Twp. Trustees*, 110 U. S. 608, 619, 28 L. ed. 258, 262; *Barnett v. Denison*, 145 U. S. 135-141, 36 L. ed. 652-654; *Ogden v. Davies County*, 103 U. S. 634, 26 L. ed. 263; *Marsh v. Fulton County Supra.* 77 U. S. 10 Wall. 676, 19 L. ed. 1040; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 81; *Merchants Exch. Nat. Bank of New York v. Bergen County Freeholders*, 115 U. S. 384, 29 L. ed. 430; *Harshman v. Knox County*, 122 U. S. 306, 30 L. ed. 1152; *Oler v. Cleburne*, 181 U. S. 162, 33 L. ed. 146; *Lake County Comrs. v. Graham*, 180 U. S. 674, 33 L. ed. 1065; *First Nat. Bank of Decorah v. Doon Dist. Twp. (Iowa)* Oct. 15, 1892; *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669.

When a particular method of exercising any corporate power by a municipality is prescribed by statute no other can be adopted.

*Anthony v. Jasper County*, 101 U. S. 697, 25 L. ed. 1008; *Ogden v. Davies County, supra*; *Wells v. Pontotoc County Supra.* 102 U. S. 635, 26 L. ed. 123.

No one can purchase municipal bonds of a public corporation, either in ignorance of the law concerning them, which he is presumed to know, or in ignorance of the fact concern-

ing them, which he has the means of knowing.

*East Oakland v. Skinner*, 94 U. S. 257, 24 L. ed. 126; *McClure v. Oxford Twp.* 94 U. S. 483, 34 L. ed. 129; *Marshall County Suprs. v. Cook*, 89 Ill. 44, 87 Am. Dec. 262; *Bisell v. Kankakee*, 64 Ill. 249; *Nesbit v. Riverside Independent Dist.* 144 U. S. 610-621, 36 L. ed. 562-566; *Doon Twp. v. Cummins*, 142 U. S. 366-380, 35 L. ed. 1044-1049; *Lake County Comrs. v. Graham*, 180 U. S. 674-684, 32 L. ed. 1065-1068.

Even a bona fide holder cannot recover upon bonds or their coupons, where there was no authority to issue the bonds.

*Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390; *Nesbit v. Riverside Independent Dist.* *supra*; *McClure v. Oxford Twp.* 94 U. S. 429, 34 L. ed. 129; *Ogden v. Daviess County*, *supra*; *Spitzer v. Blanchard*, 82 Mich. 284; *National Bank of Commerce v. Granada*, 48 Fed. Rep. 278.

The bonds, if not void, are non-negotiable.

*First Nat. Bank of New Windsor v. Bynum*, 84 N. C. 24, 87 Am. Rep. 604; *Saxton v. Stevenson*, 28 U. C. C. P. 503; *Case v. Kirk*, 4 Allen (N. B.) 543; *Nash v. Gibbon*, Id. 479; *Hughitt v. Johnson*, 28 Fed. Rep. 865; *Christian County Bank v. Goode*, 44 Mo. App. 129; *Windsor Sav. Bank v. McMahon*, 88 Fed. Rep. 263; *Carroll County Sav. Bank of Uniontown v. Strother*, 28 S. C. 504; *Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742; *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442; *Read v. McNulty*, 12 Rich. L. 445, 78 Am. Dec. 467; *Fitzharris v. Leggett*, 10 Mo. App. 527; *Russell v. Russell*, 1 McArthur, 263; *Edwards, Bills & Notes*, 140; *Palmer v. Fahnestock*, 9 U. C. C. P. 172.

Even a bona fide purchaser is bound to take notice of the law under which the bonds are issued.

*Barnett v. Denison*, 145 U. S. 135, 36 L. ed. 462; *Ogden v. Daviess County*, 102 U. S. 634, 26 L. ed. 268; *Marsh v. Fulton County Suprs.* 77 U. S. 10 Wall. 676, 19 L. ed. 1040; *South Ottawa v. Perkins*, 94 U. S. 280, 34 L. ed. 154; *Northern Nat. Bank of Toledo v. Porter Twp. Trustees*, 110 U. S. 608, 38 L. ed. 258; *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 61; *Merchants' Ech. Nat. Bank of New York v. Bergen County Freeholders*, 115 U. S. 384, 29 L. ed. 480; *Harshman v. Knox County*, 123 U. S. 306, 30 L. ed. 1152; *Coler v. Cleburne*, 181 U. S. 163, 38 L. ed. 146; *Lake County Comrs. v. Graham*, 180 U. S. 674, 32 L. ed. 1065; *First Nat. Bank of Decorah v. Doon Dist. Twp.* (Iowa) Oct. 15, 1892; *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669.

No authority was conferred whatever upon the school officers to issue warrants or bonds to build a schoolhouse, until a site had been designated by the inhabitants of the school district at a district meeting.

Dak. Terr. Laws 1879, chap. 14, § 29, subd. 4.

When they exercise the functions given by the statutes under consideration, the power granted must not only be clearly conferred but strictly pursued.

*State v. Nuckolls County School Dist. No. 9*, 10 Neb. 544; *Wiley v. Brimfield*, 59 Ill. 306; *Farmers & M. Nat. Bank of Valley City v. School Dist. No. 53*, 6 Dak. 255; *Capital Bank*

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*of St. Paul v. Barnes County School Dist. No. 53*, 1 N. Dak. 479.

*Messrs. Williams, Goodenow & Stanton and Ball & Watson*, for respondent:

Defendant is estopped as against a purchaser bona fide from establishing any of the defenses set up in the answer.

1 Dill. Mun. Corp. § 528; *Burroughs, Public Securities*, p. 301; *Knox County Comrs. v. Aspinwall*, 62 U. S. 21 How. 539, 16 L. ed. 206; *Block v. Bourbon County Comrs.* 99 U. S. 686, 25 L. ed. 491; *Pompton Twp. v. Cooper Union for Advancement of Science and Art*, 101 U. S. 204, 25 L. ed. 805; *Lynde v. Winnemago County*, 88 U. S. 16 Wall. 18, 21 L. ed. 274; *National Bank of Commerce v. Grenada*, 41 Fed. Rep. 87; *Coloma v. Eaves*, 92 U. S. 484, 28 L. ed. 579; *Phelps v. Lewiston*, 15 Blatchf. 182; *Society for Savings v. New London*, 29 Conn. 174; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Gustaf v. Minneapolis, S. Ste. & M. & A. R. Co.* 48 Minn. 560; *Danielly v. Cabanis*, 52 Ga. 212; *Lane v. Emden*, 72 Me. 354; *Anderson County v. Houston & G. N. R. Co.* 52 Tex. 223.

An instrument may be a promissory note although payable with exchange on New York. At one time, only bills of exchange were negotiable. Promissory notes and bonds were not, but in modern times the old rules have been relaxed.

*Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742; *Smith v. Kendall*, 9 Mich. 241, 80 Am. Dec. 88; *Johnson v. Frisbie*, 15 Mich. 286; *Bullock v. Taylor*, 39 Mich. 187, 88 Am. Rep. 356; *Bradley v. Lill*, 4 Bliss. 478.

In *Leggett v. Jones*, 10 Wis. 84, it is said: "We have no doubt such instruments have everywhere been treated as commercial paper, both by the business world and by the courts."

See also *Tiedeman, Com. Paper*, § 28 A.

*Corliss, J.*, delivered the opinion of the court:

Judgment has been recovered and entered in favor of the plaintiff and against the defendant upon interest coupons of certain bonds issued by defendant. The appeal is from such judgment. The court below directed a verdict for the plaintiff, and it was upon this verdict that the judgment was entered.

Among other errors assigned is one based upon the refusal of the trial court to allow the defendant to prove that the bonds in question were issued without consideration. It cannot be doubted that a want of consideration would have constituted a perfect defense to the bonds in the hands of the original taker. But it is urged that the plaintiff is a bona fide holder, for value, before maturity, of the bonds, and their interest coupons. As a matter of fact, this contention of the plaintiff is fully sustained by the record; but he can derive no protection therefrom unless the bonds or coupons are negotiable instruments, within the rule which entitles the bona fide purchaser of such paper to protection, as against defenses to the same in the hands of the original holder. Are the bonds or the coupons negotiable instruments? If not, we must reverse the judgment, and allow the defendant to make proof, if it can, of its defense of want of consideration. The only

provision in the bonds and coupons which it is claimed affects their standing as negotiable instruments is that they shall be paid at St. Paul, Minn., with New York exchange. The rule is familiar to all that the amount to be paid must be certain,—must be ascertainable from the face of the instrument, and from the law which governs the contract. No resort to extrinsic evidence is allowed. Our statute establishes no different rule. "A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer in conformity to the provisions of this article." Comp. Laws, § 4456. That the provision that the maker, in addition to the sum specified, shall pay an indefinite sum, called "exchange," renders it impossible to ascertain how much money is needed to extinguish the obligation at maturity, without resort to evidence of a fact outside of the paper, cannot admit of a moment's doubt. No court has ever challenged the truth of this proposition. But it is insisted by those courts which uphold the negotiability of instruments embracing such a provision that the amount to be paid is substantially certain; that it can be readily ascertained, as it is fixed by the rate of exchange among bankers the day the paper falls due; that the amount of the exchange is usually very small; and that the spirit of the rule requiring certainty is therefore not violated by this exception to the letter of the rule. Indeed, it is asserted that the provision amounts to no more, in effect, than a requirement that the paper be paid at the place on which exchange is to be paid. The argument is made that, when the maker is called upon to pay exchange on a specified place, he is really compelled to do no more than pay out the same sum to satisfy the obligation that he would be forced to pay had it been payable, without exchange, at the place on which the exchange is to be paid. This reasoning is fallacious. There is a marked difference, both to debtor and creditor, with respect to the amount to be paid and received, between cases where the paper is payable at one place, with exchange on another, and cases where the paper is payable, without exchange, at the last-named place. Suppose, when the money is payable in this state, the creditor wishes to use the money here. He is doubly benefited by the provision to pay here, with New York exchange. Had the paper been payable in New York, without exchange, he might be compelled to pay exchange on some western point, to bring the money to this state. But by having it paid here he saves this sum, and, in addition, places in his pocket the amount of New York exchange paid him by the debtor. In times of great financial fright, like those through which we have been passing, the difference might be equal to a considerable sum. Nor is the effect the same upon the debtor. Should his money be in New York, he must pay the costs of bringing it west, and also pay the creditor the further cost of sending it back, although the creditor may not desire it remitted, whereas, had the debt been payable in New York,

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without exchange, he would have saved both of the items of exchange.

But even if it should be conceded that the effect, in dollars and cents, would be the same to both parties, under all circumstances, it would not follow that the courts would be justified in ingrafting this exception upon the law merchant. An agreement to pay a sum of money equivalent to the market price of a specified amount of a certain commodity at a particular time and place is, in its effect upon the parties, the same as an agreement in terms to pay that sum of money. But it would not be seriously urged that the former agreement would constitute a negotiable instrument. It would not be negotiable, because resort would have to be had to extrinsic evidence to settle the amount due, whereas, in the case where that amount (although precisely the same) is fixed by the terms of the paper, certainty exists upon the very face of the contract itself. It is this certainty which the law merchant requires. To ingraft upon this rule the exception contended for by respondent would be open to serious objections. In analogous cases, there would be no escape from further modification of the doctrine requiring certainty. When once the strict letter of the rule is departed from, the business world is wholly at sea. No one can tell in advance what other analogous provisions, introducing uncertainty into the contract, will be disregarded, as not falling within the spirit of the rule. The spirit of the rule is too vague and intangible for the guidance of business conduct. The commercial world needs, and must have, the certainty of the rule itself, in its plain interpretation. When a departure from its strict letter is once tolerated, the whole subject is removed from the realm of simplicity and certainty, and transferred to the domain of construction, confusion, and doubt. What the business world needs with reference to such matters is not so much a rule based upon principle as a rule simple, definite, and permanently fixed. All these elements will be destroyed by the adoption of the exception that resort may be had to outside evidence to fix the amount of exchange, without affecting the negotiability of the instrument providing for the payment of exchange. And what need is there for an exception? What great benefit will accrue to the commercial world from its adoption? It is said that the business world has practically agreed that the words "with exchange" do not destroy the negotiability of the paper containing them. But it is not within the power of the people to modify or abrogate by usage a settled rule of law. The people must change fixed rules by legislation. It is by no means certain that there is a consensus of opinion on this subject. In the eastern states there will doubtless be found many who would take issue with those who assert that such paper is negotiable. But there is no need for this usage.

The only theory upon which the creditor can justify inserting a provision for the payment of exchange is that he desires the money remitted to the point specified, to be used by

him there. To insert a provision for exchange for any other purpose would be requiring the payment of something which the creditor cannot, in fairness, exact. All he can justly demand is the principal and interest. If he is paid more, it is to enable him to remit the money, or to have it remitted, without expense to himself. In other words, it is contracted for and received by him that he may receive in full the amount of principal and interest at the place on which exchange is paid, without diminution because of being compelled to pay such exchange himself. The creditor can always accomplish this purpose by specifying in the contract, as the place of payment, the place to which he desires the money remitted. He will still receive the full sum, without deduction for exchange, as the debtor must pay it there; and the instrument will not be open to the objection that it is not negotiable, by reason of the fact that the exact sum to be paid cannot be ascertained without resort to extrinsic evidence. If, as has been stated, there is a large amount of paper in the market, containing a provision for the payment of exchange, which is regarded and is being treated by business men as negotiable paper, those who so believe and act are not entitled to have the law strained to protect them, for they must have known that such a provision did in fact introduce into the contract an element of uncertainty, and they also were bound to know that many cases treated such paper as not negotiable. Moreover, most of such paper will be paid or renewed, or be in some way disposed of, in a few months, and in transactions entered into subsequently to this decision the people can conform to the elementary rule that certainty must appear upon the face of the paper. We are asked to protect the few holders of such paper to which there may be some defense good as between the original parties. That we may do this, we are requested to take from the rule that which, above all other elements, renders it beneficial to the commercial world,—its simplicity and certainty. It is said that the amount of exchange is very small. But the amount is uncertain, within the meaning of the rule, whether a dime or a dollar is to be added to the sum by extrinsic proof. If the amount of the exchange is to determine the negotiability of paper containing provision for exchange, some of it would, and some of it would not, be negotiable, for there are times when that amount of exchange is much more than nominal. To escape such a dilemma the courts must hold that where the uncertain sum to be so added is equivalent to many dollars, as was frequently the case during the past summer, paper is nevertheless negotiable, within the rule which requires certainty upon the face of the paper as to the amount to be paid. Many cases support the view expressed in this opinion. *Windsor Soc. Bank v. McMahon*, 88 Fed. Rep. 288; *Love v. Bliss*, 24 Ill. 168, 76 Am. Dec. 749; *Hughitt v. Johnson*, 28 Fed. Rep. 865; *Read v. McNulty*, 12 Rich. L. 445, 78 Am. Dec. 467; *Carroll County Soc. Bank of Uniontown v. Strother*, 26 S. C. 504; *Palmer v. Fahnstock*, 9 U. C. C. P. 172; *Santon v.*

*Stevenson*, 28 U. C. C. P. 508; *First Nat. Bank of New Windsor v. Bynum*, 84 N. C. 24, 87 Am. Rep. 604; *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442; *Russell v. Russell*, 1 McArthur. 268; *Fitzharris v. Leggatt*, 10 Mo. App. 529; *Christian County Bank v. Goode*, 44 Mo. App. 129; *Cass v. Kirk*, 4 Allen (N. B.) 548; *Nash v. Gibbon*, Id. 479.

An agreement to pay the principal sum and interest, and in addition the cost of sending the money to New York by express, would have been more definite, because those charges remain fixed for a long period, and there would have been certainty from the outset how much money it would take to pay the debt. But, as exchange may vary from day to day, the amount to be paid therefor is uncertain, down to the very day of payment. Yet no one would contend that an instrument containing a provision for the payment of the cost of sending the money to New York by express would be negotiable. While it would have been practically certain from the start how much money it would take to comply with the contract, the certainty would have resulted, not from an inspection of the contract alone, but from the evidence of an extrinsic fact, not liable to change, which, however, must be proved, the same as any other extrinsic fact, by evidence outside of the paper. An agreement to pay exchange between points in this country, where the money standard is the same throughout, is only an agreement to pay for the cheaper mode of remitting funds, resulting from the more refined and complex system under which financial transactions are carried on.

We are aware that there are decisions opposed to our view. In Michigan it was held by a divided court that such instruments are negotiable. *Smith v. Kendall*, 9 Mich. 242, 80 Am. Dec. 88. The dissenting opinion of Judge Campbell is much more satisfactory to our minds than the prevailing opinion. In the latter case of *Johnson v. Friebie*, 15 Mich. 286, it is evident that the judges did not intend to express their views upon the question, as an original one, both from the language of the opinion in that case, and from the fact that Judge Campbell, who had so strongly dissented in the first case, wrote the opinion in the second. This opinion merely states that the law was settled by a majority of the court in the prior case, and we have therefore no means of ascertaining from the case of *Johnson v. Friebie* what Judge Cooley's views were on the question, looking at it from the standpoint of principle and business expediency. In a late case in that state (*Cayuga Nat. Bank of Auburn v. Purdy*, 56 Mich. 6), that court has held a note to be non-negotiable which contains a provision for exchange in connection with a provision for the payment of expenses of collecting if sued upon, and further provisions waiving exemptions, and increasing the rate of interest, if not paid at maturity. These three last-named provisions have been held by many authorities (although there is conflict) not to destroy the negotiability. The case may, therefore,—and in some jurisdictions must,—have turned on the question whether the pro-

vision for the payment of exchange destroyed its negotiability. The court said: "The modern tendency to interpolate into such instruments engagements and stipulations not recognized by the lawmerchant, affecting the certainty as to the amount due and payable thereon, or the time of maturity, or superadding duties to be performed by the maker of additional obligations, other than the payment of a sum certain at maturity, should be discountenanced, and held to destroy their negotiability, and deprive them of the character of promissory notes, and they should be relegated to the domain of ordinary contracts." In neither of the Wisconsin cases was the question involved. In the later case of *Morgan v. Edwards*, 58 Wis. 599, 40 Am. Rep. 781, there is a statement that what was said by the court in the former case (*Leggett v. Jones*, 10 Wis. 85) on the point was *obiter*; and while the court, in the later case, reiterates the former dictum in even stronger language, it is nevertheless the fact that in neither case did the court settle the question authoritatively, as one necessarily involved. In *Bradley v. Lill*, 4 Biss. 473, Fed. Cas. No. 1,783, the reasoning of the learned judge is clearly unsound. The opinion exemplifies the truth of the common observation that the use of an illustration is often a dangerous mode of enforcing a point. He likens the case of a note payable with exchange to one payable, with interest, in England, and sued on in New York. He asserts that in the latter case the note would be negotiable. But the court, he says, must, in such case, take proof of an extrinsic fact to fix the amount of interest. The answer to this sophistry lies so plainly on the surface that it is hardly necessary to state it here. The note, in the case put by way of illustration, is negotiable because in England, where it is payable, the amount of interest is ascertainable by an inspection of the note itself. Nothing is uncertain or extrinsic, which the note and the law disclose and establish. The suit being brought, in the case put by way of illustration, in a foreign country, the court must have proof of the laws of the country where the note was payable, to ascertain the rate of interest, because such laws are not judicially noticed; but when the proof is made the court ascertains the amount due, from the face of the note and the terms of the statute, without further evidence. And in England, by whose laws the rate of interest is fixed, and where the note was payable, there has at all times been an absolute certainty as to the amount needed to pay the note at maturity. The test is whether the amount due is certain from the face of the paper at the time and place of payment. Suing on the instrument in a foreign country cannot destroy its negotiability. The only discussion of this question, in favor of the view that such paper is negotiable, which is worthy of that name, is to be found in the opinion of Judge Mitchell in *Hastings v. Thompson*, 54 Minn. 184, 31 L. R. A. 178. It embodies all that can be said on that side of the question. It is a position not utterly destitute of strength, but, for the reasons we have already stated, we do not regard it as tenable. It is to be 25 L. R. A.

regretted that the federal supreme court has not passed upon the point. There should be only one rule for the nation, and it is to be hoped that, whatever conclusion is ultimately reached by that court, it will be adopted in all of the states. In this circuit it is settled by the decision of Judge (now Mr. Justice) Brewer, in the case of *Hughitt v. Johnson*, 28 Fed. Rep. 865, that such paper is not negotiable. Had this suit been instituted in the United States circuit court for this district, that court would have applied and enforced this rule. Therefore, for us to establish a different doctrine would make the rights of the parties depend upon the court in which the action should be brought. While the decision which we have cited from Pennsylvania (*Philadelphia Bank v. Newkirk*, 2 Miles [Pa.] 442) is a decision of the district court, it is quite evident what views the supreme court of the state would entertain on the question, should it come before that tribunal. In *Woods v. North*, 84 Pa. 407, 24 Am. Rep. 201, that court said that "it was a necessary quality of negotiable paper that it should be simple, certain, unconditional,—not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises and the decided cases which have established this principle. It is very important to the commercial community that it should be maintained with all its rigor." In a recent case in the same court this language is quoted with approval. *Iron City Nat. Bank v. McCord*, 139 Pa. 53, 11 L. R. A. 559.

A majority of this court holds that the bonds and coupons were not negotiable, and were therefore open to the defense of want of consideration. Hence, it was error for the court to exclude the evidence offered to substantiate this defense. The chief justice, who agrees with me, rests his decision upon the terms of our statute. Comp. Laws, §§ 4456, 4462.

It is claimed that the court erred in another particular: The defendant offered to prove that the land on which the school building for which the bonds in suit were issued was situated was not owned by the defendant, or its school board; that it had never been conveyed to the district, or its school board; that proceedings to condemn it as a school site had never been instituted; and that it was, in fact, the property of a third person. This offer was rejected. Would these facts have constituted a defense? The act under which defendant derived its authority to execute bonds is a special act, and is not to be found in the printed volumes. It was approved March 13, 1886. On the same day the act was amended, and in this amendment it was expressly provided that the indebtedness of no school district mentioned in the original act should be bonded until the land on which the school building was located should have been conveyed, by good and sufficient warranty deed, to the school board of such district, or the title to it should have been obtained by the school board by proper condemnation in the manner provided by law. The existence of this fact of ownership of the site on which the school building was

situated was a condition precedent to the existence of any power to issue bonds. Until this fact existed, the district was as powerless to bond as if no statute on the subject had been passed.

The only possible escape of the plaintiff from this conclusion is by invoking another doctrine,—the doctrine of estoppel from recitals in the bond, or in a certificate attached to it. Upon each bond was indorsed a certificate signed by the county clerk certifying that such bond "is issued in accordance with law, and by authority of a majority of the legal voters of said district present and voting at an election duly held May 11, 1885, for that purpose, and is duly registered in this office." We will assume at first that this certificate is in terms broad enough to embrace the fact that the title to the school site was in the school board. The question then arises whether this fact is such a fact as the county clerk had authority to investigate, and settle by his certificate, so as to preclude an inquiry with respect to the same, as against a bona fide purchaser of the bonds. This doctrine rests upon legislative intent. Did the legislature intend to commit the determination of certain facts to the judgment of the officer making the certificate, or the officers issuing the bonds, where the facts are recited in the body of the bond, so that purchasers of such bonds might rely upon such certificate or recital? As we said in *Coler v. Dwight School Twp.* (N. Dak.) 55 N. W. Rep. 587, 591, "It is not necessary that the power to determine these facts should have been expressly conferred upon the district officers by statute." And in that connection we added in that case (quoting with approval) the language of *Mr. Justice Brewer in Bernards Twp. v. Morrison*, 133 U. S. 523, 33 L. ed. 726: "It is enough that full control in the matter is given to the officers named." We stand by this statement of the rule, but the language of section 6 does not bring this case within its purview. The county clerk derives his power to make the certificate upon the bonds from section 6 of the statute. But, as a consideration of section 5 is essential to a right understanding of section 6, we quote them both in full:

"Sec. 5. No bond shall be issued under this act until the question of issuing the same shall be first submitted to a vote of the district at a school meeting called for that purpose of which school meeting at least ten days' notice shall be given by notices posted in at least three public and conspicuous places in said districts, stating the time and place of meeting and that the said meeting is for the purpose of auditing and settling the indebtedness of said district and issuing bonds to provide for the payment thereof. The notice of such meeting may be signed by any member of the school board or in case of the absence of all the members of the school board or their inability, refusal or neglect to sign the same, by three resident electors of such district; provided that no meeting shall be called for such purpose until the district school board shall have been petitioned therefor in writing by at least one third of the resident electors; a majority of 25 L. R. A.

the legal voters present and voting at such meeting shall first appoint a committee of three from their number, resident freeholders and possessing other qualifications of electors of the district, to audit and settle the indebtedness of the district. Said committee shall at once cause notice to be given of their appointment, and shall in said notice set a time during which the outstanding indebtedness shall be presented to them. Said time shall not be less than thirty days nor more than ninety days, and said notice shall be published in some newspaper of general circulation published in each of the counties of Barnes and Griggs and shall also set forth the time when the committee will make a full report of their duties to the electors of such district, whereupon the electors shall meet at such time and place to receive said report and submit the question of the issuing of bonds to provide for the payment of the indebtedness as audited and settled, and the auditing or settling by said committee shall not be in any manner construed to be binding on said district or be construed as an admission of the legality of any claim or alleged claim against said district, and no bonds shall be issued until the claims for which they are issued shall be delivered up and canceled, and a full record shall be kept of all of the proceedings of said meeting, and the acts of said committee and of the vote cast in the names of all of the persons who voted at said meeting and shall be preserved as a record in the district, and a certified copy of such record shall be filed with the county clerk which shall be kept in his office as a public record. The ballots in favor of or opposed thereto shall contain the words respectively 'For issuing bonds' and 'Against issuing bonds' and if a majority of all the votes cast be in favor of issuing bonds, the school board shall forthwith proceed to issue bonds to the amount of the indebtedness as audited and settled and running for such length of time as shall be determined by the further vote of the resident voters present within the limits prescribed by this act. Sec. 6. Before said bonds are issued, sold or disposed of, they shall be presented to the county clerk, and the said county clerk shall carefully examine the notices of election and the proof of posting or publishing the same, and shall also carefully examine all returns of the election and all proceedings of said committee and of said district meetings, and the settlement, auditing and vote authorizing the issuance of said bonds, which examination shall be made from the records filed in his office, as provided for in the preceding section, and if satisfied therefrom that such bonds are authorized to be issued, as provided for in this act, and the claims for which they are issued are delivered up and canceled, he shall, in a book kept for that purpose, preserve a registry of each bond, showing in separate columns and entries, the number of the school districts issuing a bond, the denomination thereof, the date of issue and other facts, and upon each bond shall endorse the following certificate: I hereby certify that the within bond for ——— dollars of school district number ——— county,

territory of Dakota, is issued in accordance with law, and by authority of a majority of the legal voters of said district present and voting at an election duly held —, 188—, for that purpose, and is duly registered in this office. The blanks shall be filled according to the fact, and the certificate officially signed by the county clerk and attested by the seal of the county."

It will be noticed that the county clerk is not given full control of the matter by section 6. He is merely to settle the questions whether the provisions of section 5 have been complied with. That he has nothing, under the terms of section 6, to do with the determination of the question whether the school board has title to the school site, is apparent from the fact that that matter is not referred to in section 5; from the further fact that his decision is to be based upon the examination of a certified copy of the record of the proceedings referred to in section 5, which requires such record to be kept; and from the still further fact that, at the time section 6 was passed, section 15 had not been amended, and therefore the law did not at that time contain any provision requiring the ownership of the school site, as a condition precedent to the power to issue bonds. It is thus made apparent that the county clerk was given no authority over this matter by section 6; that no decision touching it was committed to his judgment by that section. Under such circumstances, it is too clear to justify further argument that, under the language of section 6, his certificate constitutes no estoppel. The public has no more right to rely upon it, so far as this matter was concerned, than the certificate of any utter stranger. We are not without express authority upon this point. *Coffin v. Kearney County Comrs.* 87 Fed. Rep. 143; *German Sav. Bank of Davenport, Iowa v. Franklin County, Ill.* 128 U. S. 526-540, 32 L. ed. 519-525; *Lake County Comrs. v. Graham*, 180 U. S. 674, 32 L. ed. 1065; *Northern Nat. Bank of Toledo v. Porter Trp. Trustees*, 110 U. S. 608, 28 L. ed. 258; *Kelly v. Milan*, 21 Fed. Rep. 842; *National Bank of Commerce v. Granada*, 54 Fed. Rep. 100; *McClure v. Oxford Trp.* 94 U. S. 429, 24 L. ed. 129; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360; *Brown v. Bon Homme County*, 1 S. Dak. 216. In this last case the court said: "There were no recitals in these bonds of the existence of any fact which the chairman and clerk of the board were authorized to ascertain and determine." In *Dixon County v. Field*, the court said: "If the officers authorized to issue bonds upon condition are not the appointed tribunal to decide the fact which constitutes the condition, then recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel claimed to arise upon the recital of the instrument,—the question being as to the existence of the power to issue them,—it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals, and to make them conclusive. The very ground of the estoppel is the recitals and the official statements of those to whom the law

refers the public for authentic and final information on the subject."

Nor could there have been any hardship in requiring those dealing with the bonds to ascertain whether the district had title to the school site before issuing the bonds. This title, whether under deed or condemnation proceedings, would ordinarily be a matter of public record. We do not think, however, within the meaning of the cases holding that an assessment roll must be examined despite recitals in the bonds, that the bona fide purchasers of these bonds bought at their peril, if the legislature has given the county clerk authority to determine this question, and embody his decision in his certificate. These cases relate to facts which are necessarily matters of record: *Sulliff v. Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145; *Lake County Comrs. v. Graham*, 180 U. S. 674-692, 32 L. ed. 1065-1067; *Chaffee County Comrs. v. Potter*, 143 U. S. 355-363, 35 L. ed. 1040-1043; *Dixon County v. Field*, 111 U. S. 83-92, 28 L. ed. 360-363; *Neesh v. Riverside Independent Dist.* 144 U. S. 610, 36 L. ed. 562; *Francis v. Howard County*, 50 Fed. Rep. 44; *Citizens Bank of Tezakana v. Terrell*, 78 Tex. 450; *Nolan County v. State*, 88 Tex. 182. But the title to the school site might be in the school board by an unrecorded deed.

We now come to a provision in the amendment to the act which, in our judgment, requires us to hold that the county clerk's certificate was broad enough to include the fact of title, and that it was the purpose of the legislature to make this certificate final on this point, so far as innocent purchasers were concerned. That amendment, after providing, among other things, that the title must be in the school board before bonds can be issued, declares that "the validity and obligation of any school bond registered and certified as herein provided . . . shall not be questioned in any tribunal, but every such bond shall be and remain binding." While this does not, in terms, vest in the county clerk the power, or make it his duty, to investigate and determine this question of title, the language can have no effect unless it be so construed. It is not necessary that the power to decide and settle such matters be vested in the officer, in express terms. *Burroughs, Public Securities*, p. 821; *Coler v. Dwight School Trp.* (N. Dak.) 55 N. W. Rep. 587; *Bernards Trp. v. Morrison*, 133 U. S. 523, 33 L. ed. 726. After the bond is registered and certified in the manner prescribed by the statute, this question of title is no longer open to litigation, as against bona fide purchasers. It was therefore the duty of the county clerk to investigate this matter before registering the bonds and making the certificate. A threatened violation of this duty could have been restrained by injunction, and the district protected. This provision clearly gives the county clerk full control over the matter with respect to the question of title, as well as regards the matters specified in sections 5 and 6. Where the statute declares that the validity of a bond shall not be questioned after it has been certified by an officer to have been issued in accordance with law, and that same law pro-



vides what is essential to the validity of such bond,—i. e. that the district issuing should own its school site,—it does not admit of doubt, in the judgment of the court, that such officer, by necessary implication, is vested with the power to decide such matter, and that it is his duty to decide such matter, before making the certificate. Says Burroughs in his work on Public Securities: "The power of the officer to determine whether such conditions have been complied with need not be expressed; it being deduced from the provisions of the statute, and the supposed necessity of the case, that such questions must be determined before the issue of the bonds." Page 821. That the power to decide questions, and thereby estop the municipality, need not be expressly conferred, is clear from other authorities. Judge Dillon says it is sufficient "if, upon a true construction of the legislative enactment conferring the authority, the corporation, or certain officers, or a given tribunal, are invested with power to decide whether the condition precedent has been complied with." 1 Dill. Mun. Corp. 528. In *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579, it is said that the rule of estoppel by recitals applies "where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with." In few, if any, of the cases, has there been an express delegation of the power to decide whether conditions precedent to the exercise of power existed, or had been complied with. "It is not necessary that the power to determine these facts should have been expressly conferred upon the district officers by the statute." *Coler v. Dwight School Trp.* (N. Dak.) 55 N. W. Rep. 587-591. In *Coffin v. Kearney County Comrs.*, 57 Fed. Rep. 143, the court said that the recitals, to estop the municipality, must relate to matters of fact "which it may fairly be presumed that the officers of the municipality were left to determine."

It has been urged that to construe the provisions in the amendment that the bonds shall not be questioned in any tribunal after they have been certified or registered by the county clerk as giving the county clerk authority to settle the question of school site would defeat the amendment. The proposition is not sound. The amendment was made to withhold from a district, which did not own its school site when the act was passed, power to bond its floating indebtedness until it has secured such title. Because the county clerk can decide whether in fact it had such title does not take away this restriction upon its power. The county clerk, it is to be presumed, will do his duty. Ordinarily, this presumption accords with the fact. Here is a complete check upon the illegal issue of bonds. The county clerk, doing his duty, refuses to certify and register the bonds, because the district has no title to the site, and they, therefore, cannot be issued. Will the power to decide this question defeat the amendment, in such a case? Again, suppose the county clerk is corrupt, or is deceived. Have not the taxpayers the right to enjoin

the illegal issue of bonds? The style of reasoning which we have been answering would in every case defeat the effect of a recital as an estoppel. The argument would invariably be that to hold that it created an estoppel would abrogate the restrictions upon the power to issue bonds, or sweep away the conditions essential to the existence of such power.

Unless we construe this declaration as relating to the question of title to the school site, it is an idle provision in the statute. If it refers to any such defenses as are shut out by the certificate of the county clerk,—i. e. those arising under section 5,—then it is merely declaratory of a settled rule of common law, which would have been just as operative without the declaration as with it. Before this clause was enacted, such defenses were foreclosed by the county clerk's certificate. Why, then, enact it, if that was the only purpose in enacting it? That the legislature did not intend to enact a meaningless provision is apparent from the fact that in the act, as it was originally adopted before amended, no such provision is found. It was unnecessary. The common law declared that, as to matters which were expressly intrusted to the clerk for decision, his decision was final. But in the amendment a new condition is introduced. With respect to this the clerk had not already been given authority to determine whether it had been fulfilled. If his certificate was to settle this question as to good-faith purchasers, some declaration to that effect would be necessary. The common-law rule would not apply, for without such declaration the clerk would have no power to decide this question. Hence, if a good-faith purchaser was to be protected with respect to this question, it became necessary to declare so in the amendment itself; and what declaration could be more comprehensive than that which makes the certificate of the clerk final as to the validity of the bond? This declaration was not made in the statute, as originally framed and passed, when it could have no effect. It was made for the first time in the amendment, when it could have some effect, i. e. the effect we have given it, to foreclose the defense that the district had no title to the school site when the bonds were issued. And yet we are asked to strip it of all significance. We are asked to limit, and further limit, its broad meaning, until it shall mean only what it was unnecessary for the legislature to declare. The construction which we place upon this provision is in harmony with the language in which it is couched. It recognizes that the legislature intended to make a declaration which would have some effect, and it is sustained by the general trend of legislation in such cases, which is almost uniformly in the direction of having all questions as to conditions precedent settled by some officer or tribunal, that a good-faith purchaser may rely thereon without being compelled to investigate, at remote points, questions that are more or less difficult of ready solution. It may be true that the comprehensive significance of the language of the amendment must have some limitation,—

that all defenses will not be foreclosed by the county clerk's certificate. But because the clause must be limited in its meaning is no reason why it should be so limited as to render it an idle provision. It can be restricted in its operation so as not to violate any constitutional provision, and yet be construed to embrace the defense that no title to the school site had vested in the district when the bonds were issued.

It cannot be said that the district was without power to bond until it had acquired title to the school site, in any other sense than it would have been without power to bond had it owned its school site, but had taken no proceedings under section 5 to obtain a popular vote on the question of issuing bonds. In both cases, after the law had been complied with, the power would be derived from the statute. After a district had obtained title to its school site, no new enactment would be necessary to vest it with power to issue bonds. The act confers the power on the performance of several conditions precedent. Among these conditions is the one requiring the district to own its school site. But it is no more a condition precedent to the exercise of power than a popular vote on the question of issuing bonds. It applies to all districts within the statute, just as the requirements of section 5 do. In all districts there must be a compliance with section 5, and also with the amendment as to title to the school site, to confer power upon the district to issue bonds. The issue of bonds without complying with section 5 would be just as illegal as the issue thereof without complying with the condition as to title to the school site. The language of the amendment is that the indebtedness shall not be bonded "until" the district has acquired title to its school site.

The issue of bonds without a popular vote could be restrained, the same as an issue thereof without obtaining title to the school site. In either case the bonds would be illegal, would be issued without authority, and would be void in the hands of those who were not in position to rely upon recitals in or on the bonds. If it was competent for the legislature to authorize the county clerk to estop the district by recitals in one case, it was also competent for them to vest the same power in him in the other case. We are therefore brought back, directly and inevitably, to the inquiry whether such power was intended to be vested in the county clerk as to the fact of ownership of the school site. Nor would we reach any different conclusion, could we see any distinction between a condition precedent in the nature of a popular vote and a condition precedent of a different character.

There are many cases to be found where the municipality has been held to be estopped by recitals, although the bonds were in fact issued in the very face of statutory prohibition, or where there has been a positive restriction on the power to issue them in excess of a certain percentage of the assessed valuation of the property of the municipality, or to issue them for so large an amount that the levy of a tax of a certain per cent would not suffice

to pay the annual interest thereon. *Chaffee County Comrs. v. Potter*, 142 U. S. 868, 35 L. ed. 1048; *Marcey v. Oswego Twp.* 92 U. S. 637, 28 L. ed. 748; *Humboldt Twp. v. Long*, 92 U. S. 642, 35 L. ed. 752. These cases hold that, although the bonds are issued in excess of the power of the municipality (issued for an amount forbidden by statute), the municipality will be estopped, by recitals made by a person or body having power to determine the question, from setting up such want of power,—from showing that the prohibitions of the law have been violated. These cases go far beyond the necessities of the case, for they were cases where there was such an utter want of power that a new act of the legislature would have been necessary to confer it, whereas in this case the power had been conferred subject to the performance of a condition precedent,—*i. e.* the acquiring of title to the school site,—and no new act was needed to make perfect the power after this condition had been complied with. On principle, these cases are sound. To the extent that the legislature can dispense with certain conditions,—can give unrestricted power,—it may authorize some one to decide finally whether the restrictions it imposes have been observed, so that innocent holders of the bonds may be protected. If the legislature has the power in this particular case to delegate to a person, officer, or board the authority to decide whether the facts exist which warrant the issue of valid bonds, and does in fact delegate such power, the certificate of such person, officer, or board estops the municipality from asserting the invalidity of such bonds, or all such matters of fact which the legislature could and did intrust to such person, officer, or board for decision. The certificate does not, in terms, state that the facts as to title to the school site are such as to warrant the issuing of bonds; but the form of certificate used is the precise form designated by the statute, and it is that certificate which the statute, in effect, declares shall preclude inquiry into the question of title, as well as other matters. But, independent of this consideration, there would be much force in the contention that the language would be broad enough to embrace all facts submitted to the officer for decision. He certifies, not only as to the fact that a majority of the legal voters voted for the issue of bonds, but also that the bond "is issued in accordance with law." Without discussing or attempting to settle this point, we refer to some authorities bearing upon it. *Lewis v. Barbour County Comrs.* 105 U. S. 789, 26 L. ed. 998; *Comanche County Comrs. v. Lewis*, 138 U. S. 198, 33 L. ed. 604; *Bernards Twp. v. Morrison*, 183 U. S. 523, 33 L. ed. 726; *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431; *Dixon County v. Field*, 111 U. S. 83, 28 L. ed. 360; *Moultrie County v. Rockingham Ten Cent Sav. Bank*, 92 U. S. 631, 28 L. ed. 681; *Marcey v. Oswego Twp.* 92 U. S. 637, 28 L. ed. 748; *Knox County Comrs. v. Aspinwall*, 62 U. S. 21 How. 539, 16 L. ed. 208; *Coler v. Dwight School Twp.* (N. Dak.) 55 N. W. Rep. 587-591.

Some cases appear to hold that a mere recital that the bond was issued in pursuance

of a particular statute is a sufficient recital of performance of all the conditions prescribed by the statute. See *Bernards Twp. v. Morrison*, 188 U. S. 522, 83 L. ed. 726; *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. ed. 481; *Knox County Comra. v. Aspinwall*, 62 U. S. 21 How. 559, 16 L. ed. 208. We used language in *Culer v. Dwight School Twp.* (N. Dak.) 55 N. W. Rep. 587-591, indicating that such a recital would be sufficient to estop the municipality. What was said there was not necessary to the decision of the case, and the writer of this opinion in fact intended to say that a recital that the bond was issued in conformity with a particular statute would be a sufficient recital that all the terms of the statute had been complied with, so far as the officer making the statement had power to pass upon such questions. It might with much force be urged that a bare recital that the bond was issued in pursuance of a particular act would constitute no more than a mere reference to the law under which the bond was issued, and not a declaration that the terms of that law had been complied with. If such construction were to be placed upon these words, there would be nothing to estop the municipality, except the mere fact of issuing the bonds. This is not sufficient to render the municipality liable, against proof that the conditions of the statute have not been complied with. *Lake County Comra. v. Graham*, 180 U. S. 674, 82 L. ed. 1065; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 188; *Carroll County Supra. v. Smith*, 111 U. S. 556, 38 L. ed. 517; *Marsh v. Fulton County Comra.* 77 U. S. 10 Wall. 676, 19 L. ed. 1040. In order that no one may be misled by your inadvertent language in that case, we have decided it best to make this explanation. We leave this question open to discussion whenever it arises, expressing no opinion upon it.

It is not necessary, to estop the defendant, that the certificate should be that of an officer of the municipality issuing the bonds. This power may be vested in any officer or body. *Burroughs, Public Securities*, p. 321; 1 Dill. Mun. Corp. (8d ed.) § 528. But it seemed to be intimated on the argument that, the negotiability of such bonds being destroyed by the provision for exchange, they did not come within the rule of estoppel by recitals. If this view is sound, then the defendant would not be estopped by the certificate of the county clerk, as a majority of the cases have concluded that the bonds are not negotiable. But we are clear that there is no connection between the two doctrines. The municipality is estopped by recitals on the ground that, for the convenience of the business world, the legislature has designated some one who shall settle the question whether the law has been complied with in certain particulars. Persons who pay value, who act in good faith, and have no notice that there was any failure to comply with the statute, have the right to rely upon the decision of the person to whom the legislature has for that purpose intrusted the decision of such matters. The estoppel depends, not upon the form of the security, but upon the facts that the person was authorized to decide such matters, and that the

holder of the bonds, or some one under whom he claims, has paid value for the bonds, in good faith, without notice of any irregularity or illegality in the proceedings. The fact of the negotiability of the security has never entered into the consideration of the question of estoppel, and has never been regarded as forming an element in building up the doctrine of estoppel by recitals, although, in most of the cases, it is true that it appears that the bonds were in fact negotiable. Mr. Burroughs, in his work on Public Securities, says on this subject: "The doctrine, however, is one that is entirely independent of the question of negotiability. If it is correct, it applies equally to non-negotiable paper." Page 322. He reiterates this statement at pages 327 and 354. What we have said with reference to the defendant being estopped by the certificate of the county clerk from showing that the title to the school site had not been vested in the school board applies with equal force to several defenses which the defendant sought to prove on the trial. Defendant offered to prove that the question of issuing the bonds was never submitted to a vote of the resident electors of the district at any school meeting called for that purpose; that no notice, as required by section 5 of the Act, was ever given, by posting in three conspicuous places in the district stating the time, place, and object of the meeting, and that it was for the purpose of auditing and settling the school indebtedness of the district, and issuing bonds to provide for payment thereof; that the school board of the defendant was never petitioned in writing by at least one third of the resident electors of said district to call a meeting to audit and settle the indebtedness of the district; that a committee was never appointed to audit and settle the indebtedness of the district; that the same was never audited and settled by a committee from the district, or the school board; that the claims for the bonds in suit were never given up to the defendant, or canceled; that the resident electors of the defendant never authorized or sanctioned, or in any manner ratified, the issuing of the bonds. All of these matters were settled against the defendant by the certificate of the county clerk that the bonds were issued in accordance with law. They were matters which the statute made it his duty to decide before he appended his certificate to the bonds, as will be seen by reference to sections 5 and 6 of the statute, and upon his decision the plaintiff could confidently rely, he being a purchaser in good faith, for value, and without notice of any irregularities in the proceedings. There was therefore no error in excluding proof of these defenses. Defendant also offered to prove that the persons who signed the bonds as director and as clerk were not the qualified director and clerk of the defendant. If the offer had been to prove that they were not director and clerk, either *de jure* or *de facto*, the court would have been obliged to receive the evidence. Even a bona fide purchaser of a negotiable municipal bond must take the risk of the signatures being forged, or that the persons signing are not in fact officers of the municipalities issuing the

bonds. *Coler v. Cleburne*, 181 U. S. 162, 38 L. ed. 146; *Anthony v. Jasper County*, 101 U. S. 698, 25 L. ed. 1006; 15 Am. & Eng. Encyclop. Law, p. 1292. But the offer was not to prove that the persons who signed these bonds were not actually exercising the functions of these offices, respectively, even as *de facto* officers. Defendant merely proposed to prove that they were not qualified officers of the district. There was no error in rejecting this proof. A *de facto* director and a *de facto* clerk could bind the district the same as *de jure* officers could.

The defendant also offered to prove that the assessed valuation of all of the property in the defendant district in the year 1888 was only \$4,000, and that the legal voters of the district never designated a site for the school district house at any meeting; that they never authorized the school board to build a school-house, or to issue any warrants for which the bonds in suit were given; and that they never ratified or sanctioned the matter in any manner. These offers, by themselves, would not have constituted a defense to this action. Perhaps the purpose of the defendant was to show that the debts which were founded by the issue of those bonds were void, under the decision of the territorial supreme court and of this court in the cases of *Farmers' & M. Nat. Bank of Valley City v. School Dist. No. 53*, 6 Dak. 265; and *Capital Bank of St. Paul v. Barnes County School Dist. No. 53*, 1 N. Dak. 479. But it would not follow from the fact that the warrants were void that the bonds themselves would also be void, in the hands of an innocent purchaser. This would not necessarily establish a want of consideration. The bonds might have been sold originally for cash, as the statute authorizes, and the subsequent application of the proceeds to pay void claims would not operate to the prejudice of the one who had paid value for them. Indeed, a majority of the court are of opinion that defendant cannot establish a want of consideration for the bonds by showing that they were issued in exchange for void warrants, provided the warrants had in fact been audited, surrendered, and canceled. This ruling will control the trial court on the new trial of this case. From this view, however, I am compelled to dissent. The statute, in express terms, declares that the auditing of the claims against the district shall not render valid such of them as may be invalid. They remain as void in the hands of the holder of them after they are audited as they were before. The holder of them cannot enforce them against the district; and, when he surrenders them in exchange for bonds, it is clear that he has parted with nothing of value, and therefore has paid nothing for the bonds. It is the same as though he had paid counterfeit money for them. The bonds in his hands are not the bonds of the district, not because there was not power to issue them, but because the district has received no consideration for them. Not being negotiable, the plaintiff would take them subject to this defense of want of consideration, unless the district should be held to be estopped from insisting that warrants, after they have been audited and canceled, are void, as against a

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purchaser who pays value for the bonds. In other words, the district must be held to be estopped, not only as to the existence of power to issue the bonds, but also as to the fact whether they were sold for a valuable consideration. To so hold is to go beyond all authority, and to extend the doctrine of estoppel by recitals to matters which have been governed by other rules.

At this point it becomes necessary to make an important distinction. It is necessary to a correct solution of this problem to keep constantly in mind the distinction between the defense of want of power and the defense of want of consideration. The bonds not being negotiable, the defendant will be successful if either defense is established. But it cannot prove the invalidity of the indebtedness audited to establish want of power, because the certificate of the county clerk is a final decision by an authorized officer that a sufficient amount of district indebtedness has been audited and canceled to warrant the issue of the bonds so certified. It was for this purpose that this certificate was required to be made. Power to bond to fund indebtedness would depend upon the existence of debts to be funded, and would be only commensurate with such indebtedness. Such bonds could not be negotiated if this question as to the existence of sufficient indebtedness to warrant the issue of the bonds actually issued were left open to future investigation and decision. To preclude all inquiry into it, as against innocent holders of the bonds, the legislature provided for the indorsement upon such bonds of the certificate of the county clerk, who is charged with the duty of ascertaining such fact, and this was done that the question of power should not thereafter be open to investigation. But the utmost scope of the legislative intent was by the certificate to settle the question of power, and no other question. This is always the object of recitals in such bonds. The sole purpose is to foreclose inquiry into the question of power, by estopping the municipality from showing that certain conditions precedent to the issue of bonds have not been complied with, or do not exist, and no case can be found where they have been held operative to estop the municipality from showing want of consideration. The certificate of the county clerk is not an assurance to the public that the bonds have been in fact sold for value. The sale does not take place until after the certificate is indorsed thereon. No one would buy them before. No one ever does purchase such securities in advance of their being put in such shape that he can buy them with safety, so far as the question of power is concerned.

The statute, in express terms, provides that, before the bonds are sold, they shall be so certified. This certificate, from the very nature of the case, cannot embrace a fact which must occur after the certificate is made, which is not intrusted to the county clerk for decision, and of which he cannot be expected to have any personal knowledge; the bonds being subsequently sold by other officers, *i. e.*, the proper officers of the school district. It is not a certificate that the bonds

were sold for cash, or for audited warrants, or that they were sold at all. It is a statement to the public that, if the bonds are sold, the one who buys them may confidently rely upon there being power to issue them. If this certificate creates an estoppel, not only as to power, but also as to consideration, then it follows that it cannot be shown, as against one who has bought them as non-negotiable paper, and therefore subject to the defense of want of consideration, that they were sold for void warrants, which had never been audited. Indeed, upon this theory, it cannot be shown that, as a matter of fact, they were given away. But it is said that while the purchaser must take the risk of their being given away, or issued in exchange for void warrants, which had not been audited, yet, if they were in fact issued for warrants which have been audited, the validity of such warrants cannot be inquired into. Right here is the pivotal point of this case, so far as this question is concerned. What is there in the statute to warrant a purchaser of such bonds in assuming that any warrant which has been audited is a valid warrant? There is nothing. On the contrary, the statute explicitly declares to the world that a void warrant is still void, although it may have been audited; that the holder of it cannot enforce it; and that, if he surrenders it in exchange for bonds issued by the district, he has paid nothing of value for the bonds so issued. The lawmerchant declares to the one who subsequently buys such bonds that the fact that the bonds were void in the hands of the first holder, for want of consideration, can always be shown as against him (the subsequent purchaser). Whence comes this guaranty to the public that the audited warrants are valid? It does not come from the certificate of the county clerk, for that merely asserts that the auditing committee have adjudged enough warrants to be valid to authorize the issuing of the bonds in question. What particular warrants have been decided to be valid is not stated. What effect this decision of the auditing committee is to have upon the warrants themselves, we must look into the statute to determine. The statute, in express terms, declares that it shall not have the effect to validate such warrants as were before void. So far, however, as the question of power is concerned, the decision of the auditing committee is final, because the statute expressly authorizes the issue of bonds, to the extent that such claims are adjudged to be legal by such committee. The language of the statute is that the "school board shall forthwith proceed to issue bonds to the amount of the indebtedness as audited and settled." There is power to issue bonds to that extent, whether such claims are valid or not; and the certificate of the county clerk is final, that claims enough have been audited to authorize the issue of the bonds on which the certificate is indorsed. But right here the statute draws the line, and declares that, while the question of power cannot be assailed by showing that not enough valid warrants were audited to justify the issue of bonds issued, yet, nevertheless, such war-

rants as were void before they were audited are still void for all other purposes; and, if they are declared to be void for all other purposes, how can a purchaser of bonds, who takes subject to the defense of want of consideration, insist that the district is estopped from showing that they were void, for the purpose of proving that nothing was paid for the bonds which were issued in exchange for them? The estoppel cannot rest upon the certificate, because it may be shown despite the certificate that the bonds were given away, or issued in exchange for void warrants, which had not been audited. The estoppel must rest upon the circumstance that the warrants in exchange for which the bonds have been issued had in fact been audited. As to such warrants, what representation does the statute make to the public? It declares to the purchaser that these warrants, although audited, may in fact be void, and that auditing them does not make them valid; that, if void, he who surrenders them for bonds gives nothing of value for such bonds, and therefore cannot enforce them. The lawmerchant here steps in, and informs the purchaser of such bonds, when they are not negotiable, that, if they were issued in exchange for such void warrants, he takes them subject to the same defense as was effectual against them in the hands of the first holder.

I fully agree with the majority of the court in the view that, if the bonds were originally sold for cash they cannot be invalidated by showing that the audited claims are illegal. The certificate of the county clerk settles the question of the necessity of issuing the bonds on which such certificate is indorsed. Section 5 of the Act, in terms, submits to the committee therein referred to the decision of the question of the fact of indebtedness for the purpose of funding, and the amount thereof. It is true that this decision is not to be binding upon the district as an admission of the legality of any claim. But the obvious purpose of this provision is to save the district from being bound by their decision, as against the holders of such claims. So far as the public were concerned, they had a right to rely on the decision of this board as to the amount of bonds necessary to fund the indebtedness of the district, and to purchase the bonds relying upon the correctness of such decision. The authorities amply sustain this proposition. *Sherman County v. Simonds*, 109 U. S. 735, 27 L. ed. 1093; *National Bank of Commerce v. Grenada*, 41 Fed. Rep. 87, 92, 93. See also *Hackett v. Ottawa*, 99 U. S. 86, 25 L. ed. 368; *Ottawa v. First Nat. Bank of Portsmouth*, 105 U. S. 843, 26 L. ed. 1127. But, speaking for myself, I do not think that they have any right to rely upon the auditing of such warrants as establishing their validity, so that the surrender of them constitutes a sufficient consideration for a bond issued in exchange for such warrants. But, on the question of power, we are all agreed that the recitals in the bonds estop the district. The bond, upon its face, recites that it was issued "for the purpose of liquidating indebtedness incurred for building school-house." Section 6 requires the county clerk, before registering the bond and making his

certificate, to ascertain whether the provisions of section 5 have been complied with, and whether the bonds are authorized to be issued as provided for in the act. The county clerk has decided this question in the affirmative by registering the bonds, and by making the certificate to which we have already referred. He has thus certified that the committee have decided that the bonds are necessary to fund the indebtedness of the district, and that such indebtedness has been surrendered up and canceled. We all hold that one who paid cash for these bonds at the time they were originally issued would be protected, as against the defense that there were in fact no outstanding debts of the district to fund. So would a purchaser from him. There was no attempt to prove that the record in the district or in the county clerk's office failed to show a compliance with the law. Whether a bona fide purchaser is bound to take notice of such records, or either of them, or the absence of any such records, it is not necessary for us to decide. While the statute requires these records to be kept, there is authority for the doctrine that such a purchaser can rely on the recitals in the bond, or on the certificate indorsed upon it. *Lewis v. Comanche County*, 85 Fed. Rep. 343; *Rock Creek Twp. v. Strong*, 96 U. S. 371, 24 L. ed. 815; *Gibbs v. Colfax Twp. School Dist. No. 10*, 88 Mich. 334.

We hold that the district is estopped by the certificate of the county clerk from proving as a defense that it had no title to its school site at the time the bonds were issued. A majority of the court (the Chief Justice and the writer of this opinion) hold that the bonds are not negotiable, and are therefore open to the defense of want of consideration in the hands of the plaintiff. But a majority of the court (the Chief Justice and *Judge Wallin*) hold that want of consideration cannot be shown by proving that the bonds were paid for by void warrants, if such warrants were in fact audited and canceled under the provisions of the statute. And all the members of the court are agreed that all the other defenses referred to in the opinion are foreclosed by the certificate of the county clerk. Because the court below refused to allow defendant to prove want of consideration for the bonds the judgment is reversed, and a new trial ordered.

#### Bartholomew, Ch. J.:

A proper disposition is made of this case in the opinion prepared by *Judge Corliss*. But, to avoid any possible misconception, I desire to state my individual views more fully upon one point than they are stated in the opinion of the court. It will be noticed that *Judge Corliss* and myself hold that the bonds in suit are not negotiable by reason of the additional contract to pay exchange on New York. This holding, of course, in the absence of any other controlling circumstances, opens the bonds to the defense of want of consideration, even in the hands of a bona fide purchaser before maturity, as plaintiff is shown to be. *Judge Wallin*, on the contrary, holds that the bonds are negotiable; hence, in his view, all inquiry into the con-

sideration is barred. But, while I believe the bonds to be non-negotiable, yet I believe the inquiry into the consideration is, to a large extent, limited by the terms of the statute under which the bonds were issued, and the recitals in the certificate of the clerk. *Judge Corliss* finds nothing in the statutes and recitals which should, in his judgment, restrict the inquiry into the consideration; hence, he holds that no restriction exists. The judgment below is reversed solely because the learned trial court refused to permit any inquiry whatever into the question of consideration. The error in that ruling goes only to the extent to which a majority of this court can unite in saying that the question of consideration was open. For the guidance of the trial court on the new trial, it is necessary that the line be clearly defined, and the holding of this court understood.

These bonds were issued under unusual conditions. The statute which authorized their issue proceeded upon the theory that the school districts of Barnes county had a large amount of outstanding indebtedness, and that the validity of a portion or all of this outstanding indebtedness was questioned, and the power to fix the amount of indebtedness for the payment of which bonds should be issued was left entirely with the district itself. The first step required by the statute was the calling of a meeting of the voters of the district, at which meeting the voters selected three of their own number to act as a committee to audit and settle the indebtedness of the district. This committee was required to give public notice of the time and place where it would meet to audit and settle such indebtedness, and also of the time and place where it would make a full report to the district, at which time and place the voters were required to meet to receive such report, and vote upon the question of issuing bonds for the payment of the indebtedness, as audited and settled. If there was an affirmative vote, under the terms and provisions of the statute, then the school board was required forthwith to issue bonds to the amount of the indebtedness, as audited and settled; but, before the bonds could be disposed of, they must be presented to the clerk for the certificate, as set out in the foregoing opinion. A provision in the statutes declared that the auditing and settling by the committee should not be construed to be binding on the district, or as an admission of the legality of any claim or alleged claim. Upon this provision my *Brother Corliss* builds an able argument to show that, where bonds were issued and delivered in exchange for such claims, a recovery on the bonds may be defeated by showing that such claims were in fact invalid, and hence no consideration was given for the bonds. I fully agree with him that the action of the committee, alone, could not bind the district, or estop it from disputing the validity of the claim; but I entirely disagree with him as to the result that follows from that circumstance, when bonds have in fact been voted and issued, and exchanged for such claims. In my judgment, that provision in the statute was intended to meet a case where, after the committee had

audited and settled certain claims, the district, by vote, refused to issue bonds for the payment of such claims. If then suit should be brought against the district on the original claims, the action of the committee could not be shown to establish the legality of the claims, or to estop the district. But if we are to go further, and after the tribunal authorized by law and appointed by the district has declared certain claims valid, and after the district, with full knowledge of all the facts, has ratified the action of that tribunal by voting to issue bonds for the payment of the claims thus allowed, and after the bonds have been in fact issued and exchanged for the allowed claims, if then we permit the district, when sued on the bonds, to declare them worthless because the claim for which they were exchanged was invalid, then we may well ask why was the act ever passed? Why this expensive and protracted preparation for the enactment of so light a farce? An examination of the statute will show that it expressly authorizes and contemplates a direct exchange of the bonds for the allowed claims. True, the district is not limited to that. It may sell for cash. But the exchange is expressly authorized. Does it not involve a contradiction to say that when the amount of bonds, and the purpose of their issue, have been fixed as the law directs, and when the bonds have been voted and issued as the law directs, and when they have been exchanged for the exact consideration that the law directs, nevertheless the bonds are without consideration, and worthless? Did the law intend to direct the issuance of worthless bonds? The certificate does not foreclose the question of consideration in this case, more than in any other. But it establishes certain facts, to wit, that the committee had audited and settled certain claims; that the district had, by vote, ratified that settlement, by directing the issuance of bonds to pay such claims, as audited and settled; that the bonds had issued; and that the original claims (presumably resting in warrants) had been delivered up and canceled. Under these circumstances, when the claim owner receives the promised bonds in exchange for his surrendered and canceled claim, I contend that the district is estopped, by every principle of the law of estoppel, from saying that such bonds are without consideration. But whether or not the claim owner ever received the bonds in exchange is not fixed by the certificate. When the certificate was made the bonds were in the hands of the school board. They were yet to be disposed of by them. If they sold them for cash, as the law directs, or if they exchanged them for surrendered claims, as the law directs, the question of want of consideration cannot be successfully raised. But if the bonds were given away, or if, through fraud or favoritism, they were sold for less than their value, or less than the statute directs, such facts might be shown, to establish want of consideration. The offer of defendant was broad enough to cover any wrongful or fraudulent disposition of the bonds by the school board, and for that reason, and that alone, I consent to a reversal in this case.

35 L. R. A.

Wallin, J.:

I concur in what is said by the Chief Justice upon the question of consideration.

Henry W. K. CUTTER, *Appt.*,

vs.

James R. POLLOCK *et al.*, *Respts.*

(.....N. Dak.....)

- \*1. An insolvent debtor may pay or secure one creditor in preference to another, except in cases where he executes an assignment for the benefit of his creditors.
2. Such a debtor, in this case, executed three chattel mortgages on substantially all of his property, securing certain creditors to the exclusion of others. The mortgages at once took possession, and commenced foreclosure of the mortgages. *Held*, even assuming that the debtor himself knew that the consequence of giving the mortgages would be to prevent his continuing his business, that such transactions did not constitute an assignment for the benefit of creditors, within the meaning of section 4600, Comp. Laws, rendering void all preferences contained in such an assignment.
3. When a receiver is appointed in an action, and continues to act as receiver down to the time of final judgment, the court should embody in its decision and final judgment all matters relating to the receiver's fees and expenses: how they should be paid,—whether out of the funds in his hands, or by the parties to the action; and whether, if paid out of the funds in the hands of the receiver belonging to one party, the other should not be compelled to make good this depletion of the fund in whole or in part. *Held*, error for the court, without investigating and settling such matters, to direct that all of the receiver's fees and expenses should be taxed as costs against the unsuccessful party to the suit.

(July 23, 1894.)

**A** PPEAL by complainants from a judgment of the District Court for Cass County in favor of defendants in a proceeding brought to declare certain property upon which James R. Pollock had executed chattel mortgages to be a trust fund to be distributed proportionately among all his creditors, and from an order directing the costs of a receiver, who had been appointed in the proceeding, to be paid by plaintiff. *Reversed.*

The facts are stated in the opinion.

*Messrs. Newman, Spalding & Phelps and Bartlett & Lovell*, for appellants:

The defendant Pollock had determined to quit his business and yield dominion of substantially all his estate for the benefit of the creditors mentioned in these mortgages, and the court should have so found.

A finding upon this issue was requested by plaintiffs. They did not waive it, and were entitled to it.

\*Headnotes by CORLISS, J.

NOTE.—In connection with the above case, see *Sandwich Mfg. Co. v. Max* (3. Dak.) 24 L. R. A. 304, and cases referred to in *note*.

Hayne, New Trials, § 239, sub-div. 2, and § 240, and cases cited under § 239.

The omission to find upon this issue is ground for reversal.

*Gull River Lumber Co. v. Barnes County School Dist. No. 39*, 1 N. Dak. 509, and cases cited.

If at the time of the execution of the mortgages in question the defendant Pollock had the intention to quit business, and yield dominion over, and surrender substantially all his property for the benefit of the creditors named in the mortgage, then the transaction was an assignment, and void under the statute.

Comp. Laws, § 4660; *Straw v. Jenks*, 6 Dak. 414; *Wyman v. Mathews*, 58 Fed. Rep. 678; *White v. Cotzhausen*, 129 U. S. 829, 32 L. ed. 677; *Marshall v. Livingstone Nat. Bank*, 11 Mont. 851; *Richmond v. Mississippi Mills*, 4 L. R. A. 413, 52 Ark. 80; *Collier v. Wood*, 85 Ala. 91; *State v. Dupuy* (Ark.) June 23, 1889; *Wilks v. Walker*, 22 S. C. 108, 53 Am. Rep. 706; *Meinhard v. Strickland*, 29 S. C. 491; *Farwell v. Cohen*, 18 L. R. A. 281, 138 Ill. 216. And also in *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 297; *Bonns v. Carter*, 20 Neb. 568; *Clapp v. Dittman and Perry v. Corby*, 21 Fed. Rep. 15, 737; *Martin v. Hausman*, 14 Fed. Rep. 160; *Kellog v. Richardson*, 19 Fed. Rep. 70; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71, and *Freund v. Yaegerman*, 26 Fed. Rep. 812.

Where an insolvent makes a conveyance of his property for the benefit of a portion of his creditors, the question whether such conveyance would be regarded as an assignment for the benefit of creditors, or a mortgage for the security of a part, is to be determined by the intention of the parties as it may be ascertained from the circumstances of the transaction.

Cobbey, Chat. Mortg. § 101.

Such intention can only be determined from the facts and circumstances surrounding the transaction, and not from the testimony of the debtor himself, which is inadmissible as evidence of his intention.

*Appolos v. Brady*, 49 Fed. Rep. 401; *Crow v. Beardsley*, 68 Mo. 435; *White v. Cotzhausen*, *supra*; *Preston v. Spaulding*, 120 Ill. 208; *Weber v. Mick*, 181 Ill. 520; *Farwell v. Nilsson*, 133 Ill. 45; *Farwell v. Cohen*, 18 L. R. A. 281, 138 Ill. 216; *Moore v. Meyer*, 47 Fed. Rep. 99.

The statutes in force in this country providing for assignments by insolvents and which prohibit preferences may be divided into three general classes:

1. Those which avoid the assignment and leave the estate *in statu quo* subject to the attacks of diligent creditors.

2. Those which avoid the preferences, leaving the assignment, and the trust thereby created, to stand, and directing the distribution of the estate among the creditors under the assignment, according to their respective claims.

3. Those which avoid the assignment, but direct that the estate shall thereupon become a trust fund to be distributed in equity among all the creditors in proportion to their respective claims.

There is a corresponding division of the decisions.

1. Those which hold no instrument an assignment unless it is intentionally and technically

executed under the assignment laws of the state, and preferences given by its terms.

*King v. Gustafson*, 80 Iowa, 207; *Kendall v. Bishop*, 76 Mich. 634.

2. Those which hold any instrument an assignment which transfers all the insolvent debtor's property in trust for the benefit of a portion of his creditors.

3. Those which hold that no matter what the form of instrument or whether on its face it purports to create a trust, if it effects a voluntary transfer of substantially all the debtor's property for the benefit of a portion of his creditors, it is within the statute.

*Wilks v. Walker*, 22 S. C. 108, 53 Am. Rep. 706; *Austin v. Morris*, 23 S. C. 893; *Magovern v. Richard*, 27 S. C. 272; *Lamar v. Pool*, 26 S. C. 441; *Meinhard v. Strickland*, 29 S. C. 491; *Monaghan Bay Co. v. Dickson*, 39 S. C. 146; *Putney v. Friesleben*, 89 S. C. 493. See also *Stout v. Watson*, 19 Or. 251; *Collier v. Wood*, 85 Ala. 91; *Holt v. Bancroft*, 30 Ala. 193; *Watts v. Eufula Nat. Bank*, 76 Ala. 474; *Heyer v. Bromberg*, 74 Ala. 524; 2 Chicago L. J. article *Constructive Assignments*, p. 497.

The pleadings make the case proper for the appointment of a receiver. The appointment was made upon notice and full hearing. No appeal was taken from the order, which was acquiesced in, and the receivership continued under the supervision of defendant's attorneys. No objection was made to the appointment on account of want of jurisdiction. The only objection was based upon a traverse of the facts alleged in the complaint and affidavits.

In such cases the receiver must be paid out of the fund.

*Radford v. Folsom*, 55 Iowa, 276; *Jaffray v. Raab*, 73 Iowa, 835.

*Messrs. Charles A. Pollock and Pollock & Scott*, for respondents:

*Straw v. Jenks*, 6 Dak. 414, has no binding force over the court, more than would a decision of any court from any foreign state.

*Sandwich Mfg. Co. v. Mas* (S. Dak.) 24 L. R. A. 524.

Defendant Pollock, at the time of the execution of the mortgages in question, did not intend to quit business, and yield dominion over and surrender substantially all of his property for the benefit of creditors named in the mortgages.

Cobbey, Chat. Mortg. § 101; citing *Cadwell's Bank v. Crittenden*, 66 Iowa, 237; *Kohn v. Clement*, 58 Iowa, 589.

The legislature, in doing away with all preferences, and laying down the statutory rule that a trust should be established, has simply taken away the possibility of debtors making bargains for themselves, at the expense of honest creditors; but has not, in any sense, changed the exact conditions required for an assignment under the old law.

*Cowles v. Ricketts*, 1 Iowa, 532; *Lampeon v. Arnold*, 19 Iowa, 481.

A party in failing circumstances may prefer one or more creditors by conveying or mortgaging a portion, or the whole, of his property to him or them, to the exclusion of all other creditors, provided the transaction be bona fide.

*Crawford v. Taylor*, 6 Gill & J. 323, 26 Am. Dec. 584, *note* and cases cited.



The giving of a chattel mortgage to secure a bona fide debt is not considered an assignment, as provided in paragraph 4600, and is, therefore, not in conflict with the provisions prohibiting preferences.

*Van Patten v. Thompson*, 73 Iowa, 103; *Aulman v. Aulman*, 71 Iowa, 124, 60 Am. Rep. 783; *Kohn Bros. v. Clement*, 58 Iowa, 589; *Ingram v. Osborn*, 70 Wis. 184; *Phillips v. Coldwell*, 30 Kan. 125; *De Ford v. Nye*, 40 Kan. 665; *Ouendet v. Lahmer*, 16 Kan. 527; *Watterman v. Silberberg*, 67 Tex. 100; *Gilbert v. McCorkle*, 110 Ind. 215; *Stiz v. Sadler*, 109 Ind. 254; *Magovern v. Richard*, 27 S. C. 272; *Campbell v. Colorado Coal & Iron Co.* 9 Colo. 60; *Bank of Montreal v. J. E. Potts Salt & Lumber Co.* 90 Mich. 845; *Brown v. Grand Rapids Parlor Furniture Co.* 23 L. R. A. 817, 53 Fed. Rep. 286. See also *Herskiser v. Higman*, 81 Neb. 581; *Sheldon v. Manna*, 85 Mich. 285; *Weber v. Ohlids*, 90 Mich. 498; *Dana v. Stanfords*, 10 Cal. 369; *Warner v. Littlefield*, 89 Mich. 329.

The receiver's fees and expenses were allowed from the fund and defendants given judgment therefor against the plaintiffs.

The fund can be charged with the costs of a receivership in cases where: (1) the appointment is found to have been proper; or (2) the estate is benefited, or at least not injured; or (3) the parties consent to the appointment.

*High, Receivers*, § 796, p. 658; *Johnson v. Garrett*, 28 Minn. 565; *Howe v. Jones*, 66 Iowa, 156; *Hembree v. Dawson*, 18 Or. 474.

In the case at bar the receiver was appointed at the instance and request of the plaintiffs and over the opposition and objection of the defendants.

No interest of the mortgagees was considered or sought to be advanced or protected. The plaintiffs sought to gain an advantage, in which they were unsuccessful, and there seems to be no more reason for requiring the mortgagees to bear the expenses of the receivership than there would be for taxing the ordinary costs of suit to the successful party.

The costs and expenses of the unwarranted proceedings should be paid by the parties instituting such proceedings.

*High, Receivers*, § 796, p. 658; *Howe v. Jones*, *supra*; *Lammon v. Giles*, 8 Wash. Terr. 117; *French v. Gifford*, 31 Iowa, 428.

*Corliss, J.*, delivered the opinion of the court:

This case involves a question of statutory construction. The contention on the part of the plaintiffs and appellants is that the transaction to which we will refer constituted an assignment for the benefit of creditors containing preferences, and that therefore the transactions are without any other legal effect than to make the property to which they relate a trust fund to be distributed proportionately among all creditors of the owner of such property. The plaintiffs claiming to be creditors of James R. Pollock, commenced this action in equity to have the property referred to declared a trust fund, under the provisions of section 4860, Comp. Laws. That section provides as follows: "An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust towards the satisfaction

of his creditors, in conformity to the provisions of this title; subject, however, to the provisions of this code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations or by other specified classes of persons; provided, moreover, that such assignments shall not be valid if it be upon, or contain any trust or condition by which any creditor is to receive a preference or priority over any other creditor; but in such case the property of the insolvent shall become a trust fund to be administered in equity, in the district court, and shall inure to the benefit of all of the creditors in proportion to their respective claims or demands." Pollock was a merchant engaged in business at Casselton, in this state. October 2, 1899, he executed three chattel mortgages upon his stock of goods and his store fixtures to secure claims held against him by the defendants Straw-Ellsworth Manufacturing Company, Eveline Pollock, and the Cass County Bank. These mortgages were executed and delivered to these defendants, respectively, and were successively filed for record in the office of the register of deeds of Cass county, N. D., the same day. They were all executed as part of one transaction. The value of the mortgaged property was \$12,000. The debts so secured did not amount to \$7,000. While it appears from the record that Pollock owned at the time some other property, we will assume for the purposes of this case that these mortgages covered substantially all of his property not exempt from execution. Pollock appears to have been insolvent at this time. A few hours after these mortgages were given and delivered, the mortgagor turned over all the mortgaged property to the mortgagees, who at once proceeded to foreclose the mortgages by advertising the property for sale thereunder. Each contained a provision that the mortgagee might immediately take possession of the mortgaged property. While these foreclosure proceedings were being had, the plaintiffs instituted this action, and had a receiver appointed to take and hold possession of the mortgaged property or its proceeds pending the action. Judgment having been rendered against the plaintiffs, adjudging that the mortgages were valid liens upon the property, and that plaintiffs had no right or interest in the mortgaged property, the plaintiffs have appealed to this court from such judgment.

It is here urged that the facts of this case bring it within the decision of the territorial supreme court in *Straw v. Jenks*, 6 Dak. 414, and that that decision should be followed by this court. We are by no means satisfied that Pollock, when he executed these mortgages, had considered that he would no longer continue in business, and had decided to yield up dominion of his entire property. But we will again assume a state of facts as favorable to plaintiffs as the record will justify. We will take it for granted that Pollock intended to give these mortgagees a preference, knowing that the consequence of the execution of such mortgages, and the abandonment to the mortgagees of the possession of the mortgaged

property, would be to force him to abandon his business. But it is very clear that he did not intend to surrender control over the mortgaged property, except so far as was necessary to accomplish the payment of the mortgagees named therein. The mortgages created mere liens. The legal title to the property remained in the mortgagor. After these preferred creditors had been paid, the possession of the remaining property would revert to him; and at all times any of his creditors could have levied upon his interests in the mortgaged property, and sold it to pay such creditors' claim. To assert that a mortgagor who has created a mere lien on property (especially where, as in this case, the value of the property is largely in excess of the claims secured by the mortgage) has parted with all control over the property, is to ignore the character and legal effect of the instrument under which he has surrendered possession. Despite the mortgage, it is still his property. He may sell it. He may mortgage it. It may be seized for his debts. How such a transaction can be held to be an assignment for the benefit of creditors is inexplicable to us. An assignment for the benefit of creditors creates a trust, vesting the legal title in the assignee, placing the property beyond the control of the assignor or the reach of any of his creditors, except as they have a right, under the assignment, to share in the distribution of the assigned estate. It is for this reason that assignments for the benefit of a portion of the assignor's creditors have been held void under the statute invalidating all transfers which delay creditors. In such a case the debtor would, if the transaction were valid, be able to place for a time his property beyond the reach of the creditors who have no rights under the assignment, because that portion of the assigned estate which would come back to him after the trust is executed would, during the existence of the trust, be withheld from the reach of such creditors. But a mortgage creates no trust. It creates a mere lien. It is in no respect assimilated to an assignment for the benefit of creditors, and yet, by the express terms of the statute, it is in only such an assignment that the law condemns a preference. The common law recognized the right of a debtor to secure or pay one creditor in preference to all others. The general rule is embodied in our statute. Section 4654, Comp. Laws, declares that "a debtor may pay one creditor in preference to another or may give one creditor security for the payment of his demand in preference to another." Section 4660 takes a certain class of transactions out of this general rule. But we must not lose sight of the fact that preference is the rule in this jurisdiction, and that he who questions the right of a debtor to make a preference must lay his hand upon the law which takes away this right in a given case. The legislature has seen fit to draw the line at instruments which constitute assignments for the benefit of creditors. Such instruments must not contain preferences. If they do they are void, and the property becomes a trust fund for the equal benefit of all creditors. But this statute does not attempt to prevent the giving of

security to one or any number of creditors in preference to others, and section 4654, in terms, allows this to be done. To hold that a chattel mortgage is an assignment for the benefit of creditors, that the creation of a mere lien is the creation of a trust, that retaining title to property is surrendering all control over it, displays an utter disregard of well-settled legal distinctions. To extend the construction of the statute to embrace a transaction of the character disclosed by this record, under the specious pretext of following the spirit of the law, is downright usurpation of legislative functions. To us the fallacy of the reasoning in the case of *Straw v. Jenks*, and in the other cases in which the rule there enunciated is laid down, is in the assumption that preference is the exception, and not the rule, whereas the general rule permits preference, and he who claims that a preference is illegal must bring the case within the particular exception embodied in section 4660. The statute does not declare that one who has decided to apply all his property in payment of his debts, as far as it will apply, must distribute it among his creditors ratably. This he must do if he executes a general assignment. But the law does not compel him to make a general assignment, and it does permit him to pay or secure any creditor in preference to another. Of course, this statute allowing preferences relates to insolvent debtors. When a debtor is solvent there can arise no question of preference. It is only when he is insolvent that the right to prefer is of any value to him, or to the creditor preferred. An insolvent debtor may therefore pay one creditor in preference to others, although it takes every dollar of his property to make the payment. It is only when he executes an assignment for the benefit of all of his creditors that he cannot discriminate and favor. Then he must place all creditors on an equal footing. If he does not, the law and the courts will do it for him. The argument in *Straw v. Jenks* and similar cases is that the object of the law will be defeated if the rule there enunciated is not adopted. This reasoning assumes that the object of the statute is something other than it is therein expressed to be. The purpose of the law, if the language in which that purpose is couched is to be our guide, is that the general rule permitting preferences shall be abrogated in a single class of cases, i. e. where a debtor executes such an assignment for the benefit of creditors as the act embraced in the title in which section 4660 is found refers to. An analysis of this act (sections 4660-4680, both inclusive) discloses a legislative intent therein to deal with assignments for the benefit of all the assignor's creditors. In such an instrument there shall be no preference. In every other transaction the debtor may prefer. The case of *Straw v. Jenks* has been overruled by the South Dakota supreme court in an opinion whose logic, to our mind, is unanswerable. *Sandwich Mfg. Co. v. Mas* (S. Dak.) 24 L. R. A. 524; *Straw v. Jenks*, merely followed *White v. Cota-hausen*, 129 U. S. 829, 83 L. ed. 677. This case merely followed what the court regarded as the rule in Illinois, as laid down in *Pro-*

*ton v. Spaulding*, 120 Ill. 208. In a later case the federal supreme court has ruled differently in a case arising in Missouri, following a different rule adopted in that state. *Union Bank of Chicago v. Bank of Kansas City*, 136 U. S. 285, 84 L. ed. 845. In this case, Mr. Justice Gray expressly declares that all the court intended to do in *White v. Cotehausen* was to construe the Illinois statute in accordance with what it understood to be the decision of the supreme court of that state. That the federal supreme court, in *White v. Cotehausen*, did not correctly interpret the decision of the Illinois supreme court in *Preston v. Spaulding*, is evident from later decisions of that court. See *Farwell v. Nilsson*, 188 Ill. 45; *Weber v. Mick*, 181 Ill. 520. And see *Moore v. Meyer*, 47 Fed. Rep. 99; *Schroeder v. Walsh*, 120 Ill. 408. There is nothing in *Farwell v. Cohen*, 188 Ill. 216, 18 L. R. A. 281, opposed to the views expressed in *Farwell v. Nilsson*.

In many of the cases there was in fact a general assignment for the benefit of creditors executed. When a debtor, with the purpose of executing such an assignment, makes transfers of property or gives security or pays money before executing the assignment, for the express purpose of evading the provisions against preferences, — when his purpose, known to the favored creditor, is to accomplish by independent instruments what could not be accomplished in the assignment itself, — and, thus deliberately attempting to evade the law, thereafter executes an assignment for the benefit of creditors, it is impossible that the instruments giving the preferences should be regarded as part of the assignment, and that, therefore, the preference should be held to be contained in the assignment itself, and consequently of no effect. But in such cases the transactions ought not to be too far apart, and certainly the preferred creditors should be proven to have had knowledge of the debtor's purpose to make an assignment at the time of giving the preferences. See, in this connection, *Manning v. Beck*, 129 N. Y. 1, 14 L. R. A. 196; *Lake Shore Bkg. Co. v. Fuller*, 110 Pa. 156.

We hold that these chattel mortgages did not constitute a general assignment for the benefit of creditors, and that the debtor had a perfect right to execute them to the creditors therein named, to secure his obligations to them. It therefore followed that the mortgaged property was not a trust fund in which all the creditors of defendant Pollock had an interest, but was his property, on which there were mortgage liens held by such of the defendants as were named in the three mortgages as mortgagees. As sustaining our conclusions, we cite *Sandwich Mfg. Co. v. Maz* (8 Dak.) 24 L. R. A. 524; *Hargadins v. Henderson*, 97 Mo. 375; *Union Bank of Chicago v. Bank of Kansas City*, *supra*; *May v. Tenney*, 148 U. S. 60, 87 L. ed. 868; *Farwell v. Nilsson*, *Weber v. Mick*, and *Schroeder v. Walsh*, *supra*; *Tompkins v. Hunter*, 24 N. Y. Supp. 8; *Cross v. Corstons*, 49 Ohio St. 548; *Moore v. Meyer*, *supra*; *Orou v. Beardsley*, 68 Mo. 435; *Gilbert v. McCorkle*, 110 Ind. 215; *Watterman v. Silberberg*, 67 Tex. 100; *Warner* 35 L. R. A.

*v. Littlefield*, 89 Mich. 329; *Sheldon v. Mann*, 85 Mich. 265.

Other cases might be cited, but this question has been so often discussed, and the decisions so many times reviewed, that we feel that it would be a waste of time for us to travel again over the same ground. With the exception of *Strau v. Jenks*, *White v. Cotehausen*, and a few other cases, all of the decisions which have struck down preferences have been in cases in which it appeared that an assignment for the benefit of creditors was in fact executed; and the courts in those cases held that the instruments creating the preferences were so connected in point of time, and by the circumstances of the transactions, with the subsequent general assignment, that they were a part of it, and that, therefore, the preferences were, in contemplation of law, embodied in the assignment itself. Such, among others, were the cases of *Preston v. Spaulding*, 120 Ill. 208; *Berger v. Varrelmann*, 127 N. Y. 281, 12 L. R. A. 808; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71; *Burnham v. Hastings*, 79 Mich. 85.

The judgment of the district court was therefore right, in so far as it adjudged that the mortgaged property or its proceeds, in the hands of the receiver, should be turned over to the defendants entitled thereto under such mortgages. But the judgment is attacked by this appeal in another particular. On motion of the plaintiffs, and against the opposition of the defendants, a receiver was appointed to take possession of the mortgaged property pending the litigation. In one of its conclusions of law the court held that the fees and expenses of the receiver, which were not settled by the court, should be taxed by the clerk of the court as costs in the case, and that the amount of such costs should be inserted in the judgment. It does not expressly appear that this was done, but we think it is a fair inference that it was done, as the judgment against the plaintiffs is for nearly \$5,000 costs, and we know that no such bill of costs could have been taxed against the plaintiffs unless the fees and expense of the receiver were embodied therein. This fact strengthens the natural inference that the rule of law laid down in the court's decision was followed by the clerk, at the instance of the defendants, in taxing the costs, and entering the amount thereof in the judgment. These items, we are clear, have no place in a bill of costs. If they belong there at all, it is only as disbursements, and such disbursements the statute does not authorize to be taxed against the unsuccessful party. Section 5189, Comp. Laws. It is obvious that the clerk is not the proper officer to settle the question of a receiver's compensation. That is a judicial question. Nor should it be left to him to determine what expenses are reasonable and proper. A receiver may be so extravagant in his expenditures that it would be highly unjust to allow him credit for all the moneys he has paid out. Had such state of facts existed in this case, the clerk nevertheless must have inserted all the items of disbursements in the bill of costs, provided he was satisfied that they had in fact been incurred. Again, we think it is not the proper

practice for the court to determine, in advance of a hearing on the different items of a receiver's account, that all his disbursements should be paid by one party or the other to the litigation. An examination of his account in connection with surrounding circumstances might disclose the fact that some of the items ought to be paid by the successful party. They might embrace expenditures which the successful party would have been compelled to make himself, had it not been for the receivership, but which he was saved, by such receivership, the necessity of making himself. The proper practice, where a receiver has been appointed, is for the court, after it has reached its conclusion, to order the receiver to account, on notice to all parties interested; and upon such accounting all questions can be settled, and the findings of fact and conclusions of law relating to such matters can be embodied in the decision of the court on the merits of the action. The final decree should settle what compensation the receiver is to have, what expenditures he shall be reimbursed for; how he shall be paid,—whether out of the funds in his hands, or by one of the parties to the action, or whether part of his fees and expenses shall not be paid out of such funds and the rest by one of the parties to the case, or whether such amount shall not be apportioned so that some of it shall be paid by one party, and the balance by the other. If the receiver is allowed to pay, and reimburse himself out of the moneys in his hands, the decree should provide whether the owner of such moneys shall be indemnified by the recovery of judgment against some other party to the case for this invasion of his property. Ordinarily, it would seem to us (but we do not decide the point) that the receiver should be protected by being permitted to look to the funds in his hands to save him against loss. This appears to have been done in this case. Such rule may, however, work great hardship in particular cases; and in some instances the receiver has, on this account, been compelled to look for indemnity to the party at whose instance he was appointed. See *Weston v. Watts*, 45 Hun, 219; *French v. Gifford*, 81 Iowa, 428; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438, 2 L. ed. 979. Certainly, if the court, in such a case, allows him to pay himself out of the funds, it should compel the other party to the action to make good the loss thus occasioned to the successful litigant. It is impossible for a court to make an intelligible decree when property is in the hands of a receiver, and is to be disposed of by the decree, without settling in advance the rights of the receiver with respect to compensation and expenditures, and whether he shall be allowed to pay himself out of the funds in his hands. The decree should determine whether the whole fund, or only the balance after paying the receiver, should be turned over to the successful party. In this case the court has directed the receiver to pay over every dollar that he has received, without making any deduction for his fees and expenses, and yet the defendants are allowed to tax up as costs against the plaintiffs the amount of such fees and expenses, on the

theory that they have been paid by the defendants out of their property. The court seems to have proceeded on the theory that the receiver would retain the amount of his fees and disbursements without any authority from the court so to do, and without any investigation as to the reasonableness of his charges and expenditures, and that then the clerk must tax up against the plaintiffs, as costs, whatever amount appeared to have been thus retained by the receiver, out of the funds in his hands belonging to defendants. None of these things were settled by the decree. They were left to the decision of the clerk and the receiver himself. Under the system of practice prevailing at the time the case was decided, findings were required to be made in equity cases as well as in actions at law. This must be taken into consideration in establishing the proper practice in cases like the one before us on this appeal. There can be only one final judgment, and this should settle all matters involved in the litigation, as well the rights of the receiver and the rights and liabilities of the parties to the action growing out of the receivership as the rights of the parties to the litigation on the merits of the case independently of the receivership. This final judgment must rest upon findings of fact and conclusions of law, and these, therefore, should embrace all matters essential to a full determination of the rights of the receiver with respect to compensation and indemnity, and the rights and liabilities of the parties to the suit, growing out of the payment to the receiver of his fees and expenses, as well as all matters relating exclusively to the merits of the controversy. Until all questions touching the receivership are settled, it is impossible finally to determine the rights of the parties to the case. The scope of the judgment awarding the fund to the successful party cannot be prescribed by the court until it decides whether any of this fund shall be retained by the receiver for his compensation and expenditures. The exact judgment which the victorious litigant shall recover against the defeated suitor cannot be ascertained until the court has determined whether, in the first instance, the fund belonging to the former shall be depleted by payment of the receiver's fees and expenses, and if so, whether the unsuccessful party shall make it good to his antagonist in whole or in part.

We conclude that it was error for the court to render final judgment without passing upon the receiver's account, and settling all matters connected with the receivership. These questions should not have been left to the clerk.

The judgment is reversed, and the district court is directed to enter a new judgment after all matters connected with the receivership have been investigated and settled. But the case will not be reopened for a new trial on the merits. The question of the right of the defendants to the funds in the hands of the receiver is settled, subject to such modification. The district court, without reopening questions touching the merits, will inquire into the amount of property and money in the hands of the receiver, or for which he

is properly chargeable; will ascertain what compensation is proper, what disbursements actually made were necessary; will determine whether the receiver shall be paid and reimbursed out of the fund in his hands, and what proportion of his fees and expenses ought to be borne by the plaintiffs and defendants, respectively, or whether the plaintiffs ought ultimately, or in the first instance, to pay all of such fees and expenses. All these matters should be embodied in the findings and the final judgment. We do not wish to be regarded as holding that the de-

cision of the district court upon these various questions will be final. It is possible they may be subject to review. There is also an appeal from an order of the district court made on appeal from the taxation by the clerk of the receiver's fees and expenses as costs, which order affirms such taxation. This order is reversed for the reasons already stated.

All concur.

Petition for rehearing denied September 1, 1894.

## NORTH DAKOTA SUPREME COURT.

Benjamin W. HOSMER, *Respt.*,

v.

SHELTON SCHOOL DISTRICT NO. 2 of  
Ransom County, *Appt.*

(.....N. Dak. ....)

1. A contract duly executed between the proper officers of a school district and another person, by the terms of which said person is employed as a teacher in a public school in said district, is void where such person, at the time of making the contract, holds no certificate of authority to teach in the county where the district is located.
2. The subsequent procurement of such certificate will not enable such person to recover against the district damages for the breach of such contract.

(July 23, 1894.)

**A** PPEAL by defendant from a judgment of the District Court for Ransom County in favor of plaintiff in an action brought to recover the amount alleged to be due on a contract engaging plaintiff to teach the school in the defendant district. *Reversed.*

The facts are stated in the opinion.

*Messrs. Robert J. Mitchell and Edward Engerud*, with *Mr. Ed. Pierce*, for appellant.

*Mr. P. H. Rourke*, for respondent:

If there is any reasonable doubt as to the insufficiency of the pleading, the court should deny a motion that is sprung at the trial for judgment on the pleadings.

*Eaton v. Wells*, 82 N. Y. 576, affirmed in 23 Hun. 128; *Grocers Bank v. Murphy*, 9 Daly, 510.

If the court finds in the complaint any allegations, which under any view of them, may give the plaintiff the right to recover, the demurrer will be overruled.

*Wilder v. McCormick*, 3 Blackf. 81; *Butterworth v. O'Brien*, 39 Barb. 192, 24 How. Pr. 438; *People v. New York*, 26 Barb. 240, 8

\*Headnotes by *BARTHOLOMEW, Ch. J.*

**NOTE.**—For a collection of authorities upon the subject of the relation between a school teacher and the district in which he has engaged to teach, see *note* to *Hull v. Aplington School Dist. (Iowa)* 10 L. R. A. 373.  
26 L. R. A.

Abb. Pr. 7; *Buzzard v. Knapp*, 12 How. Pr. 504.

If the teacher procures a certificate of qualification before the time at which he is to enter upon his duties, it is all the law requires of him.

Sutherland on Statutory Construction says, the courts will construe remedial statutes most liberally to effectuate the remedy.

"Employed or permitted to teach" as used in this statute has reference solely to the time when the teacher enters upon the duties of teacher.

*Oxford Twp. School Dist. No. 2 v. Dilman*, 23 Ohio St. 194; *Hots v. Huerfano County School Dist. No. 9*, 1 Colo. App. 40; *Scott v. Fairfax School Dist. No. 2*, 46 Vt. 452; *Smith v. Pleasant Plains School Dist. No. 2*, 69 Mich. 589.

The indorsement of this certificate as alleged was a valid indorsement and entitled the holder to rely upon it, even though the entry thereof was not made until three or four days after the respondent had begun to teach.

*Clarendon School Dist. No. 9 v. Brown*, 55 Vt. 61.

*Bartholomew, Ch. J.*, delivered the opinion of the court:

On August 7, 1891, Sheldon school district No. 2, the appellant herein, being at that time a duly organized school district in Ransom county, in this state, by its proper officers, and by written contract in due and legal form, hired Benjamin W. Hosmer, the respondent herein, to teach one of its schools for the period of ten months, commencing September 1, 1891, for \$60 per month, payable at the end of each month. At the time specified, respondent commenced teaching. On November 21st following he was discharged, for some reason that does not appear of record. After the full term of his employment had passed, he brought this action to recover the wages for the time during which he was not permitted to teach. At the trial below, appellant moved for judgment in its favor on the pleadings. The motion was denied, and, after a hearing on the merits had before the court, respondent had judgment for amount of his claim, less certain sums which he had earned at other employment during the time. From this judgment the appeal is taken, and the only

errors assigned relate to the denial of the motion for judgment on the pleadings. The basis for this contention is found in the following statement, which appears in the complaint: "That on the 7th day of August, 1891, at Ransom Co., in the state aforesaid, the plaintiff and defendant entered into a mutual written agreement that the plaintiff should serve the defendant as a school teacher in the public schools at the village of Sheldon, in said school district No. 2, in the county of Ransom, and state aforesaid, and that the plaintiff should and did employ the defendant as such for the term of ten months from and after the first day of September, 1891, and pay him for such services \$60.00 per month. The particulars of such written agreement more fully appear by the duplicate original contract, hereto annexed, marked 'Exhibit A,' and made a part of this complaint. That on the first day of September, 1891, the plaintiff entered upon the service of the said defendant, under said agreement, and has ever since been, and was, during the entire life and continuance of said contract, ready and willing to continue such services. That the plaintiff was legally qualified to teach said school, having, at the time he entered into the employment of the defendant, a certificate of qualification, duly issued by the superintendent of schools of Barnes Co., N. D., on the 21st day of July, 1890, for the term of three years from and after said date. That the same was duly indorsed by the superintendent of Ransom Co., N. D., on the 29th day of August, 1891, and the formal entry thereof made on said certificate on the 4th day of September, 1891. That on or about the 21st day of November, 1891, the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, though the plaintiff then and there offered to continue said services, and perform said agreement on his part, to the damage of the plaintiff in the sum of four hundred twenty dollars (\$420)."

Section 75, chap. 63, Laws 1890, as amended by section 15, chap. 56, Laws 1891, reads as follows: "It [the school board] shall employ the teachers of the schools of the district, and may dismiss any teacher at any time for plain violation of contract, gross immorality or flagrant neglect of duty; provided, that no person shall be employed as teacher or permitted to teach in any public school who is not when so employed or permitted to teach the holder of a teacher's certificate valid in the county or district in which such school is situated; provided, further, that every contract for the employment of a teacher must be in writing, and such contract must be executed before such teacher begins to teach in such school. It shall grade the salaries of teachers for the district in accordance with the grades of certificates; and no teacher holding a certificate of a lower grade shall be paid a salary equal to or in excess of that paid to a teacher of higher grade in the same district."

Section 122, chap. 63, Laws 1890, as amended by section 24, chap. 56, Laws 1891, reads as follows: "No certificate or permission to teach shall be issued to any person

under eighteen years of age; and no first grade certificate shall be issued to any person who is under twenty years of age, and who has not taught successfully twelve school months; and a third grade certificate shall not be issued more than twice to the same person. The certificates issued by a county superintendent shall be valid only in the county where issued; provided, that a first grade certificate may be renewed once without examination at the discretion of the county superintendent, upon payment of the proper fee for the institute fund, as provided in the case of examination; provided, further, that a first grade certificate shall be valid in any other county in the state when endorsed by the county superintendent of such county. No person shall be employed or permitted to teach in any of the public schools of the state, except those in cities organized for school purposes under special laws, who is not the holder of a lawful certificate of qualification or permit to teach. Any contract made in violation of this section shall be void."

It appears from the complaint that on August 7, 1891, when the written contract between respondent and appellant was entered into, respondent held a first-grade certificate issued by the superintendent of Barnes county. This certificate would be valid in Ransom county when indorsed by the superintendent of schools for such county. Such indorsement was not made until September 4, 1891. The allegation is that it was made August 29, 1891, and the formal entry made on September 4. But it was the formal entry that constituted the indorsement, and what preceded that was but a promise to indorse. Hence, neither at the time of entering into the contract, nor at the time of commencing to teach, did respondent hold a certificate valid in Ransom county. For that reason, appellant contends that the contract of employment dated August 7, 1891, was void, under section 122, and that no action can be maintained thereon or for breach thereof. If the original contract was void when made, it could not be ratified. After the removal of the inhibition, a new and valid contract might be made relative to the same subject-matter, but the void contract remains, and ever must remain, a nullity. Where the invalidity of the contract arises, as in this case, if this contract be invalid, from a prohibition and not from any vice adhering to the subject-matter of the contract, courts are inclined to be liberal in construing distinct acts in part performance of the contract, after the prohibition has been removed, as raising a new implied contract. See *Hots v. Huerfano County School Dist. No. 9*, 1 Colo. App. 40, and *Scott v. Fairfax School Dist. No. 2*, 45 Vt. 452.

But there is no direct allegation in the complaint that respondent taught a day after he had his certificate indorsed, or that the appellant in any manner acted upon or recognized the void contract. There may be an inference in that direction, but it falls far short of an allegation that can support a recovery. The action is for breach of contract in not permitting respondent to teach. Hence he pleads the written contract, and relies ex-

clusively thereon. Nor must we be understood as holding that recovery could be had on an implied contract for services actually rendered, or offered to be rendered, after the proper certificate was received, when the original contract was void. See remarks of Corliss, *Ch. J.*, on this point, in *Goose River Bank v. Willow Lake School Trp.* 1 N. Dak. 26, and authorities there cited.

In the case just cited, the court said, in speaking of certain school warrants then involved: "They were issued to pay for services of a teacher who held no lawful certificate of qualification. No such person can be employed to teach. The statute so declares, and any contract made in violation of this provision is void by the express terms of the same act." This language was based upon the wording of the statute, and the authorities were not specially noticed, as the point was secondary in that case, and not seriously controverted. Since, in that case, the teacher had no certificate at the time of making the contract, or at the time of rendering the services, it may be, as counsel now suggests, that it was not absolutely necessary to make the statement as broad as it is in that case. But, upon further consideration of the statute, and a study of the decisions under similar statutes, we adhere to our former language to its full extent. We hold that any contract of employment as teacher in our public schools, saving the exceptions contained in the statute, where the person hired does not, at the time of making such contract, hold a certificate authorizing him to teach in the county where the school is located, is void. And being void, it cannot be ratified, nor can it receive vitality from the happening of a subsequent event. It "is so nugatory and ineffectual that nothing can cure it." Black. Law Dict.

The learned counsel for respondent is correct in stating that the evil against which the statute was directed consisted in having the public schools taught by unqualified persons. And there are cases supporting the contention that when the teacher held the proper certificate at the time the service was rendered, or offered to be rendered, the statute was sufficiently met, and the teacher entitled to recover under the contract. *Holz v. Huerfano County School Dist. No. 9*, *supra*, is of that class. A recovery of damages for breach of the contract was allowed there, in a case very similar to this. But the difference in the statutes clearly distinguishes the cases. The Colorado statute prohibited the school district officers from employing a teacher who did not hold a proper certificate. There was no penalty fixed for the violation of the provision on the part of the officers, nor was the contract declared void. It was provided that the teacher should be entitled to no compensation during the time that he held no certificate, thus clearly implying that, for services rendered after he received

the proper certificate, he would be entitled to compensation. But even then the court was not content with relying upon the statute, and also placed the case upon an implied contract. In *Orford Trp. School Dist. No. 2 v. Dilman*, 22 Ohio St. 194, the court held that a statutory provision that "no person shall be employed as a teacher," etc., "unless he shall have first obtained a certificate," etc., meant, in effect, that no person should be engaged in teaching until he had obtained a certificate, and that a contract entered into before the party had obtained a certificate was valid, provided the certificate was obtained before the party engaged in the discharge of his duties as teacher. But it is entirely clear that our statute will not bear this construction. Engaging in the performance of the duties of a teacher neither constitutes nor consummates a contract. The only contract connected with the subject is the written agreement by which the proper school officers employ or hire the teacher. It is that contract, and no other, that the statute declares void under the circumstances stated. And this statute was proper and necessary, in order to prevent the employment of unqualified persons as teachers. If a completed contract is valid when made, it is difficult to understand how performance thereunder is to be prevented without incurring liability. If a completed contract is valid when made, it is not easy to perceive how it can become void, and the conditions remain unchanged. Statutes similar to ours, although perhaps none of them quite so strong, have been construed in accordance with our views in the following cases: *Butler v. Haines*, 79 Ind. 575; *Jenness v. Washington County School Dist. No. 31*, 12 Minn. 448 (Gil. 887); *Ryan v. Dakota County School Dist. No. 13*, 27 Minn. 433; *Botkin v. Osborne*, 39 Ill. 101. The case from Indiana expressly holds that the subsequent procurement of a certificate, and continuing to teach thereafter, did not entitle the party to recover. The case in 12 Minn. is very strong. The contract was made on the 22d day of the month, the school to commence on the 24th of the same month. The applicant had no certificate when the contract was made, but received his certificate on the 24th, and actually taught the entire term. It was held that he could not recover. There is no legal hardship in these cases. An unqualified person cannot enter into a contract to teach in our public schools without being a party to the violation of a mandatory statute, the terms of which he is conclusively presumed to know.

The respondent in this case cannot recover upon his complaint. The judgment of the lower court is reversed, and that court is directed to sustain appellant's motion for judgment on the pleadings.

*Reversed.*

All concur.

## ARKANSAS SUPREME COURT.

LITTLE ROCK & MEMPHIS R. CO., *Appt.*,

v.

G. F. BARRY.

(58 Ark. 198.)

**1. A train dispatcher who controls and directs the movements of trains is not****NOTE.**—A train dispatcher and telegraph operator as fellow servants of trainmen.

- I. General doctrine.
- II. Special principles against the relation.
- III. Train dispatcher.
  - a. Not a fellow servant.
  - b. A fellow servant.
- IV. Telegraph operator.
  - a. Not a fellow servant.
  - b. A fellow servant.

The ground of the liability of a railroad company for injuries sustained by an employé through the negligence of another employé, holding the position of a train dispatcher, has been placed upon the ground that such train dispatcher is not in the same line of employment, being a vice-principal, or indeed, the company itself for the time being, with whose duties no one has a right to interfere, his control over trains being supreme and his orders imperative.

In fact he has been looked upon in matters left to his discretion as the *alter ego* of the company.

The cases cannot, however, be said to be harmonious upon the question, but the weight of authority is decidedly in favor of the doctrine established in the principal case, and in *Hawkins v. New York, L. E. & W. R. Co.* *infra*.

The doctrine thus set forth would seem to be considered as settled in the federal courts, and to be upheld by the Supreme Court of the United States, and by the courts of last resort in Arkansas, California, Connecticut, Illinois, Kansas, Kentucky, Maine, Michigan, Missouri, New York, Pennsylvania, Tennessee, Texas, and Wisconsin, in which latter state this subject is provided for by the legislature.

In some few states, however, the contrary has been held and the parties have been looked upon as fellow servants, their duties being considered as not more distinct than those of a trackman or switch tender and a brakeman. This is the case in Indiana and Mississippi.

In order, however, to determine the responsibility of the master, it is necessary to consider the nature and extent of the authority delegated, the rule as to fellow servants not applying when the duties are such that must be performed either by the master in person, or by his agent.

It makes no difference that the men are in the employ of the same master, or that the same result is reached by their employment.

It is, however, incumbent upon the plaintiff to establish the fact that the relation did not exist, and in case of his failure to establish a clear case the court will order a nonsuit.

The question of the competency of the train dispatcher has also been considered in some cases, and the court has held that if competent when employed by the company his subsequent incompetency will not affect the company unless it be brought to its notice.

There are cases wherein it has been held that the co-operation of the train dispatcher and trainmen relates to the same object, and that the fact that some are performed upon the train and others at a particular place, does not determine the question, 25 L. R. A.

the fellow servant of a fireman on a passenger train employed by the same company.

**2. An instruction that the jury may consider in estimating plaintiff's damages resulting from an injury the past and prospective expenses of his sickness, is erroneous where the amount of the past expenses is not shown.**

the duties relating to the same general object for which they are employed.

If, however, his orders are improper, the company is liable for any injury resulting therefrom, yet if such orders as originally given were correct there would seem to be some ground for applying the doctrine of fellow servants, if through the negligence of some employé they were wrongfully repeated or delivered.

There is less uniformity in the decisions upon the question of the relationship of fellow servants existing between a telegraph operator and the trainmen, the decisions in favor of the position existing between them being in the majority.

The cases upholding the negative view do so upon the same principles as those declared by the court in the case of a train dispatcher, while those in favor of the affirmative rest the decision upon the ground of assumed risk, the employé being competent to discharge the duties required of him.

**I. General doctrine.**

As between servant and employer, the latter is bound to use reasonable care in the prosecution of the business in which he engages the former, and it cannot be made out upon principle, or from any case of authority that he shall not be liable for damages arising from a failure to do so. *Sheehan v. New York Cent. & H. R. R. Co.* 91 N. Y. 332; *Lanning v. New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 206, 37 Am. Rep. 491, *Fiske v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Booth v. Boston & A. R. Co.* 73 N. Y. 88, 29 Am. Rep. 97.

It is well settled that the master, who has used proper care in the selection of his servants, is not liable to one servant for the negligence of another servant, while engaged in the same common employment. *Dana v. New York Cent. & H. R. R. Co.* 23 Hun, 473.

The implied contract of the master does not, however, extend to indemnify the servant against the negligence of any one but himself. *Ibid.*

When the servant enters upon the performance of the duties he assumes full knowledge of all the risks and adjusts his compensation accordingly, the risks being those he is likely to know of and as well able to guard against as the master, and being in a position to quit the service when he is no longer willing to face the perils of the position, he cannot hold the master responsible. *Ibid.*

The rule rests upon sound principle, each one taking on himself all the ordinary risks of the employment, the negligent acts of his fellow workman in the general course of his employment being within the ordinary risks. *Lewis v. Seifert*, 116 Pa. 623.

Where, however, a master delegates to another entire control over a particular branch or circumstance of his business, the person to whom such power is delegated stands in the place of the master as to all duties resting upon him to his servants, and his acts or omissions relative thereto are the acts or omissions of the master himself. *Sheehan v. New York Cent. & H. R. R. Co.* 91 N. Y. 332; *Fiske v. Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Leaky v. Canadian Pac. R. Co.* 83 Me. 461; *Lewis v.*



(November 25, 1893.)

**APPEAL** by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Selfert, *supra*; Moon v. Richmond & A. R. Co. 78 Va. 745, 49 Am. Rep. 404; Baltimore & O. R. Co. v. McKenzie, 81 Va. 71.

And where the master exercises no discretion or oversight of his own, he is liable for the negligence of such agent. Lewis v. Selfert, *supra*.

The master, to be exempt from liability, must himself have been free from negligence. Baltimore & O. R. Co. v. McKenzie, *supra*.

He is liable if his own negligence or want of care produces the injury, and this may be manifest by employing unfit servants or agents, or furnishing improper or unsafe machinery, implements, facilities, or materials for the use of the servants. Filke v. Boston & A. R. Co. 53 N. Y. 550, 13 Am. Rep. 545.

The rule is the same, although the one injured may be inferior in grade and is subject to the direction and control of the superior, whose act caused the injury, provided they are both co-operating to avoid the same object. Lewis v. Selfert, *supra*.

If corporations could in such cases escape liability on the plea that their agent was a fellow servant or coemployé of the party injured, they could never be held at all, since such corporations must perform their duties through agents who have a common employer. Moon v. Richmond & A. R. Co. 78 Va. 745, 49 Am. Rep. 404; Filke v. Boston & A. R. Co. 53 N. Y. 550, 13 Am. Rep. 545.

The defendant ought not to escape liability for negligently issuing, as master and in the course of the performance of its duty as such, to its employes, an improper order, and whether it has done so should be submitted to the jury. Hankins v. New York, L. E. & W. R. Co. 142 N. Y. 416, post, 555, reversing 55 Hun, 51.

In employing subordinates, the principal must exercise great care, and it is required to institute affirmative inquiries to ascertain their character and qualifications, and negligence in this respect will create a liability, but after suitable persons have been employed there is not the same reason for exacting such a high degree of diligence. Chapman v. Erie R. Co. 55 N. Y. 579.

The railroad is only liable for its own negligence, or for the negligence of some officer or agent who amounts to a vice-principal or a substitute for the company. Hannibal & St. J. R. Co. v. Kanaley, 39 Kan. 1.

If proper persons are employed and afterwards become incompetent or unfit, from bad habits, to discharge their duties, and this is brought to the knowledge or notice of the principal or its managing officers, who have power to act in the premises, a failure or neglect promptly to discharge them will render the principal liable for any injury caused thereby. Chapman v. Erie R. Co. *supra*.

A good character and proper qualifications once possessed must be presumed to continue, and a principal may rely upon that presumption as to these personal qualities until he has notice of a change, or knowledge of such facts as would be deemed equivalent to notice, or at least such as would put a reasonable man upon inquiry. *Ibid.*

It is the duty of the company, not only to establish proper rules and regulations for its service, but to enforce those rules and regulations in order to exempt it from liability for the negligence of 25 L. R. A.

*Messrs. U. M. Rose and G. B. Rose, for appellant:*

Upon the proposition that because the information that No. 5 was in the bottom was given orally and not in writing, the engineer with full knowledge that it was there was justified in running into it, see *Louisville & N. R. Co. v. Hall*, 91 Ala. 112, where it was ruled: "The failure to put up bulletin boards and

those agents, whose duties it is to enforce and comply with them. Madden v. Chesapeake & O. R. Co. 28 W. Va. 610, 57 Am. Rep. 605.

In *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 877, 28 L. ed. 787, the court stated that there was a clear distinction to be made in relation to their common principal, between the servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of a corporation clothed with the control and management of a distinct department, in which their duty was entirely that of superintendence and discretion.

Those who are co-workers in the same common enterprise, under the same master, and compensated by him, are fellow servants, and the difference in wages or work does not affect the question if the general business is the same. *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258.

Prima facie, all servants of a common master employed in running, operating, and rendering service with a train of cars, are fellow servants. *Blessing v. St. Louis, K. C. & N. R. Co.* 77 Mo. 410; *McGowan v. St. Louis & I. M. R. Co.* 61 Mo. 532.

To constitute fellow servants, the employes need not be at the same time engaged in the same particular work, it is sufficient if they are in the employment of the same master engaged in the same common work, and performing duties and services for the same general purpose. *Lewis v. Selfert*, 116 Pa. 623.

If there are facts that show that the relation of fellow servant does not really exist between all such servants, the burden of showing such facts is on him who seeks to avail himself of the absence or non-existence of such relation. *Blessing v. St. Louis, K. C. & N. R. Co.* and *McGowan v. St. Louis & I. M. R. Co. supra*; *Toner v. Chicago, M. & St. P. R. Co.* 69 Wis. 133.

The question is a mixed one of law and fact to be determined by the jury on the facts, under suitable instructions from the court as to the law. *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71; *Mullan v. Philadelphia & S. Mail S. S. Co.* 78 Pa. 25, 21 Am. Rep. 2; *Potter v. Chicago, R. I. & P. R. Co.* 46 Iowa, 390; *Norfolk & W. R. Co. v. Hoover (Md.) post* 710.

In order to constitute servants of the same master "fellow servants" within the rule *respondet superior*, it is not enough that they are engaged in parts of some work or in the promotion of some enterprise carried on by the master not requiring co-operation, nor bringing the servants together or into such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety, but it is essential that they should be at the time of the injury directly co-operating with each other in the particular business in hand, or that their usual duties should bring them into habitual co-sociation so that they may exercise an influence upon each other promotive of proper caution. *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 573, 582.

No general rule can be formulated for all cases, and therefore each case must to some extent be governed by the peculiar circumstances attending it. *Little Rock & M. R. Co. v. Barry*, 58 Ark. 196.

The liability of the railroad company for injuries

placards warning employes of danger is immaterial, if they are expressly warned of the same danger by some other means."

In response to the contention that the train order should have told the engineer to watch out and run slowly around curves, see *Lake Shore & M. S. R. Co. v. Parker*, 181 Ill. 557, where it is held: "Rules requiring the engineer when his view is obstructed to control his

train so as to be able to stop within the range of his vision; to run delayed trains with great caution and at all times under full control; to approach stations with reduced speed and with care,—simply call attention specifically to the exercise of that care which the law imposes upon every engineer."

See also *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977.

committed by one of its servants against another depends upon their relative positions. *McLeod v. Ginther*, 80 Ky. 369.

It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. *Smith v. Wabash, St. L. & P. R. Co.* 82 Mo. 359; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590.

When servants are of the same department of service, and one has authority to control the action of the other, the company will be responsible for the gross negligence of the servant superior in authority, and where the servants are not engaged in the same department, but in the same common employment, the company is liable for their ordinary neglect. *McLeod v. Ginther, supra*.

It is not responsible, however, where they are co-equal in power, authority, and degree, unless the negligence is fixed upon the company or its agents, who are superior in rank to the injured servant, or who are not engaged in the same department of service. *Ibid*.

The servant does not assume the risks of the negligence of another servant, where the latter is engaged in a different department of the work of service. *East Tennessee, V. & G. R. Co. v. De Armond*, 85 Tenn. 73.

It is not a question as to the rank of the individual who gives the order or performs the act, but it is a question as to the character of the order or act, whether it is one which is given or performed as an order or act of the master in his character as such, or only as an order or act delegated by the master to another and performed by such other as an employé. *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, post, 396, reversing 55 Hun. 51.

The relation of a representative, in the sense requisite to render the performance of an act of the servant that of the principal, does not necessarily depend upon his rank in the service, but upon the character of the act he is called upon to perform. *Monaghan v. New York Cent. & H. R. R. Co.* 45 Hun. 113; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521.

#### II. *Special principles against the relation.*

If the defendant owes a duty as master to give orders, as to trains, or to take due and reasonable care to give them, the failure to perform that duty is the failure of the master in his character as such, although he intrusted the performance of the duty to the train dispatcher. *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, post, 396, reversing 55 Hun. 51.

A train dispatcher is the corporation for the time being, and exercises powers which neither the superintendent nor the president, nor any other officer or agent of the corporation, can interfere with. *Hunn v. Michigan Cent. R. Co.* 7 L. R. A. 500, 78 Mich. 513.

He controls the movements of trains, and the conductor has far less discretion than he has, when he shall start, where he shall stop and how he shall run his train; so stated in *Blessing v. St. Louis, K. C. & N. R. Co.* 77 Mo. 410; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590.

The whole power of the corporation whose duty it is to move them, specially being delegated to 25 L. R. A.

him. He is the agent through whom the corporation attempts to perform its duty. He acts in its name, by its authority, and in its stead. *Darrigan v. New York & N. E. R. Co. supra*.

His order is imperative and requires implicit obedience on the part of the engineer, of which obedience he does not know the consequences, but the company does or should know them. *Ibid*.

Disobedience or deviation being subversive of order and discipline, destructive in its consequences and a just cause for immediate dismissal. *Ibid*.

Neither the engineer nor the conductor has any voice in running a train by special order, but is simply charged with the duty of carrying out the orders that come to them from the train dispatcher's office. *Hankins v. New York, L. E. & W. R. Co. supra*.

In emergencies such employes must promptly obey the orders of any superior officers, and if such be one of the rules, the company thereby making the order of that officer, whoever he may be and whatever grade he may be, its own, and if the order is an improper one and if in executing it another employé is injured, the company is responsible, and in such a case the grade of service is material. *Darrigan v. New York & N. E. R. Co. supra*.

If, therefore, the engineer conforms to the order as he is bound to, and while so conforming and as a direct consequence thereof, is injured, reason, justice, and law require that the company shall be held responsible. *Ibid*.

In holding a train dispatcher not to be a fellow servant with a fireman, the court in *Hunn v. Michigan Cent. R. Co. supra*, did not consider that it ran counter of the doctrine recognized by the courts in relation to fellow servants to the effect that "it is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes. The rule is the same though the one injured may be inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both operating to effect the same common object" inasmuch that such rule could not be applied when the superior causing the injury represents the master, it always being a subject of inquiry to ascertain the nature and extent of the authority of the superior whose negligence caused the injury, and if his authority and duties are such as the master must necessarily, either personally or by another, exercise and discharge them, the above rule does not apply. *Hunn v. Michigan Cent. R. Co.* 7 L. R. A. 500, 78 Mich. 513.

Where it is apparent that the train dispatcher exercises his discretion in ordering the running of a train, and that disobedience of these orders would be the negligence of the servant for which the defendant would not be liable, yet any defect or imperfection in the orders, or in their communication, would be the negligence of the defendant, and that question one of fact for the jury. *McChesney v. Panama R. Co.* 49 N. Y. 8, R. 148.

The holding that a train dispatcher in the dispatch of trains performs for the master a duty which it owes as such is not a new departure in the branch of the law as to master and servant. *Han-*

The blame for the collision was all upon the men running the special, and they were the fellow servants of the plaintiff, as, indeed, were also the men in charge of the freight train.

*St. Louis, I. M. & S. Railway v. Shackelford*, 42 Ark. 417; *St. Louis, I. M. & S. Railway v. Gaines*, 46 Ark. 555; *St. Louis, I. M. & S. R. Co. v. Rice*, 4 L. R. A. 178, 51 Ark. 469; *St. Louis, I. M. & S. Railway v. Morgart*, 45

Ark. 318; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Randall v. Baltimore & O. R. Co.* 109 U. S. 479, 27 L. ed. 1003; *Henry v. Lake Shore & M. S. R. Co.* 49 Mich. 495; *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 837; *McMaster v. Illinois Cent. R. Co.* 65 Miss. 284; *Congrave v. Southern Pac. R. Co.* 88 Cal. 360; *Knahila v. Oregon Short Line & U. N. R. Co.* 21 Or. 136; *Adams v. Iron Cliffs Co.* 78 Mich. 271; *Harrison v. Detroit L. & N. R.*

*kins v. New York, L. E. & W. R. Co.* post, 396, 142 N. Y. 416, reversing 55 Hun, 51.

It is immaterial that these men are hired and paid by a common employer, and that the employment is designed to accomplish one common result. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590.

The distinction between a general dispatcher, one who has the absolute control of all the trains upon the road, and the conductor or engineer, is manifest, the latter having the duty of obedience, their business being to run their trains under orders from the dispatcher, and therefore if an employé is injured as a result of their negligence, the company is not liable. *Lewis v. Seifert*, 116 Pa. 638.

The duty of the train dispatcher does not go further than to use reasonable care, measured by the gravity of the interests at stake, to give originally correct orders; and if such orders are correct as originally given, and subsequently through the negligence of some employé are incorrectly interpreted or copied, or mistaken or repeated, or delivered to a wrong person, it has been stated that there might be reason for the application of the doctrine as to the negligence of a co-employé. *Hankins v. New York, L. E. & W. R. Co.* post, 396, 142 N. Y. 416, reversing 55 Hun, 51.

The duty of a train dispatcher pertains to management and direction, and the duty of a locomotive engineer pertains to obedience. *Smith v. Wabash, St. L. & P. R. Co.* 52 Mo. 859.

A train dispatcher is to be regarded as a representative of the company. *Ibid.*

The question as to whether or not a train dispatcher violated one or all of the rules of the company is not material, where the defendant has not performed its whole duty in promulgating rules; neither is it a defense when it is shown that if a train dispatcher had obeyed the rules the accident would not have occurred. *Hankins v. New York, L. E. & W. R. Co.* supra.

Where the facts did not show that the relation of fellow servants did not really exist, the burden of showing such facts being upon the plaintiff to show that the deceased, an engineer, was not a fellow servant of the train dispatcher. *Blessing v. St. Louis, K. C. & N. R. Co.* 77 Mo. 410.

Safety in running train requires the prompt and faithful discharge of the duties of all these employé, and their co-operation and combined labor relate to the same object and are essential to the movement of trains upon the road. *Robertson v. Terre Haute & I. R. Co.* 78 Ind. 77, 41 Am. Rep. 552.

The mere fact that the duties of some of the employés are performed upon the train, and those of others at a particular place upon the road does not determine the question of their common employment. *Ibid.*

If the duties discharged by each relate to the same general object, they must be held to be fellow servants. *Ibid.*

It is enough if they are employed for the purpose of effecting the same general object. *Ibid.*

In the above case the court considered the engineers and firemen were coemployés with the telegraph dispatcher, in the same common employment 25 L. R. A.

operating trains, and came within the definition of fellow servants who are coemployés, and that therefore the negligence of the operator was not the negligence of the company. *McKalg v. Northern Pac. R. Co.* 43 Fed. Rep. 238.

### III. Train dispatcher.

#### a. Not a fellow servant.

In *Little Rock & M. R. Co. v. Barry*, 58 Ark. 198, the plaintiff was a fireman, and the facts showed that the superintendent had instructed the conductor of the special to keep a sharp lookout for the freight; that the latter told the engineer that the freight was in the bottom and that he must keep a sharp lookout for it; that the officers of the freight had no knowledge or information that the special was behind; that the orders for the government of the trains, as to how they should run, where they should stop, etc., were given by a train dispatcher and were required by the rules of the company to be in writing, verbal orders not being permitted; that it was a train dispatcher's duty to give orders to the different trains; that he controlled their movements and was to keep himself informed as to their whereabouts,—the court held, under the circumstances of the case, that, the movement of the trains being under the direction and control of the train dispatcher, in directing and controlling their movements he was performing a master's duty and was not a fellow servant with the plaintiff, but was the representative of the company for whose negligence, if any, resulting in injury, the company was liable.

In an action for injuries received by the plaintiff, a laborer, employed by the defendant company in repairing the road, through a train sent out by the material agent and train dispatcher, with no light except the usual conductor's light, easily mistaken for a light at the side of the road, it was held that such laborer was not a fellow employé with such train dispatcher, within the meaning of section 1970 of the California Civil Code, as he represented the company, was a vice-principal, employed and discharged men and directed the movements of the trains. *McKune v. California Southern R. Co.* 68 Cal. 302.

Where a laborer upon the defendant's road was injured by a train which was dispatched off schedule time of which the laborer had no notice, it was held the company was liable. *Haynes v. East Tennessee & G. Railroad*, 3 Coldw. 222.

So where the negligence of a train dispatcher was admitted but the defendant claimed that it was that of a fellow servant, the plaintiff being a locomotive engineer, the court held that the train dispatcher and such engineer were not fellow servants. *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590.

A train dispatcher or division superintendent of a railroad company under whose orders trains are run, is not in the same line of employment as an engineer who runs a locomotive over such road with a train attached, under the orders of such train dispatcher or division superintendent. *Chicago, B. & Q. R. Co. v. Young*, 23 Ill. App. 115. *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109, to the same effect.

The division superintendent or train dispatcher

*Co. 7 L. R. A. 623, 79 Mich. 409; White v. Kennon*, 83 Ga. 343; *McKinney, Fellow Servants*, p. 283.

The court erred in refusing to instruct the jury that the train dispatcher was a fellow servant with the fireman.

This court has always held that those engaged in a common business, and in the service of a common master, are fellow servants,

and has never lent its countenance to the distinctions which some courts make, based upon grades of service and difference of departments. In accordance with the ancient authorities it considers all who are co-operating towards a common end to be fellows in the service.

*Fones v. Phillips, St. Louis, I. M. & S. Railway v. Shackelford, St. Louis, I. M. & S. Railway v. Morgart, and St. Louis, I. M. & S.*

who stands in his shoes and acts in his name, and has full control of the running of trains, stands, in respect to the engineers and train conductors whose movements he directs and orders,—is the representative of the master; and such employes are bound to regard and obey his commands as the commands of the master, and there is no room for a difference of opinion in respect to the status of the parties. *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115.

A train dispatcher is a vice-principal or substitute for the company, and not a mere fellow servant in common employment with the fireman or trainmen, and therefore if he is negligent the company is also negligent. *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 1.

In an action for damages for the willful neglect of the company's servants in sending dispatches to two conductors of trains, which were to run on the same day over the same part of its road, the negligence consisting of the wording of the dispatch so as to mislead the conductors, it was held that the company was liable for the conductor's death caused by a collision of the trains, owing to the misconstruction of such dispatch. *McLeod v. Ginther*, 80 Ky. 399.

Where the train dispatcher habitually performs, in the name of a superintendent of a railroad, certain of the latter's duties in his absence, with the company's sanction, the company will be liable for injuries sustained by an employe acting under the orders of such train dispatcher, within the scope of the delegated authority, in the same manner as if such directions were issued by the superintendent himself. *Leaky v. Canadian Pac. R. Co.*, 83 Me. 461.

In *Hunn v. Michigan Cent. R. Co.*, 7 L. R. A. 500, 78 Mich. 513, it was held that a train dispatcher was not a fellow servant with employes of the company who acted in obedience to his orders. Where the train dispatcher was guilty of negligence in informing the engineer of the defendant company of a meeting place upon the defendant's line, and in instructing one of them to wait at such point, in consequence of which the fireman was killed, it was held the company was liable, the fireman and train dispatcher not being fellow servants.

Where the evidence showed that the train dispatcher had the sole and exclusive control in directing the movement of trains on the division of the defendant's road, and that the conductors and engineers were subject to them, it was held they were not fellow servants so as to exclude the liability of the company for an injury sustained through the negligence of such train dispatcher. *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359.

The mere fact that the orders given by the train dispatcher were verbal instead of written, where the rules call for the latter, makes no difference. *Ibid.*

The rule would seem to be settled that the act of a train dispatcher vested with a discretion, is the act of the company and not that of a fellow servant, and that any negligence of his in the exercise of that discretion must be treated as the negligence of the company. *McChesney v. Panama R. Co.* 49 N. Y. S. R. 143.

Where the plaintiff, a locomotive engineer, 25 L. R. A.

was running his train under the orders of the train dispatcher of the company, and was guilty of no contributory negligence, the injury sustained by him resulting from the negligence or mistake of the train dispatcher, or master of trains, in running a special or irregular passenger train not in conformity with the rules prescribed by the company for the running of trains, the court held that if the authority conferred upon the train dispatcher or train master by the company under its rules vested in him any discretion as to the time or manner of dispatching trains, and gave him any power to change the time of starting or running trains from those fixed in the time-tables by the company, then to the extent of that discretionary authority he was the *alter ego* of the defendant and his negligence that of the company. *Ibid.*

In *Hankins v. New York, L. E. & W. R. Co.* 142 N. Y. 416, post, 396, reversing 55 Hun. 51, the court held that a fireman on a freight train was not a fellow servant of the train dispatcher.

Where trains were being run without regard to the ordinary time-tables, and several hours late proceeding in opposite directions each approaching the other in entire ignorance of the other's whereabouts, both being necessarily dependent upon the special orders received from the train dispatcher, the company were held liable for his negligence. *Hankins v. New York, L. E. & W. R. Co. supra.*

In the above case the plaintiff's train was several hours behind its schedule time, and its movements were entirely controlled by special telegraphic orders from the train dispatcher at his office at a given station, and it was while obeying such telegraphic orders that the plaintiff sustained his injury. *Ibid.*

Where the plaintiff's intestate, a fireman upon a freight train, was killed owing to the negligence of the company's agent who was called a head conductor, whose business it was to make up the morning trains, hire and station the brakemen, and generally to prepare and dispatch these trains, in not supplying a sufficient number of brakemen to the freight train, the hinder part of which became detached and caused the accident, no brakeman being upon the same, it was held that the company was liable. *Filke v. Boston & A. R. Co.* 53 N. Y. 550, 13 Am. Rep. 545.

In the above case the train in question was sent out with only two brakemen, where three were required. *Ibid.*

In *Sheehan v. New York Cent. & H. R. Co.*, 91 N. Y. 332, instead of communicating with the engineer and conductor, the defendant communicated with the telegraph operator and told him to hold the train for orders. The court held that the train was subject to his will, and the object in view became dependent upon his memory and his faithfulness in obeying the order, and the probabilities of its attainment were thereby lessened, and that to secure certainty the defendant should have so communicated with its conductor and engineer, that these servants would understand the object.

In *Sutherland v. Troy & B. R. Co.*, 26 N. Y. S. R. 201, the action was for the death of the plaintiff's husband, an engineer, caused by the negligence of a train dispatcher, who also performed the service

*Railway v. Gaines, supra; St. Louis, A. & T. R. Co. v. Triplett*, 11 L. R. A. 773, 54 Ark. 289.

Among the cases adopting our view are:

*Robertson v. Terre Haute & I. R. Co.* 78 Ind. 77, 41 Am. Rep. 552; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Blessing v. St. Louis, K. C. & N. R. Co.* 77 Mo. 410; *Slater*

*v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Ross v. Boston & A. R. Co.* 58 N. Y. 217.

The court erred in instructing the jury that they might allow for expenses of sickness when none were proved.

*Owens v. Chandler*, 16 Ark. 651; *Morton v. Scull*, 23 Ark. 289; *Dickerson v. Johnson*, 24 Ark. 251; *Burks v. Snell*, 42 Ark. 58; *Little*

of master, the facts showing that deceased was behind time and running in obedience to the dispatcher's orders; that he was to stop for these wherever he saw a red flag; that he had no knowledge as to other trains and knew that the dispatcher had; that having a good opportunity to make speed he made it relying upon being reported from the station he passed; that he looked out for the red flag at a certain point and found none and concluded that the dispatcher did not want him to stop, relying upon this better knowledge, that he was not to meet a certain train, nor to wait, and must run on. The court held that the jury having considered the facts and the question whether the deceased was acting carefully and according to the lights he had, and that whether, notwithstanding his better judgment, he was misled by the fatal omission of the red flag, and having found that he acted properly, the verdict against the company would not be disturbed.

In the same case reported in 35 N. Y. S. R. 853, 125 N. Y. 737, it was held that the jury could not infer negligence in the company in the employment of a telegraph operator who was only seventeen years of age, he having a year's experience and having been in the employ of the company for three months prior to the accident as a first-class operator.

In *Booth v. Boston & A. R. Co.*, 73 N. Y. 33, 29 Am. Rep. 97, a parallel case with that of *Filke v. Boston & A. R. Co. supra*, the company was held liable, the plaintiff's intestate being an engineer of a freight train which was dispatched without a sufficient number of brakemen.

A railroad company is bound to supply a sufficient number of brakemen upon starting a train, and for a neglect of this duty they will be responsible in damages in the absence of contributory negligence, even though the negligence in dispatching the train was that of a fellow servant. *Booth v. Boston & A. R. Co. supra*.

In *Lewis v. Selfert*, 116 Pa. 623, the question was whether a locomotive engineer in the employ of the defendant was a fellow servant of the train dispatcher, within the meaning of the rule which holds that the master is not responsible for an injury received by an employé caused by the negligence of a fellow servant, and the court held that they were not fellow servants.

Where the general train dispatcher had the general power and authority of moving trains without interference by the company or any one else, and for that purpose wielded all the power of the company, his position being such that he could send out a train on schedule time or hold it back, could change the schedule time or make new schedules as the exigency of the case required, could send a train out without schedule and direct its movements, his orders in this respect being such as must be obeyed by those having charge of the train, it was held that such train dispatcher was not a fellow servant with the engineer and conductor. *Lewis v. Selfert, supra*.

In *Washburn v. Nashville & C. R. Co.*, 3 Head, 63, 75 Am. Dec. 784, the company was held liable for the negligence of the superintendent in starting a train out of time, without any precaution whatever to avoid a collision with a train coming in the opposite direction, whereby the plaintiff, an

engineer in the employ of the company, was injured.

In an action to recover damages for the death of the plaintiff's minor son, caused by the negligence of the defendant acting through its superintendent and train dispatcher, in sending conflicting telegrams to two trains directly and completely under his control and management by virtue of the office he held, the court held the negligence was that of the corporation, as much so as though the owners or directors had sent the message, and that the deceased, an employé of the company, riding on the train at the time of the collision, to his work, which was that of quarrying rock on the defendant's land was not a fellow servant. *Galveston, H. & S. R. Co. v. Arispe*, 5 Tex. Civ. App. 611. A rehearing in the above case was denied, *Id.* 617.

A general manager who prescribes rules, or a train dispatcher who gives special orders, is not a fellow servant with the employés in charge of the train. *Phillips v. Chicago, M. & St. P. R. Co.* 64 Wis. 475.

Under § 1816a of the Wisconsin Annotated Statutes, vol. I, p. 1000, ed. of 1889, every railroad corporation doing business in the state of Wisconsin is liable for damages sustained by any employé thereof within the state without contributory negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, yard master, conductor, or engineer, or of any other employé who has charge or control of any stationary signal, target point, block, or switch.

The negligence of the persons who are employed by a railroad company to direct the movement of trains by telegraph or otherwise, such as a train dispatcher or train master, is not chargeable to a person occupying the position of a mere fireman. *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 87.

The negligence of such persons is the negligence of the company, provided the evidence proves such negligence. *Ibid.*

The train dispatcher is the superior of all persons running the trains, and in a limited degree he has all persons in that service under his authority so that he may not be a fellow servant with any of these persons when his negligence causes their injury. *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 Fed. Rep. 125; *Sheehan v. New York Cent. & H. R. Co.* 91 N. Y. 334; *Dana v. New York Cent. & H. R. Co.* 92 N. Y. 639; *Lewis v. Selfert*, 116 Pa. 623.

In *Cincinnati, N. O. & T. P. R. Co. v. Clark, supra*, the court stated that the trend of recent decisions, especially in the state courts, was to make the orders of a train dispatcher the orders of the company, and his negligence in the control and running of trains the negligence of the company for whom he acted, the reason being that the power and authority of such train dispatcher when running trains under telegraphic orders was and must be supreme; and that the company having thus delegated supreme authority in the special service should be responsible for any negligence of the train dispatcher.

It has been assumed as settled law that the negligence of the chief train dispatcher was the negligence of the company, and that the latter would be liable for any injury done by such negligence.

*Rock & Ft. S. Railway v. Townsend*, 41 Ark. 382; *Little Rock & Ft. S. Railway v. Trotter*, 37 Ark. 594; *Johnson v. State*, 36 Ark. 242.

*Messrs. W. L. Terry and J. M. Moore* for appellee.

**Hughes, J.**, delivered the opinion of the court:

The appellee was fireman on a special pas-

senger train of the appellant, which came in collision with a freight train standing on the main track of the appellant's road, at Forrest City. The appellee, perceiving that a collision would occur, jumped from his position on the special train, believing, as he testified, that it was necessary for him to do so to save his life. He was, as the evidence tends to show, injured thereby, and upon the verdict of a jury re-

but a distinction is drawn between a chief train dispatcher and a telegraph operator. *Cincinnati, N. O. & T. P. R. Co. v. Clark*, *supra*.

It is the duty of a railway company to devise some suitable and safe method of running special and irregular trains so as to avoid collision, and when the method employed is to have the trains controlled by a train dispatcher, the latter as to employees in charge of trains, stands in the place of the company. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 577, 23 L. ed. 787; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590.

A railroad company is liable for the negligence of a train dispatcher, which results in the death of one of the servants of the company. *Hunn v. Michigan Cent. R. Co.* 7 L. R. A. 500, 78 Mich. 512.

b. *A fellow servant.*

In *Robertson v. Terre Haute & I. R. Co.*, 78 Ind. 77, 41 Am. Rep. 552, it was held that the brakeman and a train dispatcher were fellow servants, and that the brakeman could not recover against the company for injuries sustained through the negligence of such dispatcher.

The duties of the train dispatcher and the brakeman are quite distinct, but no more so than the duties of the trackman or switch tender, and the brakeman. *Robertson v. Terre Haute & I. R. Co. supra*.

In an action for the death of the plaintiff's intestate while acting as a fireman, which occurred in a collision through the negligence of the defendant's train dispatcher charged with the duty of directing the movements of trains, the court held that the train dispatcher was the fellow servant of the intestate. *Millsaps v. Louisville, N. O. & T. R. Co.* 60 Miss. 423.

Where damages were claimed for the death of a husband, an engineer in charge of a pay car which collided with a freight train, the facts showing that the trains were not on time, and that the train dispatcher at a certain place instructed the freight train "to get orders at" a given point, which orders were not at the point when such conductor arrived there, whereupon he proceeded and the collision ensued, it was held the plaintiff could not recover, the negligence being that of a fellow servant. *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977.

So where the evidence, which was meager, showed that the train dispatcher controlled the movement of trains, and that the conductor had far less discretion than he as to when he should start, where he should stop, and how he should run his train, and there was no further evidence showing that the train dispatcher and engineer were not fellow servants, the court ordered a nonsuit. *Blessing v. St. Louis, K. C. & N. R. Co.* 77 Mo. 410.

In *Chapman v. Erie R. Co.* 55 N. Y. 579, the plaintiff's intestate, an engineer, was killed through the negligence of the train dispatcher, who was competent at the time he entered into the service of the company, but subsequently became incompetent, owing to the use of intoxicating liquors, for which he was reprimanded but allowed to continue in the service, it was held the company was not liable, having no notice of the 25 L. R. A.

change in the habits of such dispatcher, which would be sufficient to put a reasonable man upon his guard.

Where the train on which the plaintiff's intestate was a brakeman was sent out within three or four minutes after another train, and was itself followed by a third train at about the same distance of time, the injury which resulted in the death of the brakeman resulting from the trains being sent out so near together, but by whose direction it did not appear, the court held, the plaintiff not having made out a clear case, that the company was not liable for the negligence in observing the regulations regarding the starting of trains, or in the disobedience, unless there be proof of other negligence. *Rose v. Boston & A. R. Co.* 58 N. Y. 217; *Filke v. Boston & A. R. Co.* 58 N. Y. 553, 13 Am. Rep. 545, distinguished.

In the above case the company's time-tables were not produced, and no evidence was adduced as to the company's regulations as to the starting of trains, or as to whose duty it was to start them, and there was no evidence that any agent or officer had general authority upon the question. It was held there was no negligence imputable to the company, as its proper regulations might have been violated by a fellow servant, and the presumption was in favor of such being the case no evidence to the contrary being adduced. *Rose v. Boston & A. R. Co. supra*.

In *Norfolk & W. R. Co. v. Hoover* (Md.) post, —, the train dispatcher was held a fellow servant with an engine man upon the ground that he was a subordinate, subject to the control of the superintendent, being appointed by him, even though he had charge of the trainmen and of the train's movements, with power to employ and discharge flagmen and brakemen, the evidence not showing that the master had relinquished all control over the division and intrusted its direction, as well as the procuring of materials and machinery and other instrumentalities necessary for the service to his judgment and discretion, the engine man not being employed by him.

The evidence was not sufficient in the court's view to prove the train dispatcher a vice-principal, although it would seem to have been sufficient according to the decisions.

Where the defendant's track was operated by means of regular trains moving at times prearranged and noted on cards or time-tables, and also by occasional trains moving without prearrangement but by special order without reference to schedule or regular trains, conforming to no conditions except the immediate order of the owner, which were styled "wild" or "wild cat" trains, of the latter kind the plaintiff being foreman running irregularly and not according to schedule, the collision being occasioned by the failure of the telegraph operator and train dispatcher to communicate direct with the conductor and engineer, and to exercise reasonable precaution with regard to the dispatch of such trains, the court, distinguishing the case from *Slater v. Jewett*, 85 N. Y. 61, 29 Am. Rep. 627, *infra*, upon the ground that in that case the defendant had changed the time of the running of its trains after setting in motion a series of operations designed to carry personal notice to its

covered judgment against the appellant for \$10,000, to reverse which the case was brought here on appeal. The road is a single-track road, and the special and the freight were both coming west when the collision occurred. Between Edmonson and Forrest City there was no telegraph station, but there was one at Edmonson, and one at Hopefield, which places are east of Forrest City, on the appellant's road,

and west of Memphis. The testimony shows that the freight train left Edmonson at 9:40 A. M., and that it was then about three hours behind its schedule time, and that it did not reach Forrest City until 1:35 or 1:50 P. M., the same day. It was due at 7:45 A. M., but was over five hours and thirty minutes late, having been delayed between Edmonson and Forrest City by the breaking in two of the

employés of the intended change, and to bring to the master an acknowledgment in writing that he had received notice of it, the failure being the omission of the duty of a fellow servant, whereas the plaintiff in that case was bound to travel as ordered, the defendant being bound to the exercise of reasonable precaution, and its failure to give notice was a question for the jury, the court affirming the verdict in plaintiff's favor. *Sheehan v. New York Cent. & H. R. R. Co.* 91 N. Y. 322.

#### IV. Telegraph operator.

##### a. Not a fellow servant.

A fireman on an engine and a telegraph operator are engaged in different departments or "about a different piece of work" in the meaning of the Mississippi Constitution of 1890, section 193. *Illinois Cent. R. Co. v. Hunter*, 70 Miss. 471.

The operator is not in the same department with the trainmen, nor engaged in the same branch of the common employer's service, and although not in person the superior of the trainmen to whom he delivers orders, having no right or power to issue orders on his own motion, he is in a sense their superior, being the arm or mouth-piece of the train dispatcher or superintendent, and in a qualified degree the vice-principal. *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 73.

In *East Tennessee, V. & G. R. Co. v. De Armond*, *supra*, the plaintiff was a conductor upon the defendant's road, and was injured owing to the negligence of a telegraph operator, who it was claimed was a fellow servant of the conductors, whose negligence the latter assumed as one of the risks of his employment. The court held they were not fellow servants, such operator being engaged in a different department and in the capacity of a vice principal, his duty being to communicate the instructions of the superintendent, with regard to the dispatching of trains.

A telegraph operator is employed in a separate branch of the service and under the control of other officers of the company and is the superior servant in the line of his duty. The engineer is subject to his orders or the control of those who are so subject. *Madden v. Chesapeake & O. R. Co.* 28 W. Va. 610, 57 Am. Rep. 665.

Where the mistake, which caused the death of the plaintiff's intestate, was produced by the mistake in writing or in reading the copies of a telegraphic order by the agents of the defendant, it was held that the deceased, an engineer, was not the fellow servant of a conductor on another train, nor of the telegraph operator who dispatched the message, so as to preclude recovery, gross negligence being shown. *Madden v. Chesapeake & O. R. Co. supra*.

In *Hall v. Galveston, H. & S. A. R. Co.* 89 Fed. Rep. 18, where the action was brought to recover damages resulting from the death of plaintiff's son, a brakeman, caused through the negligence of the telegraph operator, the court held that the rule of law as to fellow servants did not exempt the defendant from liability for the negligence of the operator, if the injuries of the deceased resulted from such negligence, as the operator and deceased did not occupy with reference to each other the attitude of fellow servants so as to exempt an em-

ployer from liability to a servant for the negligence of a fellow servant.

In the above case the rules of the defendant company showed that it was the duty of the operator "to report defects in roads or bridges, or obstructions of any kind wherever met, to the superintendent, and if possible to the nearest section master or bridge foreman," and in answer to the defendant's contention that it was not the duty of such operator to report unless requested to do so by an employé of the company, the court held that it was his duty to make reports whether he was requested to do so or not, if he knew of the existence of the rules. *Hall v. Galveston, H. & S. A. R. Co. supra*.

Where the operator was only seventeen years old at the time of the accident, but had performed his duty without fault or negligence and was of good intelligence, the question of his competency was left for the jury who found for the plaintiff. *Sutherland v. Troy & B. R. Co.* 28 N. Y. S. R. 201.

Upon appeal the judgment of the court below was reversed, but it would seem to have been upon the ground that the deceased was guilty of contributory negligence in not observing the rules of the company and rushing on to his destruction because he saw no red flag at the junction, and without bearing in mind that he was running at a higher rate of speed than warranted by the rules of the company. *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737.

##### b. A fellow servant.

In *Dana v. New York Cent. & H. R. R. Co.* 23 Hun. 473, it was held that a telegraph operator and an engineer were fellow servants, and that the company was not liable for the death of the engineer caused by the negligence of the telegraph operator, who misinterpreted a message received by him with regard to the engineer's train which caused his death, the court holding that the risk which caused the death of the engineer was one which he assumed upon entering into the company's service.

Where the telegraph operator was charged with important duties at a certain point, imposing upon him the controlling and directing of the movements of trains there, within the system which the rule provided for that particular locality, and did not make him the *alter ego* of the defendant, the court held the service required of him was within and subordinate to a department of the business of the company, in the performance of which he necessarily exercised discretion and judgment in giving preference by signal in the movement of trains on to a single track, with view to the safety and protection of persons and property, and for the orderly operation of the road, but that did not make his judgment that of the company as between it and its employé, and that it was only a grade in relation of coemployé, and it was sufficient that he was competent, and that therefore he was a fellow servant with the locomotive engineer running a train on such single track. *Monaghan v. New York Cent. & H. R. R. Co.* 45 Hun. 113.

In an action to recover damages for the death of an intestate, caused by the collision upon a road operated by the defendant as receiver, through

train. The special train left Memphis at 11:40 A. M., left Hopefield at about 12:35 P. M., and passed Edmonson at 12:54 the same day. The superintendent of the road told the conductor of the special to keep a sharp lookout for the freight, and the conductor told the engineer of the special that the freight was in the bottom,—the country between the Mississippi and St. Francis rivers,—and that he must keep a sharp lookout for it. Just east of Forrest City, through Croley's ridge, there is a deep cut, and a reverse curve on the road in the shape of the letter S. The freight train was a heavy and long one, and could not sidetrack at Forrest City, and the rear cars of the freight train extended back into this cut at Croley's ridge. When the special reached this cut, its whistle was sounded, but very soon after it ran into the freight cars. The freight train had been at the station at Forrest City only about one minute, according to the testimony of the engineer of the freight, when the accident happened. The officers of the freight train, it appears, had no knowledge or information that the special was behind it. The orders for the government of the trains as to

how they should run, where they should stop, etc., were given by a train dispatcher, and are required by the rules of the company to be in writing, and verbal orders are not permitted. The testimony shows that it is the train dispatcher's duty to give orders to the different trains; that he controls their movements, and should keep himself informed as to their whereabouts. The only orders given to the conductor and engineer of the special, as shown by the testimony, were those mentioned in the testimony of J. H. Bard, the telegraph operator at Forrest City, which are the following:

"Little Rock & Memphis Railroad. Telegraph Train Order No. 5.

"Memphis, Oct. 26, 1890.

"To C. & E. of Eng. 5, Hopefield; C. & E. No. 5, Forrest City; C. & E. Eng. 4 and No. 6, Brinkley: Engine 5 will run from Hopefield to Argenta extra. When No. 5 is overtaken, pass and run ahead of them. Meet No. 6 and engine 4 at Brinkley. Do not pass Brinkley unless engine 3 is there.

"A. J. W.

negligence of the conductor on the meeting train co-operating with the negligence of a telegraph operator at a station on the defendant's road, the latter having omitted to give to the engineer the orders received from the train dispatcher as to the place where the two trains should meet, which his instructions required him to do, and having reported a performance of such duty and the former having signed the engineer's name without his knowledge to an acknowledgment and receipt of the order, and then having failed to communicate the order to him, in consequence of which the engineer went on with his train instead of waiting at the station designated until the other train came up, it was held that the company was not liable, the negligence being that of the intestate's fellow servants. *Slater v. Jewett*, 85 N. Y. 61, 30 Am. Rep. 627.

In *Sheehan v. New York Cent. & H. R. R. Co.*, 91 N. Y. 332, a telegraph operator instructed to hold a train for orders, repeated the telegram back to the superintendent and instructed the conductor of the train to hold it for a certain other train without exhibiting or delivering any message, there being no rule of the company specifically requiring him so to do, although there was a rule that whenever any agent or operator received orders to hold any train, he must carry them out strictly. An accident occurring in consequence of the order delivered to such conductor, it was left to the jury to say whether the defendant had omitted anything which it ought reasonably to have done to prevent the accident, and the court held that there was no error in such instruction, the defendant being bound to use all reasonable precautions and that its failure to instruct the conductor and engineer directly was a question for the jury.

Where the plaintiff's intestate, an engineer, was killed through the negligence of a telegraph operator at one of the stations on the defendant's road, in failing to notify the conductor of the train of a fact telegraphed to him from the station ahead, which would require him to slacken speed and to cross over a switch on to another track at a given point in consequence of which the engine driven by the intestate jumped the track and caused his death, the court held that the telegraph operator, who was also a station agent, was a fellow servant with the engineer, adhering rigidly to the doc-

trine that the servant assumes the risks of his employment and that the master does not warrant his safety therein. *Dealey v. Philadelphia & R. R. Co. (Pa.)* 8 Cent. Rep. 112.

In the above case the court considered the powers and duties of the telegraph operator very narrow and limited, his main duty being the receipt and delivery of messages regarding the running of trains upon the roadway, in which he was merely the automaton or communicator to give the information as to the condition of the track ahead of the moving train, and part of the general machinery by which the whole roadway was operated, and that his other duties did not enlarge his powers in any respect. *Ibid*.

In *McKais v. Northern Pac. R. Co.*, 42 Fed. Rep. 238, the relation which a telegraph operator bore to engineers, firemen, and others running trains on the road was the question involved, the negligence being that of the operator in not signaling the train and delivering special orders sent him by the train dispatcher, who was running the trains that collided, by telegraph, the case turning upon the alleged negligence of the telegraph operator in not putting up the proper signals and stopping the train as ordered by the dispatcher. The court sustained a motion to instruct the jury to find for the defendant, upon the ground that the telegraph operator was a fellow servant of the plaintiff and therefore the railroad company was not liable.

Where a locomotive fireman was killed, owing to the negligence of a telegraph operator in putting out a proper signal for passing trains, and thus seeing that no train passed within ten minutes of another, the court held that they were fellow servants and that no action could be maintained by the representatives of the fireman against the company; the service of putting out such signals could properly have been imposed upon a station agent or a signal man, and that therefore the telegraph operator was not a vice-principal of the railroad company. *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 Fed. Rep. 125.

In *Price v. Detroit, G. H. & M. R. Co.* 145 U. S. 651, 36 L. ed. 843, a telegraph operator at the station, by whose negligence an accident occurred, was held a fellow servant with an engineer who was killed, but the decision was that of a divided court.

E. W.



"Conductor and engineer must each have a copy of this order.

"Time received 12:23 P. M. O. K. Given at 12:23 P. M.

Conductor.	Train.	Made.	At	Received by
Heth	Eng. 5.	Complete	12:23 P. M.	G.
Hedrick	No. 5.	"	2:44 P. M.	B.
Fennelney	Eng. 4.	"	3:20 P. M.	Fl.
Kearns	No. 6.	"	4:45 P. M.	Fl."

It is contended by the appellant that under its rules these orders were sufficient, and by the appellee that under the circumstances of this case they were not sufficient.

The court refused to instruct the jury at the instance of the appellant as follows, to wit: "You are instructed that the engineer, conductor, and brakeman of the freight train and the train dispatcher were fellow servants of the plaintiff; and if you find that the accident resulted from the negligence of any of them, you will find for the defendant." The court modified this instruction by striking out the words, "and the train dispatcher," and gave it as modified. To this modification the appellant excepted. At the instance of the appellee the court gave to the jury the following instructions: "If you find for the plaintiff, in assessing his damages you may consider the character of the injuries received by him; how far they have disabled him, or may in the future disable him, from pursuing his ordinary occupation; and also the physical pain and suffering to which he has been, or may be in the future, subjected by reason of such injuries; the effect of the injury on his health; the past and prospective expenses of his sickness resulting from his injury,—and allow such damages as in your judgment would be a fair and just compensation for the same, not exceeding the amount sued for." To the giving of which the appellant excepted.

The only question we consider here is, Were these instructions obnoxious to the objections urged against them? Did the court err in modifying the third and in giving the fourth? There is an irreconcilable conflict of authority upon the vexed question, who are fellow servants? In Massachusetts it is held that all who are engaged in a common employment, working to accomplish a common result, are to be regarded as fellow servants. Many, and perhaps a majority, of the states, adopt this rule. But it is said that the tendency of recent decisions is to narrow this rule. In *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 877-890, 28 L. ed. 787-792, the court said: "There is a clear distinction to be made in relation to their common principal between the servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of a corporation clothed with the control and management of a distinct department, in which their duty is entirely that of superintendence and discretion." In *Sheehan v. New York Cent. & H. R. R. Co.* 91 N. Y. 832, a superintendent and assistant superintendent, acting as train dispatchers, were held to be vice principals. In *Smith v. Wabash, St. L. & P. R. Co.* 19 Mo. App. 120, it is held that the train dispatcher, in ordering the movement of

trains, is to be regarded as the representative of the railroad company, where he has sole and exclusive control in directing their movements. In *Darrigan v. New York & N. E. R. Co.*, 53 Conn. 285, 52 Am. Rep. 590, it is held that it is the duty of the railroad company to devise some suitable and safe method of running special and irregular trains, so as to avoid collision; and, when the method employed is to have the trains controlled by a train dispatcher, the latter, as to employees in charge of trains, stands in the place of the company." The court said: "It is immaterial that these men are hired and paid by a common employer, and that the employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions between those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service." See also *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109. The decisions in Ohio, Kentucky, Illinois, and Tennessee are substantially in harmony with the cases cited. It seems impossible to formulate any general rule for all cases. Each case must, to some extent, be governed by the peculiar circumstances attending it. In *Baltimore & O. R. Co. v. McKenzie*, it was held that, under the circumstances of that case, a section boss and night watchman represented the company, the court saying: "Where the injuries are caused by the negligence of a servant, who is charged with the performance of duties which, by law, it is incumbent on the master to perform, such servant is regarded as the representative of the master; and in legal contemplation his negligence is the negligence of the master." 81 Va. 73. Judge Cooley says: "The master is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally, or in respect of the particular duty then resting upon the negligent employé, the latter so far occupied the position of his principal as to render the principal so far chargeable for his negligence as for personal fault." Cooley, Torts, 564. Under the circumstances of this case, the movements of the trains being under the direction and control of the train dispatcher, in directing and controlling their movements he was performing the master's duty, and was not a fellow servant with the plaintiff, but the representative of the company, for whose negligence, if any, resulting in injury, the company is liable. There was, therefore, no error in the modification of the third instruction given for the appellant, as modified.

The fourth instruction—as to the measure of damages given for the appellee—is erroneous in this: that it told the jury they might consider as an element of the plaintiff's damages the past and prospective expenses of his sickness resulting from his injury, and allow such damages as in their judgment would be a fair and just compensation for the same, not exceeding the amount sued for. The only evidence in regard to expenses of plaintiff's sickness caused by the injury is his own, which is as follows: "I have paid the doctor all the money I had, after selling everything I had,

and still owe him." How much this was is not shown. How, then, could the jury estimate it? They could not find the amount from the testimony, and there was, therefore, no evidence upon which to base this part of the instruction. It was calculated to mislead the jury, and make them think the damages were entirely at their discretion. How far it affected their finding we cannot tell. There were elements of speculative damages in the

case contemplated in the framing of the instructions, and the jury were at liberty under it to think they were authorized to speculate as to the amounts of the past expenses of the plaintiff's sickness arising from his injury.

For the error in giving the part of this instruction referred to, *the judgment is reversed*, and the cause is remanded for a new trial.

Rehearing denied.

## NEW YORK COURT OF APPEALS.

Edward W. HANKINS, *Appt.*,

NEW YORK, LAKE ERIE & WESTERN  
R. CO., *Respnt.*

(142 N. Y. 418.)

1. For negligence in respect to acts which the duty of the master to the servant requires to be performed, the master is liable if injury results to the employé, without regard to the rank or title of the agent whom he has intrusted with its performance.
2. A train dispatcher in sending special telegraph orders for the movement of trains, which are entirely controlled by such orders because they are behind time, is not a fellow servant of the fireman on one of such trains, but is, in respect to such duty acting as the master, as his *alter ego*.

(June 5, 1894.)

**A**PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Cattaraugus Circuit in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed*.

The facts are stated in the opinion.

Mr. W. H. Henderson, with Messrs. Thrasher & Bixby, for appellant:

To make a time-table, general or special, as in running trains under special orders, was the duty of the master, the performance of which could not be delegated to any servant of whatever rank, without making that servant the *alter ego* of the master and the master liable for his negligence in the performance of that duty. It was a duty which belonged to the master to perform for the safety of his servants and of the public. The running of trains was the primary business of the defendant, and a time-table, general or special, must govern or control, absolutely, every employé, and must necessarily emanate from the supreme head or authority whosesoever hand is used to promulgate and publish it.

*Flike v. Boston & A. R. Co.* 53 N. Y. 553, 18 Am. Rep. 545; *Booth v. Boston & A. R. Co.* 78 N. Y. 38, 29 Am. Rep. 97; *Sheehan v. New York Cent. & H. R. R. Co.* 91 N. Y. 333; *Dana v. New York Cent. & H. R. R. Co.* 92 N. Y.

NOTE.—As to how far a train dispatcher is a fellow servant with employés on trains running under his orders, see *note* to the case immediately preceding this one.

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639; *Scott v. Sweeney*, 34 Hun. 202; *Campbell v. New York Cent. & H. R. R. Co.* 35 Hun. 506; *Sutherland v. Troy & B. R. Co.* 28 N. Y. S. R. 201.

Obedience to these orders when once promulgated and published is matter of exclusive detail which no corporation or general agent can personally oversee, and which must, from the nature of things be entrusted to employés, for whose negligence in their execution the corporation would not be liable.

*Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 372; *Crispin v. Babbitt*, 81 N. Y. 521, 37 Am. Rep. 521; *Bensing v. Steinway*, 101 N. Y. 547; *McCosker v. Long Island R. Co.* 21 Hun. 500.

Where the superintendent or overseer and directing servant is intrusted with the discharge of the duties incumbent upon the master as between him and the general servants, then the master may be held responsible for the omission of the manager or superintendent in respect to those duties intrusted to him which the master is bound to perform.

*Copper v. Louisville, E. & St. L. R. Co.* (Ind.) Oct. 17, 1885; *Moynihan v. Hills Co.* 146 Mass. 586; *Shiner v. Russell*, 6 N. Y. S. R. 78; *Shiner v. Russell*, 112 N. Y. 680; *Sutherland v. Troy & B. R. Co.* 46 Hun. 373; *McChesney v. Panama R. Co.* 49 N. Y. S. R. 148.

Mr. James H. Stevens, for respondent: The plaintiff, being an employé, having knowledge of the rules and regulations of the company, which were sufficient, assumed the risks incident to the hazardous nature of the employment, including the negligence of his co-employés and his own.

*Hickey v. Taaffe*, 105 N. Y. 86.

The exception to this rule is whether the defendant, as master, has been guilty of a neglect of duty which it owed to the plaintiff and which caused the injuries received.

In *Slater v. Jewett*, 85 N. Y. 73, 39 Am. Rep. 627, Folger, Ch. J., says: "Expressed in general terms, that duty or contract is to supply the servant with suitable and safe machinery and appliances, with competent and skillful co-workers, and to make and promulgate sufficient rules and regulations for the conduct of the business in its ordinary run, and for any extraordinary occasions that may be reasonably anticipated."

*Abel v. Delaware & H. Canal Co.* 103 N. Y. 586, 67 Am. Rep. 773; *Corcoran v. Delaware, L. & W. R. Co.* 126 N. Y. 675; *Morgan v. Hudson River Ore. & Iron Co.* 133 N. Y. 667.

Because the master, the company, had given the dispatcher rules conceded to be ample and sufficient, that had been prepared with great care, were minute, explicit, and plain, and exceedingly well devised for safety, for personal guidance of the dispatcher himself, this case is distinguishable from the cases relied on by the plaintiff.

The work of the train dispatcher is one which cannot be performed by either the corporation or its general agent with convenience, and when the company furnishes that employé with such rules the master has performed his whole duty to plaintiff, a co-employé, who concededly had knowledge of this state of things, in distinction of these cases where the train dispatcher was given full power as master, without himself being controlled by the master.

*Monaghan v. New York Cent. & H. R. R. Co.* 45 Hun, 116; *Crispin v. Babbitt*, 81 N. Y. 516, 87 Am. Rep. 521.

The company has the power to perform the duty which it owed as master to this employé, that "when needs press to vary from his general time-table, to use due care and diligence in giving notice of the change, and in running the train upon the changed time," employing competent and skillful servants known as train dispatchers, with sufficient rules for their guidance in the performance of that duty, at the same time fully informing the employé to whom the company owes that duty of the existence and nature of such rules.

The following cases are quite distinguishable:

*Rose v. Boston & A. R. Co.* 58 N. Y. 217; *Dana v. New York Cent. & H. R. R. Co.* 92 N. Y. 640; *Shiner v. Russell*, 6 N. Y. 8. R. 79; *Loughlin v. State*, 105 N. Y. 163; *Brick v. Rochester, N. Y. & P. R. Co.* 98 N. Y. 216; *Ford v. Lake Shore & M. S. R. Co.* 17 N. Y. 8. R. 897.

There being no dispute by the evidence given upon the trial as to the sufficiency of the rules adopted by the defendant, and in use at and prior to the accident, there was no question presented by the plaintiff's evidence for the consideration of the jury within the rules of law.

*Berrigan v. New York, L. E. & W. R. Co.* 131 N. Y. 532; *Morgan v. Hudson River Ore & Iron Co.* 133 N. Y. 666; *Hurley v. Buffalo Car Mfg. Co.* 142 N. Y. 31; *Potter v. New York Cent. & H. R. R. Co.* 136 N. Y. 77.

**Peckham, J.**, delivered the opinion of the court:

The nonsuit in this case was granted on the ground that, assuming the negligence of the train dispatcher, the plaintiff cannot recover, because it was the negligence of a fellow workman. Whether the train dispatcher bore that relation to the plaintiff is, in truth, the only question in the case.

The facts are not complicated, and those which we regard as material are as follows: The division upon which the accident happened extends from Dunkirk, on the west, to Hornellsville, on the east. The plaintiff was a fireman on a freight train (No. 340), which on the 19th of October, 1887, had started from Dayton, and arrived at Salamanca (a station

on defendant's road, and within the above-named division) early in the morning, on its way east, towards Hornellsville: but the train had left Dayton and arrived at Salamanca several hours behind its schedule time, and its movements since leaving Dayton had been entirely controlled by special telegraphic orders from the train dispatcher, at his office, at Hornellsville. At 7:57 of the day mentioned the engineer and conductor of this train received, while at the Salamanca station, an order by telegraph from Hornellsville, and signed by the division superintendent and the train dispatcher, which order directed them to "meet trains 341, 339, and 349 at Carrollton, ahead of train 348." Carrollton was a station a few miles east of Salamanca. The train consisted of 113 cars, and was about half a mile in length, and it started to go east as far as Carrollton, under the above order, very soon, or within a few moments after the order was received. The west-bound train, No. 341, had arrived at Carrollton several hours behind its regular time, and it was also being run by special telegraphic orders from the train dispatcher's office at Hornellsville. While at Carrollton, on its way west, the conductor and engineer of this train received their telegraphic order at 8:43 A. M., which directed them to "meet train 334 at Carrollton, 348 at Salamanca; not pass Salamanca without orders." It was the duty of the conductor and engineer of this train, upon receipt of the order, to move their train west to Salamanca. This they at once proceeded to do. Neither the engineer nor the conductor has any voice in running a train by special order. They are simply charged with the duty of carrying out the orders that come to them from the train dispatcher's office. These orders to the conductors and engineers of the trains Nos. 340 and 341 were at once attempted to be carried out by them, and in consequence thereof the two trains came into collision not far from Carrollton, and between 9:05 and 9:10 A. M.

The plaintiff was fearfully injured, his leg being almost torn from his body, and he pinned down between the engine and tender, and very badly scalded by the hot water from the boiler of his engine. Amputation near the thigh was soon after performed; and the plaintiff, as might be assumed, suffered great agony from the injury, and is rendered a maimed and wrecked individual for the balance of his life. There is no question of contributory negligence in the case, and it cannot be contended that the plaintiff was at the time of the accident engaged in anything other than an honest and careful performance of his duty. If these orders were negligently given, the sole question as to defendant's liability becomes one of law. There was enough evidence as to negligence on the part of the train dispatcher in the giving of the orders to require the submission of the question to the jury, provided the defendant ought to be held liable for his negligence. It frequently becomes very difficult to determine whether the particular act, in any case, is that of the master, in his character as such, or is only that of a mere fellow servant. It is not a question as to the rank of the individual who gives the order or performs the act. The question is one as to the character of the order or

act,—whether it is one which is given or performed as an order or act of the master, in his character as such, or only as an order or act delegated by the master to another, and performed by such other as an employé. The rule as to the liability of the master for the act of a servant is well known. Church, *Ch. J.*, said in the *Flike Case* that the master must be held liable for negligence in respect to such acts or duties as he is required to perform as master, and without regard to the rank or title of the agent whom he has intrusted with its performance. *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 18 Am. Rep. 545. This language was repeated in *Orris v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521, where the liability of the master for the negligence of his servant, by which another servant has suffered injury, was said not to depend upon the doctrine *respondet superior*, but upon the omission of some duty of the master which he has confided to such inferior employé. If the act omitted were of the kind which the master owed to the employé the duty of performing, he would be responsible to the employé for the manner of its performance. It is not a question of rank among the different employés. The rule thus laid down has been since frequently approved in this court. *Slater v. Jewett*, 86 N. Y. 62, 39 Am. Rep. 627; *Cullen v. Norton*, 126 N. Y. 1. Its application to a particular case is sometimes difficult, and the boundary line between an act of the master and an act of the employé is sometimes quite vague and shadowy. In this case the evidence would seem to be quite conclusive that the defendant had fully discharged the duty which it owed its employés in the way of establishing and promulgating appropriate and sufficient rules and regulations for the government and operation of the various trains upon its road, and its furnishing general time-tables pertaining thereto. Whether the train dispatcher violated one or all of such rules is not material, in the view we take of the case, because the defendant had not performed its whole duty in promulgating rules, nor is a defense made out when it is shown that if the train dispatcher had obeyed the rules the accident would not have occurred. If the defendant owed a duty, as master, to give correct orders to these trains, or at least to take due and reasonable care to give them, the failure to perform that duty is the failure of the master, in his character as such, although he intrusted the performance of the duty to the train dispatcher. These trains were being run without regard to their ordinary time-tables. They were several hours late, proceeding in opposite directions, and each was approaching the other in entire ignorance of the other's whereabouts. Both were necessarily dependent upon the special orders they received from Hornellsville. As was said in the *Slater Case*, *supra*, the master had the right to vary from the regular time schedules laid down for these trains. It was part of the details incident to the operation of the road; but when a variation, or, in other words, when a special time-table is made out for two trains, by which they are to run, it is the duty of the master, not alone to take reasonable care that the alteration shall be made known to the parties interested, but also to take reasonable care that the variation

ordered, and by which the trains are run, shall not necessarily or probably lead to disaster, when obediently carried out. Reasonable care in originating and formulating the order is necessary, and is the duty of the master. When the train dispatcher originates and promulgates such orders as were given in this case, he is acting as the master, or, as it is said, his *alter ego*; and the master is liable for the negligence of the agent he has employed to do his (the master's) particular work.

In this case it appears that the train dispatcher had his office at Hornellsville for the whole division, and that while he used the name of the division superintendent, in giving orders for the movement of trains, yet by the rules they were essentially his orders, and signed with his initials, in addition to those of the superintendent. It is not claimed that the division superintendent was even bound to know about these movements or special orders. There were three dispatchers at Hornellsville, but there was only one man at a time on duty, and his duty was for eight hours; and while on duty, by a rule of the company, no order could be issued by any other dispatcher. In this way, provision was made for full knowledge by each dispatcher of everything going on, on his division, as to the movement of trains during the time when he was on duty. It is said the accident resulted from a disobedience of these rules, in that the dispatcher who was about to relinquish his post sent, at the request of his successor, and in his name, the order to the east bound train at Salamanca, and the successor, forgetting the transmission of such order at his request by the preceding dispatcher, gave the order to the train at Carrollton, and bound west, which caused it to move forward, and encounter the other train. If the successor of the train dispatcher, instead of asking the one who was just off duty to send the order to the Salamanca train, had sent it himself, as the rule required, all that can be said is that there might have been more probability of his remembering it; but it cannot be said that his failure to obey the rule, in such case, was the cause of the accident. The same want of memory might have existed in either case. I do not, however, lay any weight upon this fact, because, whether the train dispatcher did or did not obey a rule of the defendant, he was acting, when the orders were given on this subject, as the master, and was discharging the master's duties, and if he negligently performed them the master must be held liable therefor. We do not say this duty went further than to use reasonable care, measured by the gravity of the interest at stake, to give originally correct orders. If they were correct, as originally given, and subsequently, through the negligence of some employé, they were incorrectly interpreted or copied, or mistakenly repeated, or delivered to the wrong person, in these and in many other supposable cases there might perhaps be reason for the application of the doctrine as to negligence of a coemployé. It is not so as the case appears here.

In the *Flike Case*, *supra*, the accident happened because of the absence of a third brakeman on a train sent out from East Albany. The company had provided a man at that sta-

tion, called a "head conductor," whose duty it was to make up the trains, and hire and station the brakeman; and, on account of one of the brakemen oversleeping himself, the train went out without a sufficient number of brakemen. The court held the company had not discharged its duty to send out only a properly equipped train when it provided a head conductor, and made rules for his presence there, and gave to him a superintendence over the trains. The defendant owed a duty to the employes to send out only such a train, and that duty was not complied with by adopting rules governing such a case. It is also the duty of the company to use care in the furnishing of proper cars and machinery; but the duty is not performed by adopting a rule providing for proper inspection, and in furnishing proper persons to perform such inspection, so long as they negligently omit to inspect. Proper inspection of the equipment and machinery of a train is itself part of the duty of the company. *Basley v. Rome, W. & O. R. Co.* 189 N. Y. 302. These cases make it plain that whenever the act is that of the master, or the duty to be performed is particularly his duty, the liability resting upon him for the proper performance of the act or duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master. Nor is the holding that a train dispatcher, in the dispatch of trains, performs for the master a duty which it owes as such, a new departure in the branch of the law under discussion. While the cases cited below do not necessarily proceed upon that basis, yet it is plain that it was, in all of them, regarded as an indisputable proposition, so far as a train dispatcher acted in ordering the movement of trains. In *Staler v. Jewett*, *supra*, it was assumed that the order of the train dispatcher was the act of the master; but it was held that the order was in fact correct, and the injury happened from a negligent performance of duty by subordinate servants, who were coemployes of plaintiff's intestate. 85 N. Y., at pages 66, 70, and 71. The same holds true in the case of *Sheehan v. New York Cent. & H. R. R. Co.* 91 N. Y. 332, 337. And Judge Danforth there says that no servant takes the risk of an injury by the very act of the master himself. In *Dana v. New York Cent. & H. R. R. Co.*, 93 N. Y. 639, a judgment of nonsuit in an action brought to recover damages for an injury received in the same accident in which Sheehan (91 N. Y. *supra*) was injured was reversed in this court and upon the same reasoning employed in the *Sheehan Case*. And in *Sutherland v. Troy & B. R. Co.* 125 N. Y. 737 (more fully in 26 N. E. Rep. 609), this court assumes, in the opinion there delivered, that, if the accident occurred from the omission of the train dispatcher at Troy to exercise proper care to notify the train, a case was made out on the question of defendant's negligence. I think this is a fair and wholesome rule,—fair to the master, while at the same time affording some protection to the employe. The defendant ought not to escape liability for negligently issuing, as master, and in the course of the performance of its duty as such to its employes, an improper order, and 25 L. R. A.

whether it has done so should be submitted to the jury.

I have looked at the various cases cited by the learned counsel for the defendant, and I have found none in this court which conflicts with these views. It is not necessary to cite each one, and criticise it in detail. It is sufficient to say they do not conflict with our decision in the case at bar. The judgment should be reversed, and a new trial granted; costs to abide the event.

All concur, except *Gray, J.*, not voting.

*Judgment reversed.*

PEOPLE of the State of New York, *Resps.*,

*v.*  
Michael CADY, *Appl.*

(143 N. Y. 100.)

**The constitutional provision against gaining a residence while confined in a public prison** applies to a person committed to such prison, even if the commitment was irregular or illegal and was made upon his own application, notwithstanding the fact that he had no family, and no home and made the application for commitment to get a home and work in the prison.

(June 22, 1894.)

**A** PPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Court of Oyer and Terminer for the City and County of New York convicting him of registering as a voter in contravention of the provisions of the statute on that subject. *Affirmed.*

The facts sufficiently appear in the opinion.

*Mr. James J. Walsh*, for appellant:

The uncontradicted testimony shows that the appellant acquired a residence at the city prison in the election district in which he registered.

Every man must have a domicile somewhere, and he can only have one domicile at one and the same time.

2 Kent, Com. 2d ed. 431; *Crawford v. Wilson*, 4 Barb. 504.

Domicil and residence are equivalent terms when used with respect to the right of suffrage.

*People v. Platt*, 117 N. Y. 159.

Domicil is the habitation fixed in any place without any present intention of removing therefrom; it is a fixed and permanent abode.

2 Kent, Com. 2d ed. 431, *note E.*

The commitment was void and a nullity, and though it did operate to confine the appellant physically, it did not operate to confine him to a prison within the meaning of the constitution.

The word "confined" in the constitution, could not have meant anything but confinement on the charge of crime.

In *Re Registry Lists*, 10 Phila. 213, it was held that former paupers in the almshouse who had been discharged as such, but who re-

**NOTE.**—As to acquiring residence as a voter while in a public institution, see *note* to *Wolcott v. Holcomb* (Mich.) 23 L. R. A. 215.

main in that institution under contract of service for hire, are entitled to vote as residents of the precinct.

The defendant does not acquire the right by the fact of his confinement, but by the act of location and the operation of his mind in intending to make a certain place his residence.

*Re Ward*, 29 Abb. N. C. 187.

**Mr. John D. Lindsay**, with **Mr. John R. Fellows**, for respondents:

The defendant was confined in a public prison, within the meaning of the constitution, from the time of his original commitment thereto till the day of the alleged crime, and was incapable of gaining a residence there for the purpose of voting.

The fact that the appellant was permitted to enjoy unwarranted or unusual liberties in no way affected the fact that he was confined in the prison. The warden's toleration thereof would not even constitute an escape.

*Wheeler v. State*, 39 Kan. 163.

In order to qualify a citizen to vote in any particular election district, the constitution requires that at the time of the election he shall have been a resident of that election district for the last thirty days.

Const. art. 2, § 1.

"Residence" as a legal qualification of an elector, is synonymous with domicile, and means the place of a person's permanent abode.

*Silvey v. Lindsay*, 107 N. Y. 55; *Allentown Election*, Brightley, Elect. Cas. 468; *Cadwalader v. Howell*, 18 N. J. L. 138; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *United States v. The Penelope*, 2 Pet. Adm. 450; *White v. Brown*, 1 Wall. Jr. 217; *State v. Daniels*, 44 N. H. 383; *Risewick v. Davis*, 19 Md. 82; *Granby v. Amherst*, 7 Mass. 1; *Jennison v. Haggood*, 10 Pick. 77; *Chase v. Miller*, 41 Pa. 420.

The place where a man is commorant may, perhaps, be properly considered as *prima facie* the place of his legal residence; this presumption, however, may be easily overcome by proof of facts to the contrary. If a person leave his original residence *animo non reverendi*, and adopt another (for a space of time however brief), if it be done *animo manendi*, his first residence is lost. But if, in leaving his original residence, he does so *animo reverendi*, such original residence continues in law, notwithstanding the temporary absence of himself and family.

*Cadwalader v. Howell*, *supra*; *Farlee v. Bunk*, 2 Cong. Elect. Cas. —; *Harbaugh v. Ocott*, 1 Bart. Elect. Cas. 33.

The question of domicile is to be determined by his residence at a particular place with positive or presumptive proof of continuing it an unlimited time, and is the conclusion of law on an extended view of facts and circumstances.

*Silvey v. Lindsay*, 107 N. Y. 55; *Guier v. O'Daniel*, 1 Binn. 352, *note*; *United States v. The Penelope*, 2 Pet. Adm. 450; *Moore v. Darrell*, 4 Hagg. Eccl. Rep. 846; *Tanner v. King*, 11 La. 175; *Opinion of the Justices*, 5 Met. 587; *Somerville v. Somerville*, 5 Ves. Jr. 760; *Casey's Case*, 1 Ashm. 126; *Allentown Election*, 28 Phila. Leg. Int. 229.

One must actually join a community, laying aside his former residence.

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*Covode v. Foster*, 3 Cong. Elect. Cas. —, 2 Bart. Elect. Cas. 600.

So the right of a soldier to vote is confined to the election district where he resided at the time of his entering the military service.

*Chase v. Miller*, 41 Pa. 420; *Re Reading*, 3 Cong. Elect. Cas. —, 2 Bart. Elect. Cas. 661.

And students in colleges and others engaged for the time being in the prosecution of some transient object, are considered in law as residing at their original homes.

*Re Ward*, 29 Abb. N. C. 187, 20 N. Y. Supp. 606; *Cadwalader v. Howell*, 18 N. J. L. 138. See also *Dale v. Irwin*, 78 Ill. 170; *Granby v. Amherst*, 7 Mass. 1; *Opinion of the Justices*, 5 Met. 587; *Vanderpoel v. O'Hanlon*, 53 Iowa, 246, 36 Am. Rep. 216; *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698; *Lower Oxford Contested Election*, 11 Phila. 641.

Where the student has a domicile of origin and resides at the college for the sole purpose of education, he does not thereby acquire the right to vote in the district in which the college is located.

*Re Ward*, *supra*; *Dale v. Irwin*, 78 Ill. 183; *Allentown Election*, *supra*. See *Granby v. Amherst*, *supra*; *Cesana v. Meyers*, 4 Cong. Elect. Cas. Smith's ed. 60.

Though where the former domicile is actually abandoned and the college is adopted as a residence, a residence can be acquired qualifying the person to vote, but not otherwise.

*Re Ward*, *supra*; *Putnam v. Johnson*, 10 Mass. 488; *Dale v. Irwin*, *supra*.

Laborers temporarily employed at a place away from their homes, who have not abandoned them, but intend to return when their employments are over, acquire no new residence.

*Cesana v. Meyers*, *supra*.

The appellant's abode in the city prison lacked the elements of choice and volition, without which he could not in law claim it as his residence.

*Dale v. Irwin*, *supra*.

A pauper abiding in a public almshouse, locally situated in a different district from that where he dwells when he becomes a pauper, and by which he is supported away from his original home, does not thereby acquire a residence in the place where the institution is located.

*Clark v. Robinson*, 88 Ill. 498; *Cesana v. Meyers*, *supra*; *Monroe v. Jackson*, 2 Cong. Elect. Cas. —, 1 Bart. Elect. Cas. 98; *Covode v. Foster*, 41 Cong. Elect. Cas. —; *Taylor v. Reading*, 41 Cong. Elect. Cas. —.

By becoming a county charge such person does not forfeit his residence at the place where he previously lived.

*Dale v. Irwin*, *supra*; *Freeport v. Stephenson County Supra*, 41 Ill. 495; *Payne v. Dunham*, 29 Ill. 125; *Upton v. Northbridge*, 15 Mass. 237; *Reading v. Westport*, 19 Conn. 561; *Amherst v. Hollis*, 9 N. H. 107; *Winchendon v. Hatfield*, 4 Mass. 123; *Andover v. Canton*, 13 Mass. 647; *Clark v. Robinson*, 88 Ill. 498.

The constitutional provision under consideration was intended to prevent the allowance of any claim of right to vote in an election district resulting from a change of abode, such as existed in the present case.

*Silvey v. Lindsay*, 107 N. Y. 55; *Re Ward*,

29 Abb. N. C. 187; *Monroe v. Jackson*, *supra*.

Earl, J., delivered the opinion of the court: The defendant was convicted of illegal registration, in the fall of 1893, in an election district in the city of New York of which he was not at the time a resident. He claims he was a resident of the election district, and whether he was or not is the question to be determined upon the present appeal. At and before the time of his registration he was in the Tombs city prison under a commitment by a magistrate, of which the following is a copy:

"The warden and keeper of the city prison of the city of New York will receive and safely keep in his custody, for examination by the commissioners of public charities and correction, the body of Michael Cady, charged with destitution on confession. 1 District Police Court, New York, Aug. 14, 1893. C. W. Meade, Police Justice.

"Committed to W. H. Six months. Edward C. Sheehy."

Sheehy was one of the commissioners of charities, and this commitment is supposed to have been made under section 412 of the New York Consolidation Act of 1882, which reads as follows: "It shall be lawful for the board of charities and correction to commit to any of the institutions under their charge other than penal for a period not exceeding six months, any person or persons committed to their charge by any police magistrate of the city of New York, and such vagrants as ask for commitment." He had been in the Tombs prison for about seven years, most of the time under similar commitments. He was always committed upon his own application, and, when a commitment ran out, he would immediately, or after a lapse of some time, make application for another, and thus there might be an interval of time, probably overlooked, between two successive commitments. He was during all the time supported at the public expense in the prison, and was there frequently employed to carry messages and do some slight work for the warden of the prison, and while thus employed was permitted to go in and out of the prison. He was received into the prison and detained there, solely by virtue of the commitments, and could be formally discharged from the prison, according to the practice in vogue there, only by the authority of one of the commissioners of charities. As a witness in his own behalf, he testified that he lived in the Tombs prison in the election district where he registered; that he had lived there nearly seven years; that he had no other home, and never had had any other home since he went to the prison, that during that time he did not intend to have any other home; that he did intend to make the prison his home "as long as he could not do any better,—could not get any other home," and that he had such intention during the whole time; that he was

committed upon his own application; that he had no home, no work, and made application to be committed to get a home and work.

Now, under these circumstances did he gain a residence in the Tombs? The Constitution provides in article 2, section 8, that "no person shall be deemed to have gained or lost a residence by reason of his presence or absence while kept at any almshouse or other asylum at public expense, nor while confined in any public prison." It does not appear where his residence was before his commitment to the prison. He was at all times in a real sense a prisoner at the Tombs. He was not there as a laborer working for wages, or even working for his own support, or as a member of the warden's family. He was maintained at the public expense, and was confined like others of his class. One committed to prison does not cease to be a prisoner because he is not strictly confined, and is permitted by the prison officials to go in and out of the prison upon errands. Nor does it matter for the purposes now in hand, that the commitment was irregular, or even illegal. One may even be taken by violence, and thrust into prison, and confined there, or he may be detained there by his consent without any commitment and yet he could not by such detention in prison gain a residence there for the purpose of voting. Before going to the prison the defendant had a residence somewhere, and, before he could change that, it was requisite that he should go to the Tombs, intending to make that his home and domicile, either permanently or for some unlimited time, without any intention of returning or reverting to his former residence, and in fact intending thereby to change his former residence to the Tombs. The domicile or home requisite as a qualification for voting purposes means a residence which the voter voluntarily chooses, and has a right to take as such, and which he is at liberty to leave, as interest or caprice may dictate, but without any present intention to change it. It is preposterous to suppose that the defendant had within these rules and the law laid down in *Silvey v. Lindsay*, 107 N. Y. 55, and many other cases found in the learned brief submitted in behalf of the people, made the Tombs his residence. He was a single man. The Tombs is not a place of residence. It is not constructed or maintained for that purpose. It is a place of confinement for all except the keeper and his family, and a person cannot, under the guise of a commitment, or even without any commitment, go there as a prisoner, having a right to be there only as a prisoner, and gain a residence there. We think upon all the evidence it is clear and without reasonable dispute that the defendant was not a resident in the district in which he registered, and are of opinion that no error was committed upon the trial to his prejudice.

*The conviction should be affirmed.*

All concur.

Agnes S. LYON, by John D. Lyon, her  
Guardian *ad Litem*, *Resp't.*,  
v.

MANHATTAN R. CO., *Appt.*

(142 N. Y. 298.)

**An order for the physical examination of the plaintiff**, in an action for personal injuries, under Laws 1893, chap. 721, amending Code Civ. Proc., § 813, can be made only in connection with, or as a part of, an order for the examination of the party before trial and in conformity to the general provisions for such examinations, and the physical examination by surgeons cannot be authorized as an independent proceeding.

(May 1, 1894.)

**APPEAL** by defendant from an order of the General Term of the Court of Common Pleas for the City and County of New York reversing an order of the Special Term directing a physical examination of plaintiff before trial in alleged accordance with the provisions of the Code of Civil Procedure. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Julien T. Davies and Joseph H. Adams*, for appellant:

The effect of section 873 (as amended) is to provide that the order for a physical examination of the plaintiff may be made either simultaneously with an order for the examination of the plaintiff as a witness before trial, or it may be made on a separate application.

There is no merit in the contention that the statute providing for a physical examination is unconstitutional, the legislature having conferred the power which the court of appeals has held did not exist at common law.

*Walsh v. Sayre*, 53 How. Pr. 334; *Shaw v. Van Rensselaer*, 60 How. Pr. 143; *Neuman v. Third Ave. R. Co.* 18 Jones & S. 412; *Roberts v. Ogdensburgh & L. O. R. Co.* 29 Hun, 154; *McQuigan v. Delaware, L. & W. R. Co.* 14 L. R. A. 466, 129 N. Y. 50; *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734.

The validity of the act has been upheld in *Willoughby v. Ehrmann*, 25 N. Y. Supp. 1121.

Demonstrative evidence, that is the production voluntarily or by compulsion of the subject of the litigation before the court, there to be exposed to the public view, has been one of the usual powers exercised by courts in a great variety of instances.

Thus criminatory documents, even those found in the possession of one charged with crime, although forcibly taken away, and even without immediate warrant of law, are admissible.

*Com. v. Tibbetts*, 157 Mass. 519.

And as to chattels found in the possession of a prisoner, where the same would be otherwise admissible.

*People v. Bartholf*, 49 N. Y. S. R. 368; *Gindrat v. People*, 138 Ill. 103.

So objects of every kind are customarily produced in court and constitute evidence of

physical facts, and, if capable of exhibition upon the trial, may be produced compulsorily by process of the court.

*Hays v. Gainesville Street R. Co.* 70 Tex. 602. On the prosecution for the theft of a cow, the hide and other parts of the animal were produced in evidence.

*State v. Crow*, 107 Mo. 341.

Upon a trial for murder the jury were allowed to examine the overcoat of the defendant for blood stains.

*Richards v. State*, 82 Wis. 173.

So the clothing of one alleged to have been killed by negligence was properly exhibited to the jury.

*Senn v. Southern R. Co.* 108 Mo. 142.

So, even, it is within the inherent power of the court to permit the jury to view the premises which are the subject of consideration.

*Andrews v. Youmans*, 82 Wis. 81; *St. Louis, A. & T. H. R. Co. v. Claunch*, 41 Ill. App. 592; *Stewart v. Cincinnati, W. & M. R. Co.* 17 L. R. A. 539, 89 Mich. 315; *Springer v. Chicago*, 12 L. R. A. 609, 135 Ill. 552.

Photographs of the injured parts of the person are admissible.

*Alberti v. New York, L. E. & W. R. Co.* 6 L. R. A. 765, 118 N. Y. 77; *Blair v. Pelham*, 118 Mass. 420; *Barker v. Perry*, 67 Iowa, 146.

A party is not protected from a discovery even in actions of fraud, deceit, conversion, etc.

*Davenport Glucose Mfg. Co. v. Taussig*, 33 Hun, 32; *Haynes v. Hatch*, 39 N. Y. S. R. 805; *Blocker v. Guild*, 15 Daly, 348; *Edison Mfg. Co. v. Hazard*, 26 Jones & S. 566; *Gilpin v. Daly*, 50 Hun, 413.

In the case of alleged paralysis, an unsworn medical attendant illustrated the loss of feeling by thrusting a pin into the paralyzed side.

*Osborne v. Detroit*, 82 Fed. Rep. 36.

So in an action for personal injury caused by plaintiff's clothing catching in defective machinery, he was allowed to wear and exhibit the clothing to the jury for the purpose of explaining the manner of the accident.

*Tudor Iron Works v. Weber*, 81 Ill. App. 306.

The plaintiff may, if he sees fit, exhibit his injury to the jury.

*Hiller v. Sharon Springs*, 28 Hun, 344; *Mulhado v. Brooklyn City R. Co.* 80 N. Y. 370; *Cunningham v. Union Pac. R. Co.* 4 Utah, 206; *Hess v. Lowrey*, 7 L. R. A. 90, 123 Ind. 225; *Langworthy v. Green Trop. Co.* 95 Mich. 93; *Citizens Street R. Co. v. Willoughby*, 134 Ind. 563; *Townsend v. Briggs*, (Cal.) Feb. 21, 1893.

Where a party attempts to describe what his physician has found, said, or done, the physician in question can be called to testify on the same subject.

*Re Coleman*, 111 N. Y. 220; *People v. Schuyler*, 106 N. Y. 298; *Edington v. Aetna L. Ins. Co.* 77 N. Y. 564; *Marz v. Manhattan R. Co.* 56 Hun, 575; *Treanor v. Manhattan R. Co.* 39 N. Y. S. R. 186; *Winner v. Lathrop*, 67 Hun, 511; *McQuigan v. Delaware, L. & W. R. Co.* 14 L. R. A. 466, 129 N. Y. 50.

Courts have long held that they had the inherent power to order a physical examination of the plaintiff, in certain cases, in the interests of justice.

*Anonymous*, 7 L. R. A. 425, 89 Ala. 291; *Dezanbagh v. Dezanbagh*, 6 Paige, 175, 3 L. ed. 945; *Le Barron v. Le Barron*, 35 Vt. 365;

**NOTE.**—As to the power generally to compel a plaintiff to submit to a physical examination, see note to *McQuigan v. Delaware, L. & W. R. Co.* (N. Y.) 14 L. R. A. 466.  
25 L. R. A.



*Newell v. Nevell*, 9 Paige, 25, 4 L. ed. 596; 2 Bishop, Mar. & Div. § 590.

The writ *de ventre inspeciendo* was sometimes invoked at common law in England.

1 Bl. Com. 456; *Re Blakemore*, 14 L. J. Ch. N. S. 336.

In *Rice v. Rice*, 11 L. R. A. 591, 47 N. J. Eq. 559, it was held that a party, although not sworn, might be summoned as a witness and required to unveil her face for the purpose of identification.

Upon a question of identity, it was held in a criminal case that the court exercised a constitutional power in compelling a prisoner to exhibit his arm in such a manner as to disclose a tattoo mark, and that he was not thereby compelled to be a witness against himself.

*State v. Ah Oluey*, 14 Nev. 79, 33 Am. Rep. 530.

The power to order a physical examination of the plaintiff has been held to be inherent by the tribunals of thirteen states, and the claim here made that the legislature could not confer the power is obviously without merit.

*Schoeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375; *White v. Milwaukee City R. Co.* 61 Wis. 536; *Alabama, G. S. R. Co. v. Hill*, 9 L. R. A. 442, 90 Ala. 71.

In Alabama power to grant the order is held to be inherent.

*Alabama, G. S. R. Co. v. Hill*, *supra*; *McGuff v. State*, 88 Ala. 147.

In Arkansas it is held that the defendant is entitled to a physical examination of the plaintiff before trial, as a matter of right, where permanent injuries are claimed.

*Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584.

In Georgia power to grant the order is inherent where the injury is alleged to be permanent.

*Richmond & D. R. Co. v. Childress*, 3 L. R. A. 908, 32 Ga. 719.

In Illinois the power was denied, the supreme court saying the court had no power to make or enforce the order.

*Parker v. Enslow*, 102 Ill. 372, 40 Am. Rep. 588.

But in later cases this position has been receded from, and the law now appears to be that the order may be granted in a proper case.

*Chicago & E. R. Co. v. Holland*, 122 Ill. 461; *Joliet Street R. Co. v. Call*, 143 Ill. 177.

In Indiana the power is held not to be inherent.

*Pennsylvania Co. v. Newmeyer*, 129 Ind. 409; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 554; *Hess v. Lowrey*, 7 L. R. A. 90, 122 Ind. 233.

In Iowa the inherent power of the court to compel the examination is laid down.

*Schoeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375.

In Kansas the power to grant the order is declared to be inherent.

*Achison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659.

In Michigan the power to grant the order is inherent.

*Graves v. Battle Creek*, 19 L. R. A. 641, 95 Mich. 266.

In Minnesota it is held that the court had 25 L. R. A.

the power to compel the plaintiff to perform a physical act in the presence of the jury to show the nature and extent of his injuries.

*Hatfield v. St. Paul & D. R. Co.* 33 Minn. 130, 53 Am. Rep. 14.

In Missouri the power to grant the order is inherent.

*Loyd v. Hannibal & St. J. R. Co.* 53 Mo. 509; *Sidekum v. Wabash, St. L. & P. R. Co.* 93 Mo. 400; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169; *Shpard v. Missouri Pac. R. Co.* 85 Mo. 629, 55 Am. Rep. 390.

In Nebraska the power to order the examination is declared to exist on the proper facts being shown.

*Stuart v. Havens*, 17 Neb. 211; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724.

In New York the power to grant the order is denied.

*McQuigan v. Delaware, L. & W. R. Co.* 14 L. R. A. 466, 129 N. Y. 50.

In Ohio the court has the power to grant the order.

*Miami & M. Turnp. Co. v. Baily*, 37 Ohio St. 104.

In Texas the power to order the examination where the ends of justice require it is declared to be inherent but within the discretion of the court.

*International & G. N. R. Co. v. Underwood*, 64 Tex. 463; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95.

In Wisconsin the power to grant the order is held to be inherent.

*White v. Milwaukee City R. Co.* 61 Wis. 536, 50 Am. Rep. 154.

The statute compelling a physical examination of the plaintiff will act as a potent means of preventing injustice by enabling the courts to learn the truth in regard to the extent of the alleged injuries.

1 Taylor, Ev. 6th ed. 49, citing XI Hebrews, 1; *The Tracy Peerage*, 10 Clark & F. 191; *Roberts v. New York Elev. R. Co.* 13 L. R. A. 499, 128 N. Y. 457.

*Mr. Nelson Smith*, for respondent:

Defendant is not entitled to an order for the physical examination of the plaintiff, apart from her examination as a witness, at the instance of the defendant.

In the absence of a statute, it is well settled in this country and in this state, by the decisions of this court and of the Supreme Court of the United States, that a defendant is not entitled to a physical examination of the person of the plaintiff in an action to recover damages for personal injuries.

*McQuigan v. Delaware, L. & W. R. Co.* 14 L. R. A. 466, 129 N. Y. 50; *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734; *Roberts v. Ogdensburg & L. C. R. Co.* 29 Hun, 154; *Neuman v. Third Ave. R. Co.* 18 Jones & S. 412; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724; *Loyd v. Hannibal & St. J. R. Co.* 53 Mo. 515.

The order that the plaintiff submit to a physical examination, and the statute upon which it is founded, would violate the rights of the plaintiff, secured by the Federal Constitution, to sue for the injuries she has sustained, and have her case tried.

The privileges and immunities secured to citizens, and the prohibition against any state denying to any person within its jurisdiction the equal protection of the laws, as provided by the Federal Constitution, arts 4, 14, secure to every person the right to sue in the courts of the state, and have the case tried.

*Coryfield v. Coryell*, 4 Wash. C. C. 880; *Slaughter-House Cases*, 83 U. S. 16 Wall. 75, 21 L. ed. 408; *Re Ah Fong*, 3 Sawy. 145; *Ward v. Maryland*, 79 U. S. 12 Wall. 430, 20 L. ed. 452; *Paul v. Virginia*, 75 U. S. 8 Wall. 180, 19 L. ed. 360; Gould & Tucker's Notes, U. S. Rev. Stat. 118, where a collection of cases will be found.

The plaintiff's right to sue and have her case tried is violated by this order, in this:

1. It directs that the trial of her action shall be stayed until the examination is made.

2. It means all that is implied by it, and there is implied from it everything which will come to pass if the examination is made. It, therefore, means that the plaintiff must expose her person to two men not selected by herself; and that she must allow these men to touch and handle her person against her will.

3. Every touching of the person by another without consent is a battery, and every battery implies an insult. Hence, every touching is an assault and battery.

*Moak's Underhill, Torts*, 297; *Union Pac. R. Co. v. Botzford*, 141 U. S. 252, 35 L. ed. 737.

The order and the statute upon which it is based are not within what is called the "police power" of the state.

Neither the nation nor the state can, under the guise of exercising the police power, deprive any person of rights secured by the Federal Constitution.

*Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746; *Cooley, Const. L.* 4th ed. 715, 716; *Smith v. Turner*, 48 U. S. 7 How. 283, 12 L. ed. 702; *Slaughter-House Cases*, 83 U. S. 16 Wall. 86, 21 L. ed. 394.

The adjudications of this court in what has been said and implied have already gone far enough to show the meaning of the right of liberty, as secured by the Constitution, to be all that we have claimed for it.

*People v. Marz*, 99 N. Y. 386, 52 Am. Rep. 34; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 328; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

Assuming that a person may be deprived of the right to sue in the courts by due process of law, we submit that the order directing the physical examination is not "due process of law," and is, in its nature, an extra judicial proceeding.

*Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Hurtado v. California*, 110 U. S. 521, 28 L. ed. 234; *White v. White*, 5 Barb. 481.

The inspection in suits for nullity of a marriage contract, on the ground of impotence, bears no analogy to the physical examination claimed in actions for personal injuries.

*Bishop, Mar. Div. & Sep. ed.* 1891, § 903.

O'Brien, J., delivered the opinion of the court:

The complaint in this action alleges that in the month of October, 1892, the plaintiff, a young girl then under age, was a passenger

upon one of the defendant's trains, and that she was seriously injured by reason of a collision, such injury affecting the spinal column and whole nervous system. These allegations were put in issue by the answer. The defendant obtained an order from one of the judges of the court in which the action was pending, directing the plaintiff to appear before a referee named in the order, at her residence, at a date designated, and then and there submit to a physical examination in respect to the nature and extent of the injuries claimed, to be conducted by two medical experts named, in their presence, and in the presence of such women as she might desire to have present, but not in the immediate presence of the referee, unless the plaintiff should so elect. The general term reversed this order and this appeal brings the questions here for review. The ground upon which the order was reversed is that the defendant was not entitled to an order for such an examination, except at the time of granting an order for her examination as a witness or a party before the trial, and that a separate physical examination alone is not authorized. On the argument before us in support of this reversal, the learned counsel for the plaintiff does not rest the case wholly upon the reasons given by the general term, but attacks the statute as in conflict with the federal and state constitutions. He insists that such conflict arises from the fact that the plaintiff is required, as a condition of prosecuting her action in the courts, to expose her person against her will; that the statute, in effect, deprives her of the sacredness and privacy of her own person, and of her liberty and natural rights and the equal protection of the laws. The argument, though perhaps novel, is not without interest on account of the ideas advanced and the manner of their presentation. In the view we take of the questions involved in the appeal, it will not be necessary to follow the discussion. The statute enacts a rule of procedure, the purpose of which is the discovery of the truth in respect of certain allegations which the plaintiff has presented for judicial investigation in the courts of justice. It prescribes a method of aiding the court and jury in the correct determination of an issue of fact raised by the pleadings, and, as it seems to me, does not violate any of the express or implied restraints upon legislative power to be found in the fundamental law. But, in regard to the meaning and construction of the statute, I think the court below was entirely correct. The general purpose of the enactment was to change a rule of the common law which had recently been asserted by the highest court and by this court. *Union Pac. R. Co. v. Botzford*, 141 U. S. 250, 35 L. ed. 734; *McQuinn v. Delaware, L. & W. R. Co.* 129 N. Y. 50, 14 L. R. A. 466.

It is not necessary, in this case, to insist that the statute should be subjected to a strict construction, but certainly it ought to receive a construction that would make it fair and reasonable in its operation. By chapter 721 of the Laws of 1893, section 873 of the Code of Civil Procedure was amended by inserting the following provision in the middle of that section: "In every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plain-

tiff before trial, may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper. In every action brought to recover damages for personal injuries, where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination be made." The learned counsel for the plaintiff contends that, under the section as now amended, the physical examination is not authorized apart from, or independent of, the examination before trial, while the learned counsel for the defendant contends that the second clause of the amendment provides for a mere physical examination, distinct and apart from the other words of the amendment, and from the preceding or subsequent sections of the Code. In other words, he separates this clause from the rest of the section, and from the other section relating to examinations of parties, and insists that it contains within itself everything necessary to its execution as an independent enactment. I take it to be a settled rule of statutory construction that an original statute, with all its amendments, must be read together and viewed as one act passed at the same time. *Goliman v. Kennedy*, 49 Hun, 157. No part of the original or the amendment is to be held inoperative if they can all be made to stand and work together. I assume that had section 878, as now amended, been originally enacted in its present form, no one would claim that it should then receive the construction now claimed in behalf of the defendant; and yet we should read it and the other sections on the same subject as if they had been passed in this present form at the same time.

But the most serious objection to the defendant's construction is that, under it, it would be utterly impossible to attain the end which the legislature had in view, and it would, in fact, defeat every practical and useful object sought to be accomplished. The section, as amended, provides that the examination shall be had before the judge or a referee; and a referee was actually appointed in the order, and the plaintiff directed to appear before him. For what purpose? If the defendant's construction be correct, he could not administer an oath to any one, or ask a single question, or make any report of the proceeding. He could not even be present at the examination unless the plaintiff required it. The plaintiff might stand mute and no one could compel her to answer a single question put by the medical experts or any one else. The experts are not required to reduce anything to writing or make any report to the court, and no provision is made for a record by any one. All the defendant can get from the proceeding upon this construction is an opportunity to have two physicians inspect the plaintiff's person as to any external marks or symptoms of injury or disease, for the purpose of enabling them to testify at the trial, it may be years afterwards. The defendant's counsel cannot even know in advance of the trial what

testimony the experts can give, whether for or against him, unless, after an appointment by the court, they should volunteer to disclose to him the results of their observation, and this might not be regarded as entirely proper on their part, as they were in some sense officers of the court, or, at all events, impartial as between the parties,—a character that they should preserve in order to give to their testimony much weight at the trial, so that, when the proceedings are finished, practically nothing has been accomplished. The parties have not advanced much in the process of discovering where the truth is. They are, for all practical purposes, just where they started.

Moreover, how is it possible for medical experts to make a physical examination in a case like this, or indeed in any case, by merely observing the external marks or indications of personal injury or disease? The term itself implies not only such observation, but an inquiry, by means of questions and answers, as to the cause, nature, character, and extent of the disability. Mere external appearances are, in themselves, of no consequence unless identified and connected with the accident as the cause, and hence disclosures such as ordinarily occur between patient and physician must necessarily accompany the inspection of the injured parts. It is clear, I think, that such an examination as the statute contemplates can never be obtained under the defendant's construction. It must be held that the legislature intended to enact some useful and practical rule in the administration of justice, that would promote the discovery of truth, and not to do a vain thing. In order to reach this simple and just result, all we need to do is to read the amendment as a part, only, of the general scheme prescribed by the code for the examination of parties before trial. In order to give even color to the other view, it must be detached from the context and from all its surroundings, and read as if it stood alone, in disregard of settled rules of construction. Not only that, but we must reject provisions of the same section, of the plainest import, as wholly inapplicable to this particular examination. The statute has, in terms, provided that the physical examination shall be procured in the same way and as part of an examination of the party before trial, and in that way only can the object and purpose of the amendment ever be attained. This construction gives effect to every word of the section as amended, and is in harmony with the sections immediately preceding and following it. Then the referee becomes something more than a mere spectator at an idle ceremony. He may take the plaintiff's testimony upon the issue, and report to the court. He has, of course, power to administer an oath and to authenticate the proceedings, and the plaintiff is bound to appear before him, and answer all proper questions with respect to the nature and extent of the injuries, whether framed by the medical experts from their own examination, or by the counsel present. It becomes a fair struggle for truth, and both parties may participate. The record of the examination is placed on file, and both sides know what must be met if it is introduced in evidence, as it may be. The statute upon this construction might be a val-

uable accession to the rules for administering justice, and not an instrument to be used by one party to surprise his antagonist at the trial, or, in some cases, possibly himself. That this is the fair and reasonable, and indeed the necessary, construction of the section as it now stands, I cannot doubt. Moreover, the other view would, in the end, be most unfortunate for the defendant and parties situated as the defendant is. We know that in actions of this character, brought by women against corporations, considerations sometimes influence the jury, other than those growing out of the law and the facts applicable to the case. When facts are found upon conflicting evidence, and damages assessed, the accuracy of the mental process upon which the jury acted cannot ordinarily be reviewed. It is not desirable to increase the chances of injustice by adding new elements that are liable to be used at the trial against corporations in this class of actions. *Mr. Justice Gray*, in the Supreme Court of the United States, in the case of *Union Pac. R. Co. v. Botsford*, *supra*, remarked that: "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a

woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass." This amendment has changed the law, but it is not so certain that it will ever change the general sentiment of mankind which was expressed in that remark. The power conferred by the amendment should never be used in such a way as to leave any doubt as to the fairness and good faith of the proceeding, otherwise it may prove to be a sword instead of a shield. It should be a fair and open inquiry after truth, in which both sides are or may be participants. If it is used only for the purpose of enabling the defendant to prepare expert witnesses to give testimony at the trial it will be hardly possible to keep the fact from the jury, and it is easy enough to see how such an element in the case might be used to excite sympathy, stimulate prejudices, and in some cases possibly to enhance damages.

The order appealed from should be affirmed, with costs.

All concur, except *Earl, Finch, and Bartlett, Jr.*, dissenting.

## MINNESOTA SUPREME COURT.

S. O. FRANCIS, *Respt.*,

v.

WESTERN UNION TELEGRAPH CO.,  
*Appt.*

(.....Minn.....)

- \*1. A message delivered to the defendant for transmission was written on one of its blanks, upon which were printed the following conditions: (1) That the company would not be liable for mistakes or delays in the transmission or delivery or for nondelivery of the message beyond the sum paid for sending the same, unless the message was ordered repeated; (2) that the company would not be liable for damages in any case where the claim was not presented within sixty days after the message was filed with the company for transmission. The company neglected to transmit the message at all, and the addressee brought an action. *Held*, that these conditions were unreasonable and inapplicable.
2. In an action against a telegraph company for failing to transmit and deliver a message, damages for mental suffering cannot be recovered.
3. The common-law rule in this respect is not changed by Laws 1885, chap. 208, entitled "An act to regulate the business of operating telegraph lines," etc.

(July 17, 1894.)

\*Headnotes by MITCHELL, J.

NOTE.—In connection with the very full collection of authorities upon the question of damages for mental anguish, see the note to *Western U. Teleg. Co. v. Rogers (Miss.)* 13 L. R. A. 869, and the subsequent cases of *Wilcox v. Richmond & D. R.* 26 L. R. A.

APPEAL by defendant from an order of the District Court of Ramsey County refusing a new trial after verdict in favor of plaintiff in an action brought to recover damages for defendant's failure to transmit and deliver a telegraph message. *Reversed.*

The facts are stated in the opinion.

*Mr. George H. Fearons*, with *Messrs. Ferguson & Kneeland*, for appellant:

The condition requiring presentation of claim within sixty days is not unreasonable.

*Cole v. Western U. Teleg. Co.* 83 Minn. 237; *Lewis v. Great Western R. Co.* 5 Hurlst. & N. 867; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Weir v. Adams Exp. Co.* 5 Phila. 855; *United States Exp. Co. v. Harris*, 51 Ind. 127.

Where the sender has made use of a message blank the conditions incorporated therein are brought home to him and deemed to have received his consent.

*Cole v. Western U. Teleg. Co. supra*; *Heimann v. Western U. Teleg. Co.* 57 Wis. 562; *Brees v. United States Teleg. Co.* 48 N. Y. 133, 8 Am. Rep. 526; *Young v. Western U. Teleg. Co.* 65 N. Y. 168; *Kiley v. Western U. Teleg. Co.* 109 N. Y. 281; *Wolf v. Western U. Teleg. Co.* 62 Pa. 83, 1 Am. Rep. 387; *Redpath v. Western U. Teleg. Co.* 112 Mass. 71; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Western U. Teleg. Co. v. Carew*, 15 Mich. 525; *Schwartz v. Atlantic & Pacific Teleg. Co.* 18 Hun, 157; *Western U. Teleg. Co. v. Dunfield*, 11 Colo. 385; *Beasley v. Western U. Teleg. Co.* 39 Fed. Rep. 181;

*Co. (U. S. C. C. S. C.)* 117 L. R. A. 804; *Connell v. Western U. Teleg. Co. (Mo.)* 20 L. R. A. 172; *Western U. Teleg. Co. v. Wood (U. S. C. C. Tex.)* 21 L. R. A. 708; *International Ocean Teleg. Co. v. Saunders (Fla.)* 21 L. R. A. 810.

*Western U. Teleg. Co. v. Dougherty*, 11 L. R. A. 102, 54 Ark. 221; *Sherrill v. Western U. Teleg. Co.* 109 N. C. 527; *Hill v. Western U. Teleg. Co.* 85 Ga. 425; *Aiken v. Western U. Teleg. Co.* 5 S. C. N. S. 358; *Lester v. Western U. Teleg. Co.* 84 Tex. 318; *Massengale v. Western U. Teleg. Co.* 17 Mo. App. 257.

Mental anguish alone claimed to have been suffered from the negligent failure by a telegraph company to perform a contract to deliver a message there being no suggestion of malice, fraud, deception, or the like in the case, is not a basis for recoverable damages.

At common law no such principle was ever recognized.

*Lynch v. Knight*, 9 H. L. Cas. 577; *Hamlin v. Great Northern R. Co.* 1 Hurlst. & N. 408; *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111; *Wood's Mayne, Damages*, pp. 74, 75.

Mental suffering alone, unconnected with any other injury to the person, will not support an action.

3 *Sutherland, Damages*, 715; *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 23, 24 Am. Rep. 376; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 42, 41 Am. Rep. 41; *Canning v. Willamstown*, 1 Cush. 451; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224, 3 Am. Rep. 245; *Meidel v. Anthis*, 71 Ill. 241; *Oldfield v. New York & H. R. Co.* 14 N. Y. 310; *Tilley v. Hudson River R. Co.* 29 N. Y. 252, 86 Am. Dec. 297; *Dorrah v. Illinois Cent. R. Co.* 65 Miss. 14; *Wyman v. Leavitt*, 71 Me. 227, 86 Am. Rep. 303; *Boove v. Dantville*, 53 Vt. 188; *Paine v. Chicago, R. I. & P. R. Co.* 45 Iowa, 569; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 318; *Freese v. Tripp*, 70 Ill. 498; *Joch v. Dankwardt*, 85 Ill. 331; *Salina v. Trooper*, 27 Kan. 544; *Cowden v. Wright*, 24 Wend. 429, 85 Am. Dec. 633; *Covington Street R. Co. v. Packer*, 9 Bush, 455, 15 Am. Rep. 725; *Clinton v. Laning*, 61 Mich. 355; *Hyatt v. Adams*, 16 Mich. 180; *Hunt v. Wolton*, T. Raym. 259; *Trigg v. St. Louis, K. C. & N. R. Co.* 74 Mo. 147, 41 Am. Rep. 305; *Flemington v. Smithers*, 2 Car. & P. 292; *Kenyon v. Gilmer*, 181 U. S. 22, 83 L. ed. 110; *Wilcox v. Richmond & D. R. Co.* 17 L. R. A. 304, 8 U. S. App. 118, 52 Fed. Rep. 264; 2 *Greenl. Ev.* § 267; 2 *Wood, Railway Law*, pp. 1238, 1239; 1 *Harris, Damages by Corp.* § 223; *Pierce, Railroads*, ed. 1881, 802.

So in cases of mere mental effects such as fright, annoyance, and the like.

*Ewing v. Pittsburgh, O. C. & St. L. R. Co.* 14 L. R. A. 666, 147 Pa. 40; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109; *Victorian R. Co. v. Coullas*, 13 App. Cas. 223; *Owen v. Henman*, 1 Watts & S. 548, 87 Am. Dec. 431; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401.

Mental distress and anxiety which may be proved in actions for personal injuries is confined to such as is connected with the bodily injury, and is fairly and reasonably the plain consequence of such injury.

*Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 290.

Wherever the rule of damages is compensation there can be no recovery for wounded feelings or anything else which cannot be measured by money and satisfied by pecuniary recompense.

*Telfer v. Northern R. Co.* 80 N. J. L. 188; 35 L. R. A.

*Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 294; *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5; *Gunderson v. Northwestern Elevator Co.* 47 Minn. 161; *International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810, 52 Fla. 434.

The same rules measure the damages recoverable against telegraph companies as against railroad companies and others without discrimination.

*Candee v. Western U. Teleg. Co.* 84 Wis. 471, 17 Am. Rep. 452; *Gray, Communications by Telegraph*, p. 147; *Western U. Teleg. Co. v. Hamilton*, 50 Ind. 181; *Logan v. Western U. Teleg. Co.* 84 Ill. 468; *Russell v. Western U. Teleg. Co.* 8 Dak. 315; *West v. Western U. Teleg. Co.* 39 Kan. 93.

The first innovation (and one which has never been approved outside of this country) was made in Texas in 1881, in the case of—

*So Relle v. Western U. Teleg. Co.* 55 Tex. 306, 40 Am. Rep. 805.

In 1883 the question again came before the Texas court in two suits on the same transaction. In the suit by the sender, it was held that there might be a recovery on the theory of exemplary damages; and in the suit by the sendee, that there could be no recovery. The *So Relle Case* was overruled, the court saying: "It cannot be sustained upon principle nor upon authority. . . . In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action."

*Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 568, 46 Am. Rep. 278.

In the case of *Western U. Teleg. Co. v. Cooper*, 1 L. R. A. 728, 71 Tex. 507, the court held that there might be a recovery for mental anguish from the non-delivery of a message reading "Josephine sick."

But in the next case it was held that in order to subject a telegraph company to this extraordinary liability, the message must disclose some close relationship between the parties.

*Western U. Teleg. Co. v. Brown*, 2 L. R. A. 766, 71 Tex. 723.

In the next case it was held further necessary that the company should have notice "of the peculiar conditions and circumstances which rendered the prompt performance of more than ordinary importance."

*Western U. Teleg. Co. v. Simpson*, 73 Tex. 422.

In its efforts to escape the evils flowing from the Pandora's box it had opened, the court undertook to further limit its ruling.

*Rosell v. Western U. Teleg. Co.* 75 Tex. 26.

In the next case practically all limit was discarded.

*Western U. Teleg. Co. v. Adams*, 6 L. R. A. 844, 75 Tex. 531.

At the same time it was held, however, that a telegram, "Come on first train; bring Ferdinand; his father very low," did not apprise the company that mental anguish would result from a failure to promptly deliver it.

*Western U. Teleg. Co. v. Kirkpatrick*, 76 Tex. 317.

A verdict rendered under this doctrine much impressed the court that its effect was "to allow the plaintiff to coin his tears into silver

dollars," but it did not feel itself at liberty to set the same aside.

*Western U. Teleg. Co. v. Rosentreter*, 80 Tex. 406.

In 1892 the court was called upon to apply the same doctrine to a railroad company, and it declared that cases in which such damages are recoverable "are exceptional. As a rule, mental suffering is not an element of the damages which are recoverable for breach of a contract, or, in an action for a tort, founded upon a right growing out of a contract."

*Hale v. Bonner*, 14 L. R. A. 386, 82 Tex. 83.

The doctrine of these cases has gained recognition in Indiana, Kentucky, and North Carolina.

It has also been recognized in a 'qualified sense in Alabama, and, largely under the influence of a local statute, in Tennessee, with a vigorous dissent.

On the other hand, the correctness of these cases has been denied and the fallacies of their reasoning carefully pointed out.

*Western U. Teleg. Co. v. Rogers*, 18 L. R. A. 859, 68 Miss. 748; *Chapman v. Western U. Teleg. Co.* 17 L. R. A. 480, 88 Ga. 763; *Russell v. Western U. Teleg. Co.* 8 Dak. 315; *West v. Western U. Teleg. Co.* 89 Kan. 98; *Connell v. Western U. Teleg. Co.* 20 L. R. A. 172, 116 Mo. 84; *International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810, 82 Fla. 484; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 434; *Summerfield v. Western U. Teleg. Co.* (Wis.) Jan. 30, 1894; *Morgan v. Western U. Teleg. Co.* (Ark.) Feb. 1894.

And every federal court before which the question has arisen.

*Chase v. Western U. Teleg. Co.* 10 L. R. A. 464, 44 Fed. Rep. 554 (Arkansas); *Crawson v. Western U. Teleg. Co.* 47 Fed. Rep. 544 (Georgia); *Tyler v. Western U. Teleg. Co.* 54 Fed. Rep. 634 (Virginia); *Kester v. Western U. Teleg. Co.* 55 Fed. Rep. 603 (Ohio); *Gahan v. Western U. Teleg. Co.* 59 Fed. Rep. 483 (Minnesota); *Western U. Teleg. Co. v. Wood*, 57 Fed. Rep. 471, U. S. Cir. Ct. App. Term 1893.

Telegraph companies are within the rule which protects from damages which cannot reasonably be supposed to have been in the contemplation of both parties when they made the contract.

*Beaupré v. Pacific & Atlantic Teleg. Co.* 21 Minn. 155, and cases cited; *Thompson, Electricity*, chap. 2, art. 1; *Western U. Teleg. Co. v. Cornwell*, 2 Colo. App. 491; *Western U. Teleg. Co. v. Hall*, 124 U. S. 444, 81 L. ed. 479, and cases cited; *Howard v. Stillwell & B. Mfg. Co.* 189 U. S. 199, 85 L. ed. 147; *Leonard v. Beaudry*, 80 Mich. 168; *Cahn v. Western U. Teleg. Co.* 2 U. S. App. 24, 48 Fed. Rep. 810; 1 Kent, Com. 477, 490; *Co. Litt.* 283 d, § 485; *Allopp v. Allopp*, 5 Hurlst. & N. 534; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224, 3 Am. Rep. 245; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515; *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 343.

The following cases uphold the rule that mental anguish alone is not an element of damages:

Federal decisions: Arkansas—*Crawson v. Western U. Teleg. Co.* 47 Fed. Rep. 544; Georgia—*Chase v. Western U. Teleg. Co.* 10 L. R. A. 464, 44 Fed. Rep. 554; Kansas—*Cobb v.* 85 L. R. A.

*Western U. Teleg. Co.* U. S. Dist. Ct. Kan. 1883; Minnesota—*Gahan v. Western U. Teleg. Co.* 59 Fed. Rep. 483; Ohio—*Kester v. Western U. Teleg. Co.* 55 Fed. Rep. 603; Texas—*Western U. Teleg. Co. v. Wood*, 57 Fed. Rep. 471; Virginia—*Tyler v. Western U. Teleg. Co.* 54 Fed. Rep. 634; *Wilcox v. Richmond & D. R. Co.* 17 L. R. A. 804, 8 U. S. App. 118, 52 Fed. Rep. 264.

State decisions: Dakota—*Russell v. Western U. Teleg. Co.* 8 Dak. 315; Florida—*International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810, 82 Fla. 484; Georgia—*Chapman v. Western U. Teleg. Co.* 17 L. R. A. 480, 88 Ga. 763; Kansas—*West v. Western U. Teleg. Co.* 89 Kan. 98; *Salina v. Trooper*, 27 Kan. 544; Mississippi—*Western U. Teleg. Co. v. Rogers*, 18 L. R. A. 859, 68 Miss. 748; Maine—*Wymann v. Leavitt*, 71 Me. 227, 36 Am. Rep. 308; Missouri—*Connell v. Western U. Teleg. Co.* 20 L. R. A. 172, 116 Mo. 84; *Spohn v. Missouri Pac. R. Co.* 116 Mo. 617; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 434; Nevada—*Johnson v. Wells, Fargo & Co.* 6 Nev. 224, 3 Am. Rep. 245; Pennsylvania—*Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 14 L. R. A. 666, 147 Pa. 40; Wisconsin—*Summerfield v. Western U. Teleg. Co.* (Wis.) Jan. 30, 1894; Arkansas—*Morgan v. Western U. Teleg. Co.* Feb. 1894; Texas—*Gulf, C. & S. F. R. Co. v. Trott*, Feb. 19, 1894.

England—*Victorian Comrs. v. Coultas*, 13 App. Cas. 222; *Flemington v. Smithers*, 2 Car. & P. 292; *Lynch v. Knight*, 9 H. L. Cas. 577.

Other opinions to the same effect are to be found in the cases of:

Connecticut—*Masters v. Warren*, 27 Conn. 293; Georgia—*Central Railroad v. Senn*, 73 Ga. 712; *Augusta & S. R. Co. v. Randall*, 85 Ga. 297; Illinois—*Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Freeze v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Locan v. Western U. Teleg. Co.* 84 Ill. 468; *Joch v. Dankwardt*, 85 Ill. 331; *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; *Chicago v. McLean*, 8 L. R. A. 765, 183 Ill. 148; Iowa—*Paine v. Chicago, R. I. & P. R. Co.* 45 Iowa, 569; *Parkhurst v. Masteller*, 57 Iowa, 474; *Ferguson v. Davis County*, 57 Iowa, 601; Kansas—*Western U. Teleg. Co. v. Howell*, 83 Kan. 685; Kentucky—*Covington Street R. Co. v. Pacher*, 9 Bush, 455, 15 Am. Rep. 725; Louisiana—*Black v. Carrollton R. Co.* 10 La. Ann. 33, 63 Am. Dec. 886; Maine—*Smith v. Grant*, 56 Me. 255; Massachusetts—*Canning v. Williamstown*, 1 Cush. 451; *Stowe v. Heywood*, 7 Allen, 118; *Davidson v. Nichols*, 11 Allen, 514; Michigan—*Hyatt v. Adams*, 16 Mich. 180; *Clinton v. Lansing*, 61 Mich. 855; Minnesota—*Stone v. Evans*, 32 Minn. 243; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 290; *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5; *Gunderson v. Northwestern Elevator Co.* 47 Minn. 161; Mississippi—*Dorrah v. Illinois Cent. R. Co.* 65 Miss. 14; Missouri—*Kinney v. St. Louis, K. C. & N. R. Co.* 69 Mo. 658; *Trigg v. St. Louis, K. C. & N. R. Co.* 74 Mo. 147, 41 Am. Rep. 805; *Nagel v. Missouri Pac. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Burnett v. Western U. Teleg. Co.* 39 Mo. App. 610; New Jersey—*Telfer v. Northern R. Co.* 30 N. J. L. 188; New York—*Terwilliger v. Wanda*, 17 N. Y. 54, 72 Am. Dec.

420; *Lehman v. Brooklyn City R. Co.* 47 Hun. 855; Ohio—*Mulford v. Clewell*, 21 Ohio St. 161; *Kester v. Western U. Teleg. Co.* 26 Chicago Legal News, p. 252, 8 Ohio C. Ct. Rep. 236; Pennsylvania—*Owen v. Hanman*, 1 Watts & S. 518, 37 Am. Dec. 481; *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318; *Pennsylvania R. Co. v. Vandever*, 36 Pac. 298; *Huntingdon & B. T. R. & Coal Co. v. Decker*, 84 Pa. 419; *Lehigh Iron Co. v. Rupp*, 100 Pa. 95; *Fox v. Borkey*, 126 Pa. 164; Tennessee—*Nashville & C. R. Co. v. Sterens*, 9 Heisk. 12; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, dissenting opinion by Justice Lurion; Utah—*Webb v. Denver & R. G. W. R. Co.* 7 Utah, 17; Vermont—*Bovee v. Danville*, 53 Vt. 183; Virginia—*Richmond & D. R. Co. v. Norment*, 84 Va. 167; Wisconsin—*Oliver v. La Valle*, 86 Wis. 598; *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 23, 24 Am. Rep. 376; *Fenelon v. Butts*, 53 Wis. 844; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 351, 41 Am. Rep. 41; United States—*Kennon v. Gilmer*, 181 U. S. 22, 33 L. ed. 110; England—*Allopp v. Allopp*, 5 Hurlst. & N. 534; Text books—Bigelow, Lead. Cas. on Torts, 619-621, § 19; Field, Damages, § 39; Wood's Mayne, Damages, p. 74; Whart. Neg. §§ 839, 428, 756; Pierce, Railroads, 302; Sedgw. Damages, 7th ed. p. 29, note A; Kent, Com. 195.

*Messrs. Henry Johns and R. L. Johns*, for respondent:

The condition that a claim for damages must be presented "within sixty days after the message is filed with the company for transmission," has no operation unless there has been a partial performance by forwarding the message.

*Western U. Teleg. Co. v. Way*, 83 Ala. 542; *Western U. Teleg. Co. v. Yopst*, 3 L. R. A. 224, 118 Ind. 248.

A stipulation fixing the period of limitation at thirty days from the date of the receipt of the message by the transmitting company is unreasonable and void.

*Southern Exp. Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332.

A condition that the company will not be liable for damages in any case where the claim for damages is not presented in writing "within sixty days after sending the message," applies only to cases where the message is sent, and if there is a failure to transmit, no notice or demand is required to fix the company's liability.

*Western U. Teleg. Co. v. Yopst*, 3 L. R. A. 224, 118 Ind. 248; *Burdwell v. American Exp. Co.* 35 Minn. 844; *Western U. Teleg. Co. v. McKibben*, 114 Ind. 511; *Johnston v. Western U. Teleg. Co.* 33 Fed. Rep. 363; *Western U. Teleg. Co. v. Longwill* (N. M.) March 21, 1889.

Under our statute, the telegraph company is made expressly liable to the party injured.

*Western U. Teleg. Co. v. McKibben*, *supra*.

Under our statute a telegraph company is a common carrier.

2 Gen. Stat. p. 832.

A common carrier cannot limit its liability by mere notice, or by anything less than a special or express contract.

*Hutchinson, Carr.* § 288; *Little Rock & Ft. S. R. Co. v. Cravens*, 18 L. R. A. 527, 57 Ark. 112; *Tyler v. Western U. Teleg. Co.* 60 Ill. 421, 14 26 L. R. A.

Am. Rep. 38; *Dress v. United States Teleg. Co.* 48 N. Y. 132, 8 Am. Rep. 526; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 23 L. ed. 556; *Rice v. Kansas Pac. R. Co.* 68 Mo. 814; *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332.

By the mere use of a telegraph blank, the sender is not held to have knowledge of the conditions incorporated therein and to have assented thereto.

*Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Adams Exp. Co. v. Nock*, 2 Duv. 562, 87 Am. Dec. 510; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725; *Leveering v. Union Transp. & Ins. Co.* 42 Mo. 88, 97 Am. Dec. 320; *King v. Woodbridge*, 34 Vt. 565; *Kansas City, St. J. & O. B. R. Co. v. Rodebaugh*, 38 Kan. 45.

A common carrier cannot, by contract or otherwise, limit his liability for negligence in any degree.

*Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 360; *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 506, 31 Am. Rep. 353; *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781; *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191.

Such a limitation must be supported by a consideration of its own.

*Little Rock & Ft. S. R. Co. v. Cravens*, *supra*.

There is a difference and an important difference between conditions printed on the face of the message and those printed on the back.

*Wilson v. Chesapeake & O. R. Co.* 21 Gratt. 654; *Brown v. Eastern R. Co.* 11 Cush. 101; *Malone v. Boston & W. R. Corp.* 12 Gray. 388, 74 Am. Dec. 598; *Quimby v. Vanderbilt*, 17 N. Y. 806, 72 Am. Dec. 469; *Limbarger v. Westcott*, 49 Barb. 288; *McMillan v. Michigan, S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 208; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 818, 21 L. ed. 297; *Britton v. Barnaby*, 62 U. S. 21 How. 527, 16 L. ed. 177; *Verner v. Sweitzer*, 32 Pa. 208.

The failure to send the message was an act of gross negligence on the part of the defendant.

The legislature has declared that actual damages are recoverable against a telegraph company for failure or neglect to transmit or deliver a message within a reasonable time after the reception thereof.

Laws 1885, chap. 208, § 5; 2 Gen. Stat. p. 833.

Actual damages are such damages as are not speculative or punitive, exemplary or vindictive.

Injury to the feelings, even when unaccompanied by any injury to the person, property, or health, is actual damage.

*Woodward v. Glidden*, 33 Minn. 108; *McCarthy v. Niskera*, 22 Minn. 90; *Larson v. Chase*, 14 L. R. A. 85, 47 Minn. 307.

The question whether mental anguish resulting from the failure or neglect of a telegraph company to promptly and correctly transmit and deliver a telegraphic message can be taken into account as an element of damages in a suit based upon such failure, has, with few exceptions, been decided in the affirmative.

*Young v. Western U. Teleg. Co.* 9 L. R. A. 669, 107 N. C. 370.

The following states have answered this question in the affirmative:

Indiana—*Reese v. Western U. Teleg. Co.* 7 L. R. A. 583, 123 Ind. 294; *Western U. Teleg. Co. v. Strutemeier*, 6 Ind. App. 125; *Western U. Teleg. Co. v. Newhouse*, Id. 422; *Reniham v. Wright*, 9 L. R. A. 514, 125 Ind. 596; North Carolina—*Young v. Western U. Teleg. Co.* 9 L. R. A. 669, 107 N. C. 870; *Thompson v. Western U. Teleg. Co.* 106 N. C. 549, 107 N. C. 449; *Sherrill v. Western U. Teleg. Co.* 109 N. C. 527; Tennessee—*Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695; *Marr v. Western U. Teleg. Co.* 85 Tenn. 529; *Newport News & M. V. R. Co. v. Griffin*, 92 Tenn. 694; Alabama—*Western U. Teleg. Co. v. Henderson*, 89 Ala. 510; Kentucky—*Chapman v. Western U. Teleg. Co.* 90 Ky. 265; Texas—*Stuart v. Western U. Teleg. Co.* 66 Tex. 580, 59 Am. Rep. 628; *Loper v. Western U. Teleg. Co.* 70 Tex. 689; *Western U. Teleg. Co. v. Cooper*, 1 L. R. A. 725, 71 Tex. 507; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654; *Western U. Teleg. Co. v. Simpson*, 73 Tex. 422; *Roswell v. Western U. Teleg. Co.* 75 Tex. 26; *Western U. Teleg. Co. v. Feegles*, Id. 587; *Western U. Teleg. Co. v. Adams*, 6 L. R. A. 844, 75 Tex. 581; *Western U. Teleg. Co. v. Moore*, 76 Tex. 66; *Western U. Teleg. Co. v. Kirkpatrick*, Id. 217; *Gulf, O. & S. F. Teleg. Co. v. Richardson*, 79 Tex. 649; *Erie Teleg. Co. v. Grimes*, 82 Tex. 89; *Western U. Teleg. Co. v. Beringer*, 84 Tex. 38; *Western U. Teleg. Co. v. Erwin* (Tex.) May 81, 1898; *Western U. Teleg. Co. v. Nations*, 82 Tex. 589; *Potts v. Western U. Teleg. Co.* Id. 545; *Western U. Teleg. Co. v. Ward* (Tex.) 19 S. W. Rep. 898; *Womac v. Western U. Teleg. Co.* (Tex.) May 10, 1898; *So Belle v. Western U. Teleg. Co.* 55 Tex. 810, 40 Am. Rep. 805; Illinois—*Logan v. Western U. Teleg. Co.* 84 Ill. 468; Federal court—*Beasley v. Western U. Teleg. Co.* 39 Fed. Rep. 181; Wisconsin—*Cutts v. Western U. Teleg. Co.* 71 Wis. 46.

The following authorities support the principle contended for:

Thompson, Electricity, § 878; Shearm. & Redf. Neg. §§ 605-756; Cooley, Torts, §§ 646, 647; 8 Sutherland, Damages, §§ 975-981; Sedgw. Damages, §§ 48-50; 33 Cent. L. J. p. 5.

The following states have decided this question in the negative:

Kansas—*West v. Western U. Teleg. Co.* 39 Kan. 95; Dakota—*Russell v. Western U. Teleg. Co.* 8 Dak. 815; Missouri—*Council v. Western U. Teleg. Co.* 20 L. R. A. 172, 116 Mo. 84; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 494; Mississippi—*Western U. Teleg. Co. v. Rogers*, 18 L. R. A. 259, 68 Miss. 748; Florida—*International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810, 32 Fla. 484; Wisconsin—*Summerfield v. Western U. Teleg. Co.* (Wis.) Jan. 80, 1894; Georgia—*Chapman v. Western U. Teleg. Co.* 17 L. R. A. 480, 88 Ga. 763; Federal courts—*Chase v. Western U. Teleg. Co.* 10 L. R. A. 484, 44 Fed. Rep. 554; *Crawson v. Western U. Teleg. Co.* 47 Fed. Rep. 544; *Cahn v. Western U. Teleg. Co.* 3 U. S. App. 24, 48 Fed. Rep. 810; *Tyler v. Western U. Teleg. Co.* 54 Fed. Rep. 484; *Kester v. Western U. Teleg. Co.* 55 Fed. Rep. 608; *Gahan v. Western U. Teleg. Co.* 59 Fed. Rep. 493.

The right to recover for mental anguish alone, unaccompanied with any other element of damage, has been recognized in many other 35 L. R. A.

states, in actions other than those against telegraph companies.

Wisconsin—*Oraker v. Chicago & N. W. R. Co.* 36 Wis. 657; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 854, 41 Am. Rep. 41; Maryland—*Cannon v. Baltimore & O. R. Co.* 24 Md. 108; *Handy v. Johnson*, 5 Md. 450; Washington—*Willson v. Northern Pac. R. Co.* 5 Wash. 621; Nevada—*Quigley v. Central Pac. R. Co.* 11 Nev. 869, 21 Am. Rep. 757; Georgia—*Head v. Georgia Pac. R. Co.* 79 Ga. 858; *Smith v. Overby*, 30 Ga. 241; *Cooper v. Mullins*, 80 Ga. 146, 76 Am. Dec. 688; *Bray v. Latham*, 81 Ga. 640; California—*Fairchild v. California Stage Co.* 13 Cal. 599; *Pleasants v. North Beach & M. R. Co.* 84 Cal. 586; Massachusetts—*Fillebrown v. Hoar*, 124 Mass. 580; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Ballou v. Farnum*, 11 Allen, 78; Illinois—*Yundt v. Hartrunfts*, 41 Ill. 10; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; Louisiana—*Byrne v. Gardner*, 83 La. Ann. 6; Pennsylvania—*West Chester & P. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744; Minnesota—*Purcell v. St. Paul City R. Co.* 16 L. R. A. 203, 48 Minn. 184; *Larson v. Chase*, 14 L. R. A. 85, 47 Minn. 307; *Woodward v. Glidden*, 33 Minn. 108; *DuLaurans v. First Div. of St. Paul & P. R. Co.* 15 Minn. 49, 2 Am. Rep. 102; *McCarthy v. Niskern*, 22 Minn. 90; Maine—*Goddard v. Grand Trunk R. Co. of Canada*, 57 Me. 202, 2 Am. Rep. 39; New Hampshire—*Bench v. Hancock*, 27 N. H. 223, 49 Am. Dec. 869; Vermont—*Alexander v. Blodgett*, 44 Vt. 476; Alabama—*Lunsford v. Dietrich*, 86 Ala. 250; Michigan—*DeMay v. Roberts*, 46 Mich. 160, 41 Am. Rep. 154.

**Mitchell, J.**, delivered the opinion of the court:

The allegations of the complaint are that the plaintiff and his wife had been separated for some time "on account of a certain family trouble," she residing in Wyoming. in this state, and he in Indianapolis, Ind.; that he had been endeavoring to effect a reconciliation and a renewal of marital relations with her, and had written her on the subject, requesting her, in case a reconciliation was possible, to wire him to that effect, and to inform him how many physicians there were in a place called Lindstrom, with a view of his taking up his residence there, and engaging in the practice of his profession as a physician; that in response to this letter plaintiff's wife delivered to the defendant at Wyoming, for transmission, the following message, addressed to him: "Only one there. Yes, come;" and paid the sum charged for its transmission; that the defendant negligently failed to transmit or deliver the message to plaintiff at all; that, not receiving any message from his wife, he concluded that she was unwilling to renew her marriage relations with him, and feared that all hope of reconciliation with her was at an end; that he was kept in this mental state for more than three weeks before he learned that his wife had sent the message; that during this time, in consequence of the neglect of the defendant to transmit and deliver the message, "he suffered great mental pain, distress, and anguish, and sustained great damage to his



feelings," for which he seeks to recover. The evidence tended to show that the message was written on one of defendant's blanks, at the foot of which was printed, "Read the notice and agreement on the back." On the back was printed: "All messages taken by this company are subject to the following terms: To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for the nondelivery of any unrepeatable message beyond the amount received for sending the same." "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." It is conceded that this message was not ordered repeated, and that no claim for damages for its nondelivery was presented to the company within 60 days after it was filed for transmission. Various questions arose on the trial with reference to these conditions, but this branch of the case can be very briefly disposed of. The repeating of a message may prevent mistakes in its transmission, but can have no tendency whatever to prevent a failure to transmit it. Hence this condition is not applicable to this case, or, if intended to be so, it is, as to such a case, void, because unreasonable. The same is true of the "sixty-day" limitation. It is either inapplicable—at least, as to the addressee of the message—to a case of failure to transmit the message at all, or, if intended to be applicable, unreasonable, for the sixty days might elapse before the addressee ascertained that any message had been delivered for transmission. The company has probably substituted the words, "after the message is filed," for the words, "after sending the message," formerly used, in view of the decisions of the courts that the old form did not apply where the claim was founded upon a failure to send the message at all. But there are some things which cannot be accomplished even by artfully worded "fine print" conditions. Our conclusion that these conditions are either inapplicable or unreasonable, under the facts of this case, is founded on general principles, and without reference to the provisions of Laws 1885, chap. 208, entitled "An act to regulate the business of operating telegraph lines and imposing penalties for misconduct of owners and agents of such lines," the effect of which upon attempted stipulations for exemption from liability we have now no occasion to consider.

This brings us to the principal question in the case, viz., whether the addressee of a telegraphic message can recover damages for mental suffering caused by the failure of the telegraph company to transmit and deliver the message. In the consideration of this question it is necessary at the outset to consider two preliminary questions, viz.: (1) Has the statute above cited, particularly sec-

tion 5, changed the common-law rule? (2) What is the nature of such an action as this? Is it an action founded on contract, or is it one purely of tort? Section 5 of the act provides that, if any person or company owning or operating a telegraph line in this state shall fail to transmit a message within a reasonable time, or if it is shown due diligence has not been exercised after reception thereof for that purpose, or shall fail to deliver the same to the party to whom the same is addressed, if known, within a reasonable time after its arrival at the point of destination, they "shall be liable in a civil action at the suit of the party injured for all actual damages sustained by reason of such neglect or omission." The courts were not entirely agreed as to whether an action against the telegraph company could be maintained by the addressee, for whose benefit the message was intended, but who had no immediate contract relations with the company. Again, assuming to follow the rule in *Hadley v. Baxendale*, 9 Exch. 341, that the damages which one party to a contract ought to recover for a breach of it by the other are such as either arise naturally from the breach itself or such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach, some courts held that under the latter clause of this rule consequential damages could not be recovered against a telegraph company unless the company was informed, either by the contents of the message or otherwise, of the nature of the subject-matter to which the message related, and that, where it was ignorant of this, only nominal damages, or the amount paid for the transmission of the message, could be recovered. We are of the opinion that the only object of section 5 was to settle both these questions, and to establish the rule—First, that the party injured, whether sender or addressee, may maintain an action; and, second, to hold the company liable for all actual damages proximately resulting from the breach of its contract, regardless of whether or not it was advised of the nature of the subject-matter of the message. In other words, that the company has nothing to do with, and has no right to speculate upon, the extent of the interest of either sender or addressee in the message, or as to its value or importance; that, when it receives a message for transmission and delivery, the company has but one duty to perform, viz., to transmit and deliver it correctly, and without unreasonable delay, and if it fails to do so it will be liable for all actual damages, although not of a character such as would be suggested by the message as the probable result of a failure to transmit and deliver it. The statute does not define actual damages, but leaves that to be determined by common-law rules. We are therefore of opinion that the statute has no bearing on the question before us. It is hardly necessary to add that the same is true of the declaration in the bill of rights that every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive in his person, property, or character. This is but declaratory of a gen-

eral fundamental principle upon which the courts have always acted, and which would have been the law even if not incorporated in the constitution. It creates no new legal rights or new legal wrongs, and establishes no new rule of damages. It merely declares that for any wrong, recognized as such by law, a person shall have a remedy to obtain the redress to which he is entitled according to the principles of law.

This action is not one of tort, but on contract; its gist and gravamen being the breach of the contract, the duties and obligations growing out of which are regulated by the statute, which itself becomes a part of it. The best test of this is the fact that such an action could not be maintained without pleading and proving the contract. We are therefore left to determine the question here presented according to the rules of the common law applicable to actions for damages for breach of contract. In such actions, can damages be recovered for mental suffering resulting from a breach of the contract? The law has always been exceedingly cautious in allowing damages for mental suffering, for the manifest reasons, among others, that such damages are more sentimental than substantial, depending largely upon temperament and physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another, and there being no possible standard by which such an injury can be even approximately measured, they are subject to many, if not most, of the objections to speculative damages which are universally excluded. In no case will an action for damages lie for mental suffering caused by an act which, however wrongful, infringes no legal right of the party. In actions for a tort resulting in physical injuries, of which mental suffering forms a component part, the latter is permitted to be taken into account in the assessment of damages; and where the tort is willful, and of a character as naturally and necessarily to injure the feelings, damages for such injuries are sometimes allowed, although there was no physical injury or pecuniary loss. *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, perhaps goes as far in that direction as any case to be found in the books. In this latter class of cases such damages are often but another name for punitive damages. But we are not concerned here with the question when such damages may be recovered in actions of tort. We think we are warranted in asserting that the doctrine that damages for mental suffering resulting from a breach of contract is wholly unknown to and unauthorized by the common law, unless "telegraph cases" are to be made an exception. An action for breach of promise of marriage is sometimes spoken of as an exception; but that action has always been recognized as *sui generis*. It is an action for breach of contract only in form and name, and in many of its essential features has always been considered as one for a willful tort. We have no desire to discuss at length a question which has been so often and so fully considered of late years by the courts in these telegraph cases. The strongest ar-

gument we have found in favor of allowing damages for mental suffering resulting from the nondelivery of a telegraph message is the opinion of the court in *Wadsworth v. Western U. Teleg. Co.*, 86 Tenn. 695. It advances all that can be said on that side of the question, and puts it strongly and plausibly. Aside from the dissenting opinion of Linton, J., in the same case, the strongest arguments that we have found against the allowance of such damages are the opinions in *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 359; and *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 20 L. R. A. 172. These cases contain about all that can be advanced on either side of the question. It is somewhat remarkable that, although telegraphy has now been in use for over 50 years, it never seems to have occurred to any court, or, so far as we can discover, to any lawyer, that damages were recoverable for mental suffering resulting from neglect to transmit or deliver a telegram until it was so held in 1881 by the supreme court of Texas in *So Relle v. Western U. Teleg. Co.*, 55 Tex. 308, 40 Am. Rep. 305, citing in support of the doctrine only actions in tort for physical injuries. This decision has, with more or less variations, been followed by the same court in a long line of later cases; but the doctrine seems to have involved that court in some very glaring inconsistencies, compelled, perhaps, by the necessities of the situation in which the court has placed itself. The multitude of cases of this character in that state since the decision of the *So Relle Case* indicates the vast field of speculative litigation opened up by that decision, and how difficult the subject is of control by the courts. In *Rowell v. Western U. Teleg. Co.*, 75 Tex. 26, the court, apparently impatient at the amount of "intolerable litigation" to which the doctrine had given rise, seems to have gone back, partially at least, upon their former decisions. In that case the plaintiff had received information of the dangerous illness of his mother-in-law. A subsequent dispatch was sent, containing information of her improved condition. This dispatch the telegraph company failed to deliver. The court held that for continued mental anxiety caused by the nondelivery of the message the plaintiff could not recover. The "Texas doctrine," with more or less modification, has quite recently been adopted by the courts of Alabama, Kentucky, Tennessee, North Carolina, and Indiana. The harvest of "intolerable litigation" which is being reaped in Texas has not yet matured in those states, but certainly will if the doctrine is adhered to. The "Texas doctrine" has been favorably referred to in many of the more recent text-books, but the bench and bar will understand of how little weight as authority most of these books are, written as they very frequently are, by hired professional book-makers of no special legal ability, and who are usually inclined to take up with the latest legal novelty for the same reasons that newspaper men are anxious for the latest news. On the other hand, the doctrine has been vigorously repudiated by the

courts of Georgia, Mississippi, Florida, Missouri, Kansas, Wisconsin, Dakota Territory, Arkansas, and perhaps some other states; also, with practical unanimity by all the United States circuit courts and circuit courts of appeal which have passed upon the question. The Supreme Court of the United States has not yet been called on to pass upon the question; but, in view of the general tenor of the decisions of that court on kindred questions, there is every reason to believe that when the question is presented its decision will be that such damages are not recoverable. No lawyer as yet seems to have had the temerity to present such a case to a court of last resort in any of the eastern or northeastern states.

Some of the decisions holding that such damages are recoverable proceed upon the assumed but false analogy of torts resulting in physical injury accompanied with mental suffering, or where the tort was willful, and calculated and intended to injure the feelings; as, for example, slander, libel, and the like. Others very plausibly argue that such cases are new only in instance, and not in principle, that the principle applicable to all actions on contract is that a party is liable for all damages proximately resulting from its breach; that the reason that in such actions no recovery has usually been allowed for mental suffering is that the contracts were of a business or commercial character, not involving the feelings; that telegraphy is a modern invention; that a telegraph company is a carrier of intelligence often sent for a purpose not pecuniary, but relating wholly to matters of sentiment or feeling; and that, therefore, the damages resulting from the breach of a contract to transmit such intelligence are not to be, and cannot be, measured, by any pecuniary standard, but according to the standard of injury to the feelings. In other words, that damages for which a person is liable for breach of contract depend on the nature of the contract. If it is pecuniary in its nature, only pecuniary damages will be allowed, but, if it relates to the feelings, then damages for injury to the feelings will be allowed. But we deny the correctness of the premise upon which this argument is based. The law looks only to the pecuniary value of a contract, and for its breach awards only pecuniary damages. An action for breach of promise of marriage, as already remarked, is only an apparent, and not a real, exception to the rule. We recognize the fact that the common law is not a code of cast-iron rules, but a system of principles capable of being applied to new conditions as they arise; and when a case arises which falls within a recognized legal principle the fact that it is new in instance will not and ought not to stand in the way of the courts applying the principle. But to allow damages for injury to the feelings resulting from a breach of contract—even one like this—would be, not to apply an old principle to a new instance, but to adopt a new principle entirely unknown to the law. Courts have no more right thus to abrogate the common law than they have to repeal the statutory law. Lord Coke said: "The wis-

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dom of the judges and sages of the law has always suppressed new and subtle inventions in derogation of the common law." The wise remark of another, peculiarly applicable to the present time, was that "the variety of judgments and novelties of opinions are the two plagues of a commonwealth." The great lights of the law may take some liberties with the law in the way of new applications of old principles that modesty would forbid to ordinary men; and while we are not disposed to look upon everything ancient with slavish reverence merely because it is ancient, it would certainly be presumptuous in us to lightly discard a doctrine which has been so long approved, and which is so firmly established by authority. The principles of the common law were founded upon practical reasons, and not upon a theoretical logical system; and usually, when these principles have been departed from, the evil consequences of the departure have developed what these reasons were. The Pandora box that has been opened by the "Texas doctrine" proves more forcibly than argument the wisdom of the common-law rule that damages of this kind cannot be recovered in actions on contract. And, if damages of this kind are to be allowed for the breach of a contract of this character, where are we to stop? Upon what legal principle can a court refuse to allow them for the breach of any other contract? The breach of any contract—even the failure of a debtor to pay his debt at maturity—may result in more or less mental anxiety or suffering to the party to whom the obligation is due. Why not allow damage for the mental suffering or disappointment of passengers caused by the delay of trains through the negligence of the carrier? The object of the journeys of travelers is often not pecuniary, but to visit sick relatives or attend the funeral of deceased ones, which are matters affecting the feelings as much and as exclusively as a telegram. If the train is delayed through the negligence of the carrier, so that the passenger does not reach his destination in time to accomplish his desired object, why is he not entitled to damages for his disappointment and mental suffering as much as the sender or addressee of a delayed telegram? See *Wilcox v. Richmond & D. R. Co.* 8 C. C. A. 73, 52 Fed. Rep. 264, 17 L. R. A. 804, 8 U. S. App. 118. The truth is, once depart from the old rule, and we are all at sea, without either rudder or compass. Any other doctrine is unauthorized by any principle of law, and would, we are satisfied, work badly in practice, giving rise to a flood of speculative litigation uncontrolled by any guide as to the measure of damages except the whim of the jury, or the arbitrary standard that may be adopted by the particular judge who tries the cause.

It is suggested that the transmission of intelligence by electricity is a comparatively new thing; that contracts of this kind are unlike any others; that, as messages frequently have no pecuniary value, and consequently a failure to transmit them would result in no pecuniary loss, although it might cause great anxiety or disappointment, there-

fore, unless damages for mental suffering are allowed, none could be recovered that would adequately compensate the party or adequately punish the telegraph company for its neglect of duty. If this be so, it would only go to prove that, in the progress of the world, a new condition of things has arisen for which the existing law is not adequate, and which calls for legislative interposition. This has been done in some jurisdictions by subjecting a telegraph company to a certain penalty to be recovered by, and for the benefit of, the party interested in the message. Whether this is wise or not, it is certainly better than to leave it to the courts or juries to assess the vague, shadowy, and sentimental damages caused by mental anxiety or injured feelings.

*Order reversed.*

**Buck, J.**, absent, sick, took no part.

**Canty, J.:**

I reluctantly agree to the foregoing opinion. I fully agree with the reasoning in *Wadsworth v. Western U. Teleg. Co.*, 86 Tenn. 695, above cited, that there ought to be a remedy in such a case as this; that it ought to be an exception to the rule that damages cannot be recovered for mental suffering unaccompanied by actual or threatened physical injury, except in the few instances, where it is allowed as a species of punitive dam-

ages. But the difficulty is in the character of the damages. The injuries in such cases as this are too hard to determine with any reasonable certainty, are more often assumed than real; and the suit too liable to be wholly speculative. If every one was allowed damages for injuries to his feelings caused by some one else, the chief business of mankind might be fighting each other in the courts. Damages for mental suffering open into a field without boundaries, and there is no principle by which the court can limit the amount of damages. Mere logic will not dispose of a question of this character. The court must keep one eye on the theoretical, and the other on the practical. At the same time I am strongly of the opinion that there should be some practical remedy in this class of cases, and, if the legislature would provide for the recovery of damages for mental suffering in cases like this, and limit the amount of recovery to, say two or three hundred dollars, there would not be the same incentive to bring speculative suits, or to employ experts to draw on their own imagination for the purpose of proving the condition of the plaintiff's imagination; there would not be so much elaborate preparation to impose on the jury. But, if the court should allow such damages at all, on no principle could it thus arbitrarily limit the amount of recovery, and escape the evils mentioned.

## UNITED STATES CIRCUIT COURT OF APPEALS.

**P. M. ARTHUR et al.**, Intervenor, *Appts.*,  
v.

**Thomas F. OAKES et al.**

(.... Fed. Rep. ....)

1. **Equity will not enjoin employes of a receiver of a railroad from quitting his service**, although the effect of such action will be to cripple the property, or prevent or hinder the operation of the road.
2. **Employes of the receiver of a railroad may lawfully confer** together upon the subject of a proposed reduction of wages, and if not restrained by their contract, may withdraw in a body from the receiver's service be-

cause of such reduction, although they expect that such action will inconvenience the receiver and the public.

3. **Equity will enjoin any combination or conspiracy among the employes of the receiver of a railroad which has for its object and intent the physical injury of the property in the receiver's possession, or actual interference with the regular continuous operation by him of the railroad.**
4. **Employes of a receiver of a railroad may be enjoined from disabling rolling stock or other property in the receiver's possession, from interfering with its possession or obstructing its management, and from using force, intimidation, threats, or other wrongful methods against the receiver, his agents, or employes, or persons seeking employment.**

**NOTE.**—The importance of this decision and the popular interest which was manifested by that of *Judge Jenkins* in the lower court make a full representation of both opinions desirable, so the circuit court case is given herewith in full as a footnote.

**UNITED STATES CIRCUIT COURT EASTERN DISTRICT OF WISCONSIN.**

**FARMERS' LOAN & TRUST CO.,**

v.

**NORTHERN PACIFIC R. CO. et al.**

(60 Fed. Rep. 803.)

1. **An injunction is the appropriate remedy to prevent an unlawful combination and conspiracy**
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to interfere with the operation of a railway and paralyze its business, since the injury would be irreparable and compensation could be obtained only through a multiplicity of suits.

2. **Punishment for contempt is not such a remedy for a conspiracy to obstruct the business of a railroad in the hands of a receiver as to prevent the remedy of injunction.**
3. **A combination and conspiracy of the employes of a receiver of a railroad company to quit the service with the object and intent of crippling the property and preventing or hindering the operation of the road is illegal, since it involves the intimidation and oppression of others and the injury to property in their keeping tending to the prejudice of the public.**
4. **A combination or conspiracy having for its purpose the inauguration of a strike upon the lines of**

5. **Illegal combinations are not sanctioned** in any degree by the Act of Congress of June 20, 1886, legalizing the incorporation of national trades unions.
6. **Trade unions are not prohibited** by an injunction against illegal combinations of working men.
7. **Employees of the receiver of a railroad may be enjoined from combining** and conspiring to quit his service with the object and intent of crippling the property in his custody, or embarrassing the operation of the railroad.
8. **A strike is not unlawful** if it is merely a combination among employes having for its object their orderly withdrawal in large numbers or in a body from their employer's service, to accomplish some lawful purpose.
9. **Injunction is a proper remedy to restrain threatened acts of employees** of a railroad receiver which would inflict irreparable loss upon the property, and seriously prejudice the interests of the public involved in the regular continuous operation of the road.

(October 1, 1894.)

**A** PPEAL by intervening petitioners from a decree of the Circuit Court of the United States for the Eastern District of Wisconsin,

denying their motion to strike out certain portions of an injunction restraining employes of the receiver of the Northern Pacific Railway Company from interfering with the property in his hands. *Reversed in part.*

The case sufficiently appears in the opinion.

Argued before Harlan, *Circuit Justice*; Woods, *Circuit Judge*, and Bunn, *District Judge*.

*Messrs. Charles Quarles, T. W. Spence, and T. W. Harper, for appellants:*

An injunction is an extraordinary remedy, to be resorted to only when the end sought can be reached by no other legal process.

The writs of injunction in this case, in so far as they enjoin acts forbidden by law, are superfluous, and unnecessary, and they have no functions to perform, in so far as the writs forbid acts which the law does not forbid the order awarding the writs is erroneous.

The order appointing the receivers and directing them to take possession of the road, and authorizing them to operate it, is an equitable execution.

*Davis v. Gray*, 83 U. S. 16 Wall. 217, 21 L. ed. 452.

a railway operated by receivers is unlawful and may be prevented by injunction.

(April 6, 1894.)

**M**OTION by intervening petitioners to strike out certain portions of the injunction which had been granted to receivers in possession of the Northern Pacific Railroad to restrain a strike which was threatened by the employes of the road. *Motion denied except as to one clause of the injunction.*

The facts sufficiently appear in the opinion.

*Jenkins, Circuit Judge*, delivered the following opinion:

On the 19th day of December, 1893, the receivers of the defendant company presented to the court their verified petition representing that on the 17th day of August, 1893, and within two days after their appointment, and in view of the insolvent condition of the railroad company, they ordered a reduction varying from 10 to 20 per cent in the salaries of all employes (including the general manager and other general officers of the company) amounting to \$1,200 per annum or more, which reduction was acquiesced in by the employes to whom the same applied. On the 25th of August, 1893, in view of the increasing depression in the transportation business, the consequent falling off of earnings, and the necessity of greater retrenchment in operating expenses, the receivers ordered a further reduction in salaries and wages of employes, amounting to 5 per cent on all salaries aggregating \$50 a month and under \$75, and to 10 per cent on all salaries aggregating from \$75 to \$100 per month. This latter order was to take effect immediately, but upon consideration its operation was suspended by the receivers until the entire subject of salaries and wages could be more fully considered, especially with reference to certain schedules covering the pay and employment of certain classes of employes. The receivers informed the court that some of these schedules, which had been in existence for many years, were not justified by conditions now existing; that they had been amended from time to time, and extended so that they had become voluminous, and in some respects obscure, and had produced in operation inequalities and results unjust to the property, and unjust to many employes; that they thereupon revised and rearranged the schedules, and, instead of putting into operation the reduction contemplated by the order of August 25, they determined and ordered on the 25th of October, 1893 (giving general notice thereof 25 L. R. A.

to the employes of the road), that all existing schedules covering the rates of pay of employes should, on the 1st of January then next ensuing, be abrogated, and that certain new schedules prepared by them should take effect on that day; and the general manager was instructed on and after that day to reduce all salaries and wages aggregating \$50 per month and less than \$75 per month 5 per cent, and all salaries and wages aggregating \$75 per month 10 per cent. The revised schedules corrected supposed inequalities between the different classes of employes, and did away with certain obnoxious regulations which were supposed to militate against the proper management of the property. The receivers further represented to the court that the reduction made in salaries and wages was justified in view of the large shrinkage of business, growing out of the financial revulsion throughout the country; that the rates of compensation provided for were fair and just to the employes to whom they related, in view of the then present conditions. It was made to appear to the court that the gross earnings of the property during the year 1893 were continuing to greatly decrease; that the decrease for the month of September, 1893, as compared with the month of September, 1892, amounted to \$753,000; that the decrease for the month of December, 1893, as compared with the month of December, 1892, would amount to \$730,000; decreasing by more than one half the entire estimated gross earnings for the month. That by the revised schedules the average reduction in the rates of compensation to the various classes of employes was about as follows: Engineers, 8 per cent; firemen, 7 per cent; trainmen and freight conductors, 8 per cent; passenger conductors, 10 per cent; telegraphers, 5 per cent. The receivers further advised the court that many of their employes claimed that the schedules and rates in force when the receivers took possession constituted contracts between the several employes and the receivers, terminable only by the consent of the employes, in which view the receivers could not concur; and that discontent and opposition to the enforcement of the schedule were rife among the employes, based upon the assumption that no power existed in the receivers to change the schedule. The receivers further advised the court that some of the employes threatened that, in the event that the revised schedules should be put into operation, they would suddenly quit the service of the receivers, and would compel by threats and force and violence other employes to quit the service; that they would prevent, by an organized effort, and by force and intimidation, others from taking service under the receivers in the place of

Any interference with the possession of the receivers, or with the operation of the road, is an obstruction to the execution of the mandate of the court.

*Secor v. Toledo, P. & W. R. Co.* 7 Biss. 521; *King v. Ohio & M. R. Co.* 7 Biss. 532.

The employes of receivers of railroad companies are *pro hac vice* servants of the court, and consequently they are at all times before the court for punishment, by summary process, upon mere citation for contempt.

*Re Doolittle*, 28 Fed. Rep. 644; *United States v. Kane*, 28 Fed. Rep. 748; *Gluck & B. Corporate Receivers*, § 83.

This is true as to the world at large.

*Gluck & B. Corporate Receivers*, § 33, and cases.

The remedy for interference is a simple citation to show cause, which would bring the guilty persons before the court.

*Re Doolittle and United States v. Kane, supra*; *Re Higgins*, 27 Fed. Rep. 443.

If two equal rights conflict, it does not and cannot rest with any court to declare which of these shall give way.

No court can subordinate the right of the laborer to the right of the employer, nor can any court declare that capital shall abate any of its rights because of collision with the rights of the laborer.

The assertion of a right cannot be called the "exercise of unbridled will" and liberty cannot be opprobriously stamped as license, merely because the exercise of his right by one man works damage to another man, or to another set of men, or to society.

The right of a man to his services is the same in kind and degree as the right of a man to his property.

Whatever may be the injury that casually results to an individual from the act of another while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuria*, and the individual from whose act it proceeds is liable neither at law nor in the form of conscience. And the principal right necessarily carries with it also all the means essential to its exercise.

*The Eleanor*, 15 U. S. 2 Wheat. 345, 4 L. ed 257.

The question presented is this: Whether when the wages of men working under no contract are reduced by their employer on account of small profits, these men may, by concerted action, quit work in order to bring about a restoration of the old scale.

It is not logical to say that a railway is a public highway and owes a duty to the public, and that it must be kept a going concern although it prove unremunerative to the shareholders, and at the same time shift this duty, owed to the public, from the shoulders of the railroad company and its shareholders to the wage-earners, who in no event can have any interest in the profits.

The workmen are not the actors; the receivers are the aggressors; the sole reason for the change is lack of profits to the bondholders.

The judgment of the circuit court is, not that the men must not breach a contract, but that they are obligated to enter into a new contract.

those who might leave such service; and that they would thereby, as the means of forcing the receivers to abandon the proposed revised schedules, disable the receivers from operating the road, and from discharging their duty to the public as common carrier. The receivers further represented to the court that some of the employes threatened, if the revised schedules should be put in operation, to disable locomotives and cars so that the same could not be safely used at all without expensive repairs; that they would take possession of the cars, engines, shops, roadbed, and other property in possession of the receivers, and that they would destroy and prevent the use of the property, and would so conduct themselves with regard thereto as to hinder and embarrass the receivers in the management of the property, in the operation of the trains thereover, and would bring about incalculable loss to the trust property, and inflict great inconvenience and hardship upon the public. The receivers further represented to the court that, unless the parties were restrained by order of the court, they would carry out such threats, and the receivers would be prevented from operating the road, from carrying the mails of the United States thereover, from performing the duties of a common carrier thereon, and that great loss of property and jeopardy to life would ensue; that the parties referred to (whose names the receivers were unable to state) were contriving secretly to perpetrate the acts of violence and wrong described, and to interfere with the possession and operation by the court, through the receivers, of the property; that such combination included not only dissatisfied employes of the receivers, but others not in the service of the receivers, who from a spirit of sympathy or mischief, threaten to join the employes in perpetrating the wrongful acts and things stated; and that they would so do unless restrained by the court. The receivers thereupon asked, among other things, for an order authorizing them to put in operation and maintain on and after January 1, then proximo, the revised schedules in such petition described, and that a writ of injunction might issue as prayed for in the petition.

Upon consideration of the petition the court on that day entered its order authorizing the receivers to adopt the revised schedules, and directing

the issue of a writ of injunction as prayed for in the petition, and directing its delivery to the marshal for execution, ordering him to protect the receivers of the Northern Pacific Railroad in their possession of the property of the railroad, and in their operation thereof; and directing the receivers to file, in the courts wherein they had been appointed receivers of said property upon ancillary bills, petitions similar to that on which the order was based, to the end that the power of each court might be seasonably invoked for the protection of the receivers in the possession and management of the property within its territorial jurisdiction. The writ in question was directed to the officers, agents, and employes of the receivers, engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of the receivers, and to all persons, associations, and combinations, voluntary or otherwise, whether employes of said receivers or not, and to all persons generally. The restraining clause of the writ is as follows:

"Now, therefore, in consideration thereof, and of the matters in said petition set forth, you, the officers, agents, and employes of Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and each and every one of you, and all persons, associations, and combinations, voluntary or otherwise, whether employes of said receivers or not, and all persons generally, and each and every one of you, in the penalty which may ensue, are hereby charged and commanded that you, and each and every one of you, do absolutely desist and refrain from disabling or rendering in any wise unfit for convenient and immediate use any engines, cars or other property of Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers for the Northern Pacific Railroad Company, and from interfering in any manner with the possession of locomotives, cars, or property of the said receivers, or in their custody,



a conspiracy, even though inconvenience, discomfort, or prejudice ensue to individuals or to the public.

*State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 54 Fed. Rep. 788.

Every definition of conspiracy includes and bases it upon a tort.

*Adler v. Fenton*, 65 U. S. 24 How. 407, 16 L. ed. 696.

Before this court can restrain an act the law must have condemned it.

*Wheaton v. Peters*, 33 U. S. 8 Pet. 591, 8 L. ed. 1055.

Under the common law, since the abrogation of, or departure from, the old English statutes, which made it a criminal offense for an individual to refuse to work, combinations of workmen for the purpose of improving their condition, increasing their earning power, and enforcing the payment of higher wages by combination, have been held innocent.

*Curew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Snow v. Wheeler*, 113 Mass. 186; *State v. Stewart*, 59 Vt. 285, 59 Am. Rep. 710; *Com. v. Hunt*, 4 Met. 184.

The best American authorities to-day concur in placing labor and capital on the same plane.

*State v. Glidden*, 55 Conn. 74; *Curran v. Galen*, 2 Misc. 553; *Rogers v. Everts*, 17 N. Y. Supp. 264; *State v. Stewart*, 59 Vt. 289, 59 Am. Rep. 710.

The right of employes to quit work singly, and the right of employes to quit work in a body, has been and is to-day recognized and affirmed by the federal courts.

*Re Doolittle*, 23 Fed. Rep. 547; *United States v. Kane*, Id. 748; *Oxur & Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 19 L. R. A. 382, 51 Fed. Rep. 263; *King v. Ohio & M. R. Co.* 7 Biss. 533; *United States v. Workmen's Amalgamated Council, of New Orleans*, 54 Fed. Rep. 994.

The Wisconsin statute prohibits persons from combining, associating, agreeing, mutually undertaking, or concerting together for the purpose of willfully or maliciously injuring another.

The word "willfully" is ordinarily used to express something like a wicked purpose or an evil or improper motive, or to characterize an act done wantonly.

*State v. Preston*, 84 Wis. 675; *United States v. 3 Railroad Cars*, 1 Abb. U. S. 196.

The word "maliciously" in the penal statutes is construed as meaning a wicked intent to injure.

*Tuttle v. Bishop*, 30 Conn. 80; *Com v. Wadden*, 3 Cush. 558.

The United States statute prohibiting trusts does not touch the case.

*United States v. Patterson*, 55 Fed. Rep. 605-641; *United States v. Trans-Missouri Freight Assn.* 24 L. R. A. 73, 58 Fed. Rep. 58.

The phraseology of the injunctional writs is correct or erroneous, according to the idea which their words conveyed to the men addressed, the words being taken in the sense in which those men had the right to construe them.

Unless there be the most decisive reasons which lead us to conjecture the intent was otherwise, words are to be understood in their

of Railway Conductors, the Brotherhood of Locomotive Firemen, the Order of Railway Telegraphers, and the Brotherhood of Railway Trainmen. The petition then proceeds to give the names of the executive heads of those organizations, and asserts that the employes will not strike unless such strike is ordered by one or more of the executive heads of the national labor organizations named; and that without an order from the executive head, no assistance would be given to the employes by the national organizations to which they belonged if they should attempt to strike. The petition further alleged that the railway in question was engaged in interstate commerce, and that the strike along the line of the road would not only cause irreparable damage to the trust property, but to a large portion of the country traversed by the Northern Pacific Railroad, because not reached by any other line of road or telegraph line or express company. That there were many communities along the line of the railroad whose entire commercial facilities were furnished by the three departments of the railroad operated by the receivers.—the railroad, the telegraph, and the express; and that all classes of business men in large portions of the country traversed by the railroad operated by the receivers were dependent to a very large extent, upon these three departments of service, and that large sections of country are dependent upon the railroad trains operated by the receivers for their necessary daily supply of fuel, provisions, etc. The petition asked for an order granting a writ of injunction restraining these committees and the heads of the national organizations mentioned from ordering or recommending or advising a strike.

Upon consideration of this petition an order was made directing a writ of injunction to issue as prayed in the original petition, and as prayed in the supplemental petition, with a similar direction with respect to the presentation of the order and writ to those courts in which ancillary bills had been filed for like orders from those courts. The writ of injunction issued upon this order was directed to the various persons named, and to their agents, sub-agents, representatives, and employes, and to the officers, agents, and employes of the receivers, and 25 L. R. A.

to the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of the receivers, and to all persons, associations, and combinations, voluntary or otherwise, whether employes of said receivers or not, and to all persons generally. It embodied the provisions of the first writ, with the following additional clause:

"And from combining or conspiring together or with others, either jointly or severally, or as committees, or as officers of any so-called 'labor organization,' with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, and from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time; and from ordering, recommending, advising, or approving by communication or instruction or otherwise, the employes of the said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending, or advising any committee or committees, or class or classes of employes of said receivers to strike or join in a strike on January 1, 1894, or at any other time, until the further order of this court."

On the 15th day of February, 1894, P. M. Arthur, grand chief engineer and chief executive officer of the Brotherhood of Locomotive Engineers; E. E. Clark, grand chief conductor and chief executive officer of the Order of Railway Conductors; F. P. Sarrent, grand chief fireman and chief executive officer of the Brotherhood of Locomotive Firemen; D. G. Ramsey, grand chief telegrapher and chief executive officer of the Order of Railway Telegraphers; S. E. Wilkinson, grand master and chief executive officer of the Brotherhood of Railway Trainmen; and John Wilson, grand master and chief executive officer of the Switchmen's Mutual Aid Association,—in behalf of themselves and of their respective organizations and associations, and the members thereof, and in behalf of such of the employes of the receivers as are members of the said associations and organizations, moved the court to modify the writs of injunction by expung-



proper and most known signification, not the grammatical one, which regards the etymology and original of them, but that which is vulgar and most in use; for use is the judge, the law, and rule of speech. Lieber's Hermeneutics, Hammond's edition, 299.

All the lexicographers are in accord on the meaning of the word "strike," and therefore the word "strike" in these injunctions means just what the people who coined the word have made it mean: "A combined effort of workmen to obtain higher wages or other concessions from their employers, by stopping work at a preconcerted time."

If the definition given by the learned circuit judge of the word "strike" be correct, then the following sentence, found in McCarthy's "History of Our Own Times," is rank nonsense, or worse.

"Some eminent men, of whom Mr. Mill was the greatest, had long been endeavoring to get the world to recognize the fact that a strike is not a thing which can be called good or bad, until we know its object and its history; that the men who strike may be sometimes right and that they may have sometimes been successful."

And the writer in the Encyclopædia Britannica, on the subject "Trade Unions," made a slip when he wrote that a strike was a simultaneous cessation of work to secure a concession.

Messrs. James McNaugh, John C. Spooner, and George P. Miller for appellees.

ing and striking from the writs the parts italicized. The motion was based upon the petition and supplemental petition, and upon the orders of the court directing the issuance of the writs; and at the hearing the constitutions, statutes, and rules of order of the various organizations referred to were presented and considered in argument.

In the discussion of the important and interesting questions presented by this motion it is not within the province of the court to assume part in the contest between capital and labor, which it is asserted is here involved. It may be that the aggregated power of combined capital is fraught with danger to the republic. It may be that the aggregated power of combined labor is perilous to the peace of society, and to the rights of property. It doubtless is true that in the contest the rights of both have been invaded, and that each has wrongs to be redressed. If danger to the state exists from the combination of either capital or labor, requiring additional restraint or modification of existing laws, it is within the peculiar province of the legislature to determine the necessary remedy, and to declare the general policy of the state touching the relations between capital and labor. With that the judicial power of the government is not concerned. But it is the duty of the courts to restrain those warring factions, so far as their action may infringe the declared law of the land, that society may not be disrupted, or its peace invaded, and that individual and corporate rights may not be infringed. It therefore becomes the duty of the court to inquire whether, in respect of the things complained of, there has been threatened violation of the law of the land, and to determine the appropriate remedy, taking care, however, to apply the remedy without usurpation of jurisdiction, or, as remarked by Lord Chancellor Bacon, "to contain jurisdiction within the ancient mere-stones without removing the mark;" and having also constantly in mind the maxim that the province of the court is "*deere ad non dare legem*." In this spirit, as I trust, I proceed to the consideration of the questions involved, taking occasion to express my obligation to counsel, whose able presentation of the law has much relieved the labor of the court, if it could not lighten its responsibility.

If the combination and conspiracy alleged, and the

Harlan, J., delivered the opinion of the court:

The questions before us relate to the power of a court of equity—having custody by receivers of the railroad and other property of a corporation—to enjoin combinations, conspiracies or acts on the part of the receivers' employes and their associates in labor organizations which, if not restrained, would do irreparable mischief to such property, and prevent the receivers from discharging the duties imposed by law upon the corporation.

The original bill was filed on behalf of stockholders and creditors of the Northern Pacific Railroad Company, a corporation created by an act of congress, and had for its general object the administration under the direction of the court of the entire railroad system, lands and assets of that corporation, and the enforcement of the respective rights, liens, and equities of its preferred and common stockholders, bondholders, and creditors.

The railroad company having filed its answer, receivers were appointed with authority to take immediate possession of its railroads and other property and to exercise its authority and franchises, conduct its business and occupation as a carrier of passengers and freight, discharge the public duties obligatory upon it or upon any of the corporations whose lines of road were in its possession, preserve the property in proper condition and repair so as to be safely and advantageously used, protect the title and possession of the same, and employ such persons and make such payments and dis-

acts threatened to be done in pursuance thereof, are unlawful, it cannot, I think, be successfully denied that restraint by injunction is the appropriate remedy. It may be true that a right of action at law would arise upon consummation of the threatened injury, but manifestly such remedy would be inadequate. The threatened interference with the operations of the railway, if carried into effect, would result in paralysis of its business, stopping the commerce ebbing and flowing through seven states of the Union, working incalculable injury to the property, and causing great public privation. Pecuniary compensation would be wholly inadequate. The injury would be irreparable. Compensation could be obtained only through a multiplicity of suits against 12,000 men, scattered along the line of this railway for a distance of 4,400 miles. It is the peculiar function of equity in such case, where the injury would result not alone in severe private, but in great public, wrong, to restrain the commission of the threatened acts, and not to send a party to seek uncertain and inadequate remedy at law. That jurisdiction rests upon settled and unassailable ground. It is not longer open to controversy that a court of equity may restrain threatened trespass involving the immediate or ultimate destruction of property, working irreparable injury, and for which there would be no adequate compensation at law. It will, in extreme cases, where the peril is imminent, and the danger great, issue mandatory injunctions requiring a particular service to be performed, or a particular direction to be given, or a particular order to be revoked, in prevention of a threatened trespass upon property or upon public rights. I need not enlarge upon this subject. The jurisdiction is beyond question, is plenary and comprehensive. Some of the authorities are assembled by Judge Taft in the case of *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, 19 L. R. A. 883, a case in which the court restrained Mr. Arthur, chief of the Brotherhood of Locomotive Engineers, from giving the order and signal for a strike which was intended to result in injury to the complainant's rights. See also, *Blindell v. Hagan*, 54 Fed. Rep. 40, affirmed on appeal, 6 C. C. A. 83, 55 Fed. Rep. 596; *Coeur d'Alene Condot. & Min. Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 230, 19 L.

bursments as were needful. The receivers were also authorized to manage all other property of the company at their discretion and in such manner as in their judgment would produce the most satisfactory results consistent with the discharge of the public duties imposed on them, and to fix the compensation of officers, attorneys, managers, superintendents, agents, and employes in their service. It was further ordered that an injunction issue against the defendant and all claiming to act by, through, or under it, and against all other persons, to restrain them from interfering with the receivers in taking possession of and managing the property.

Subsequently the Farmers' Loan & Trust Company, as trustee for the holders of bonds and collateral trust indentures, filed an original bill in the same court against the Northern Pacific Railroad Company, the individual plaintiffs in the first suit, and the receivers. The relief asked was that the plaintiff as trustee under the mortgages named in the bill be placed in possession of the mortgaged premises, or that receivers of the rights, franchises, and property of the railroad company be appointed with authority to operate its railroads and carry on its business under the protection of the court; that the liens created by the several mortgages be ascertained and declared; and that the mortgaged property, in certain contingencies, be sold and the proceeds applied according to the rights of parties.

The railroad company having appeared in that suit, an order was entered appointing the same persons receivers who were appointed in

the first suit, and the two suits were consolidated, to proceed together under the title of the *Farmers' Loan & Trust Co. v. Northern Pacific Railroad Company, etc.*

By a writ of injunction dated December 19, 1893, the officers, agents, and employes of the receivers, including engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all persons, associations, and combinations, voluntary or otherwise, whether in the service of the receivers or not, were enjoined—

From disabling or rendering in any wise unfit for convenient and immediate use any engine, cars, or other property of the receivers;

From interfering in any manner with the possession of locomotives, cars or property of the receivers or in their custody;

From interfering in any manner, by force, threats, or otherwise, with men who desire to continue in the service of the receivers, or with men employed by them to take the place of those who quit;

From interfering with or obstructing in any wise the operation of the railroad or any portion thereof, or the running of engines or trains thereon as usual;

From any interference with the telegraph lines of the receivers along the lines of railways operated by them, or the operation thereof;

From combining and conspiring to quit, with or without notice, the service of said receivers with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with

R. A. 332. It would be anomalous, indeed, if the court, holding this property in possession in trust, could not protect it from injury, and could not restrain interference which would render abortive all efforts to perform the public duties charged upon this railway.

It was suggested by counsel that, as improper interference with this property during its possession by the court is a contempt, punishment therefor would furnish ample remedy; and that, therefore, an injunction would not lie. This is clearly an erroneous view. Punishment for contempt is not compensation for injury. The pecuniary penalty for contumacy does not go to the owner of the property injured. Such contempt is deemed a public wrong, and the fine inures to the government. The injunction goes in prevention of wrong to property and injury to the public welfare; the fine, in punishment of contumacy. The authority to issue the writ is not impaired by the fact that, independently of the writ, punishment could be visited upon the wrongdoer for interference with property in the possession of the court. The writ reaches the inchoate conspiracy to injure, and prevents the contemplated wrong. The proceeding in contempt is *ex post facto*, punishing for a wrong effected.

Asserting then, as undoubted, the right of the court by its writ to restrain unlawful interference with the operation of this railway, I turn my attention to the objections urged to particular paragraphs of the writs. It is contended that the restraint imposed by that part of the original writ to which objection is made by this motion is in derogation of common right, and an unlawful restraint upon the individual to work for whomsoever he may choose, to determine the conditions upon which he will labor, and to abandon such employment whenever he may desire. In the determination of this question it is needful to look to the conditions which gave rise to the issuance of the writ. Here was a railway some 4,400 miles in length, traversing some seven states of the Union, engaged in interstate commerce, carrying the mails of the United States. This vast property was within the custody of the court, through its receivers, in trust to operate it, to discharge the public duties imposed

upon it, to keep it a going concern until the time should come to hand it over to its rightful owners with all public duties discharged, and with its franchise, rights, and privileges unimpaired. The receivers employed in the operation of this property some 12,000 men. These men are *pro hac vice*, officers of the court, and responsible to the court for their conduct. *Re Higgins, 27 Fed. Rep. 443.* The petition represented to the court—and the facts are confessed by this motion—that some of the men threatened to suddenly quit the service of the receivers, and to compel, by threats and force and violence, other employes, who were willing to continue in the service, to quit their employment; that by organized effort, and by force and intimidation, they would prevent others from taking service under the receivers in place of those who might leave such service, and would thereby, as a means of forcing the receivers to submit to the terms demanded, disable the receivers from operating the road and discharging their duty to the public as a common carrier, and would so conduct themselves by disabling locomotives and cars, and taking possession of the property of the receivers, as to destroy and prevent its use, and hinder and embarrass the receivers in its management, thereby causing incalculable loss to the trust property, and inflicting great inconvenience and hardship upon the public. The restraining portion of the writ complained of, and now under consideration, prohibited these men from combining and conspiring to quit this service with the object and intent of crippling the property of the receivers and embarrassing the operation of the road, and from carrying that conspiracy into effect. The writ was in prevention of the mischief asserted. In no respect, as I conceive, does that portion of the writ interfere with individual liberty. None will dispute the general proposition of the right of every one to choose his employer, and to determine the times and conditions of service, or his right to abandon such service,—to use the expression of Judge Pardee in *Re Higgins, supra*.—"peaceably and decently." But it does not follow that one has the absolute right to abandon a service which he has undertaken, without regard to time and conditions. It is absurd to say that one may do as he will with-

or without notice, as to cripple the property or prevent or hinder the operation of said railroad; and, generally,

From interfering with the officers and agents of the receivers or their employes in any manner by actual violence or by intimidation, threats, or otherwise, in the full and complete possession and management of the railroad and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the receivers whether belonging to them or to shippers or other owners, and from interfering, intimidating, or otherwise injuring or inconveniencing or delaying the passengers being transported or about to be transported over the railway of the receivers or any portion thereof, or by interfering in any manner by actual violence or threat, and otherwise preventing or endeavoring to prevent the shipment of freight or the transportation of the mails of the United States over the road operated by the receivers, until the further order of this court.

This injunction was based on a petition of the receivers, urging in view of the general depression in the business of transportation the necessity of reducing expenses, and representing to the court that many employes were threatening that if their compensation was diminished as indicated in a revised schedule of wages which the receivers had adopted to take effect January 1st, 1894, they would prevent or obstruct the operation of the railroads in the hands of the receivers.

A second writ of injunction was issued December 22, 1893. It was based on a supple-

mental petition of the receivers, and was in all respects like the former one except that it contained, *in addition*, a clause by which the persons and associations to whom it was addressed were enjoined—

From combining or conspiring together, or with others, either jointly or severally, or as committees, or as officers of any so-called labor organization, with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, and from ordering, recommending, approving, and advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time, and from ordering, recommending, advising, or approving, by communication or instruction, or otherwise, the employes of said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending, or advising any committee or committees, or class or classes of employes of said receivers, to strike or join in a strike, on January 1, 1894, or at any other time until the further order of this court.

The appellants as chief executive officers respectively of the brotherhood of locomotive engineers, the order of railway conductors, the brotherhood of locomotive firemen, the order of railway telegraphers, the brotherhood of railway trainmen and the switchmen's mutual aid association, appeared in court on behalf of themselves and their respective organizations and associations, as well as on behalf of such employes of the receivers as were

out respect to the rights of others. It is not infringement upon individual liberty to compel recognition of the rights of others. Liberty and license must not be confounded. Liberty is not the exercise of unbridled will, but consists in freedom of action, having due regard to the rights of others. There would seem to exist in some minds a lamentable misapprehension of the terms "liberty" and "right." It would seem by some to be supposed that in this land one has the constitutional right to do as one may please, and that any restraint upon the will is an infringement upon freedom of action. Rights are not absolute, but are relative. Rights grow out of duty, and are limited by duty. One has not the right arbitrarily to quit service without regard to the necessities of that service. His right of abandonment is limited by the assumption of that service, and the conditions and exigencies attaching thereto. It would be monstrous if a surgeon, upon demand and refusal of larger compensation, could lawfully abandon an operation partially performed, leaving his knife in the bleeding body of his patient. It would be monstrous if a body of surgeons, in aid of such demand, could lawfully combine and conspire to withhold their services. It was stated at the argument that this was not a fair illustration of the proposition, because human life was involved. I cannot perceive that the aptness of the illustration is weakened because of that fact. Whether the effect be the destruction of life or the destruction of property, the principle is the same. It would be intolerable if counsel were permitted to demand larger compensation, and to enforce his demand by immediate abandonment of his duty in the midst of a trial. It would be monstrous if the bar of a court could combine and conspire in aid of such extortion by one of its members, and refuse their service. I take it that in such case, if the judge of the court had proper appreciation of the duties and functions of his office, that court, for a time, would be without a bar, and the jail would be filled with lawyers. It cannot be conceded that an individual has the legal right to abandon service whenever he may please. His right to leave is dependent upon duty, and his duty is dictated and measured by the exigency of the occasion. Ordinarily, the aban-

donment of service by an individual is accompanied with so little of inconvenience, and with such slight resulting loss, that it is a matter of but little moment when or how he may quit the service. But, for all that, the principle remains, recognized by every just mind, that the quitting must be timely and decent, in view of existing conditions; and this I take it, was Judge Pardee's meaning by the expression, "peaceably and decently." He had occasionally only to deal with the particular facts he was considering, but the principle asserted is universal in its application. If what I have stated be correct as to individual action, the principle applies with greater force to the case of a combination of a large number of employes to abandon service suddenly, and without reasonable notice, with the result of crippling the operation of the railway and injuring the public. The effect in this particular instance would have proven disastrous. These labor organizations are said to represent three fourths of all the employes upon the railways within the United States,—an army of many hundred thousands of men. The skilled labor necessary to the safe operation of a railway could not be readily supplied along 4,000 miles of railway. The difficulty of obtaining substitutes in the place of those who should leave the service would be intensified by the fact, asserted and conceded at the argument, that no member of these large organizations would dare to accept service in the place of those who should leave, because such acceptance would be followed by expulsion from their order, and by social ostracism by their fellows. If this conspiracy had proven effective by failure on the part of the court to issue its preventive writ, this vast property would have been paralyzed in its operation, the wheels of an active commerce would have ceased to revolve, many portions of seven states would have been shut off in the midst of winter from necessary supply of clothing, food, and fuel, the mails of the United States would have been stopped, and the general business of seven states, and the commerce of the whole country passing over this railway, would have been suspended for an indefinite time. All these hardships and inconveniences, it is said, must be submitted to, that certain of these men, discontented

members of those associations and organizations or of some of them, and moved that the court modify the orders and injunctions of December 19, 1893, and December 22, 1893—

1. By striking from both writs of injunction these words: "And from combining and conspiring to quit with or without notice the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of said receivers with or without notice, as to cripple the property or prevent or hinder the operation of said railroad."

2. By striking from the writ of injunction of December 22, 1893, the above clause or paragraph relating specially to "strikes" which was not in the writ issued December 19, 1893.

The motion was in writing and upon its face purported to be based on the petition and supplemental petitions filed by the receivers, on the orders of the court made December 19 and 22, 1893, respectively, and on the above writs of injunction. Beyond the facts set out in those petitions, the only evidence adduced at the hearing of the motion was documentary in its nature, to wit, the constitutions and by-laws of the associations whose principal officers had been permitted to intervene in the cause.

The court upon the hearing of the motion modified the writ of injunction of December 22, 1893, by striking therefrom the above words in italics: "*And from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific railroad on January 1, 1894, or at any other time.*"

The grounds upon which these words were stricken from the second writ of injunction are thus stated in the opinion of the court:

"In fairness this clause must be read in the light of the statements of the petition. It was therein asserted to the court that the men would not strike unless ordered so to do by the executive heads of the national labor organizations; and that the men would obey such orders instead of following the direction of the court. The clause is specially directed to the chiefs of the several labor organizations. The use of the words 'order, recommend, approve, or advise' was to meet the various forms of expression under which by the constitution or by-laws of these organizations the command was cloaked, as, for instance, in the one organization the chief head 'advises' a strike; in another he 'approves' a strike; in another he 'recommends' the quitting of employment. Whatever terms may be employed the effect is the same. It is a command which may not be disregarded, under penalty of expulsion from the order and of social ostracism. This language was employed to fortify the restraints of the other portions of the writ, and to meet the various disguises under which the command is cloaked. It was so inserted out of abundant caution, that the meaning of the court might be clear; that there should be no unwarrantable interference with this property, no intimidation, no violence, no strike. It was perhaps unnecessary, being comprehended within the clause restraining the heads of these organizations from ordering, recommending, or advising a strike, or joiner in a strike.

"It is said, however, that the clause restrains

with the conditions of their service, may combine and conspire, with the object and intent of crippling the property, to suddenly cease the performance of their duties. It is said that to restrain them from so doing is abridgment of liberty and infringement of constitutional right. I do not so apprehend the law. I freely concede the right of the individual to abandon service at a proper time, and in a decent manner. I concede the right of all the employes of this road, acting in concert, to abandon their service at a proper time, and in a decent manner; but I do not concede their right to abandon such service suddenly, and without reasonable notice.

The railway is a great public highway. Its primary duty is to the public. In the interest of the public it must be kept a going concern, although it prove unremunerative to the shareholders. Bondholders and shareholders invest their money in view of the public nature of the enterprise. Their rights and interests are subordinated to the public duty charged upon the road. And so also, employes, in entering the service, assume obligations coextensive in kind with that of the corporation. They may, indeed, sever their relation in a proper and decent manner, but they may not legally resort to obstructive methods to compass their demands. Their rights—as the rights of bondholder and shareholder—are subordinate to the rights of the public, and must yield to the public welfare. This public consideration permeates and controls the whole subject. The reason is forcibly stated by Judge Ricks in the case of *Toledo, A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 743, 752, 19 L. R. A. 385; holding that the duties of an employe of a public corporation are such that he cannot always choose his own time for quitting the service. In the following language: "Holding to that employer so engaged in this great public undertaking the relation they did, they owed to him and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew if it failed to comply with the law in any respect, severe penalties and losses would fol-

low for such neglect. An implied obligation was therefore assumed by the employes upon accepting service from it under such conditions that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable loss and injuries and excessive damages by any acts or omissions on their part. One of these implied conditions on their behalf was that they would not leave its service, or refuse to perform their duties, under circumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss or injury, or visit upon it severe penalties. In ordinary conditions, as between employer and employe, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employe has it in his power to arbitrarily terminate the relations, and abide the consequence. But these relative rights and powers may become quite different in the case of the employes of a great public corporation, charged by the law with certain great trusts and duties to the public. An engineer and fireman who start from Toledo with a train of cars filled with passengers destined for Cleveland, begin that journey under contract to drive their engine and draw the cars to the destination agreed upon. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperiled, and the safety of the property jeopardized? The simple statement of the proposition carries its own condemnation with it. The very nature of their service, involving as it does the custody of human life and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them."

In the case under consideration the receivers sought to change the terms and conditions of service. The employes had, of course, the right to decline service upon the terms proposed. Notwithstanding the public character of the service,

an individual from friendly advice to the employes as a body, or individually, as to their or his best interest in respect of remaining in the service of the receivers. Read in the light of the petitions upon which the injunction was founded, I do not think that such construction can be indulged by any fair and impartial mind. It might be used as a text for a declamatory address to excite the passions and prejudices of men, but could not, I think, be susceptible of such strained construction by a judicial mind. The language of a writ of injunction should, however, be clear and explicit, and, if possible, above criticism as to its meaning. Since, therefore, the language of this particular phrase may be misconceived, and the restraint intended is, in my judgment, comprehended within the other provisions of the writ, the motion in that respect will be granted and the clause stricken from the writ."

Except in the particulars mentioned in the opinion of the circuit court, the motion to modify the injunctions was denied and the injunctions continued in force. Of this action of the court the intervenors complain.

In considering the important questions presented by the record we have assumed, as did the circuit court, the truth of all the material facts set out in the petition and supplemental petition of the receivers. This is the necessary result of the intervenors having based their motion on those petitions, and on the orders of the court directing writs of injunction to be issued. As those orders were based on the petitions of the receivers, it must be taken that the intervenors, although insisting that the injunction should have been modified to the full

extent indicated by their motion, concede for the purposes of the motion the facts to be as alleged in those petitions.

It is consequently to be regarded as undisputed in this cause that, at the time the writ of December 19, 1893, was issued, some of the railroad employes were giving it out and threatening that if the revised schedules and rates in question were enforced they would suddenly quit the service of the receivers; by threats, force, and violence, would compel other employes to quit such service and, by organized effort and intimidation, prevent others from taking the places of those who might quit; would disable locomotives and cars so that they could not be safely used or used only after expensive repairs; would take possession of the cars, engines, shops, and roadbeds in the possession of the receivers, and otherwise prevent their being used; would so conduct themselves with regard to the property in the hands of the receivers as to hinder and embarrass them, their officers and agents in its management and in the operation of trains, and that such dissatisfied employes, and others not in the employ of the receivers, but co-operating with those employes from a spirit of sympathy or mischief, would, unless restrained by the order of court, have carried out their threats, with the result that the receivers would not only have been compelled to abandon the revised schedules and rates proposed to be enforced, but would have been disabled from operating the railroads in their custody, from discharging their duties to the public as carriers of passengers and freight, and from transporting the mails of the United States, bring-

upon notification of their declination at a time prior to January 1, 1894, reasonable in view of the service in which they were engaged, they had the undoubted right to abandon their employment upon that day. That, however, is not the case presented to and dealt with by the court. Nor does the rectitude of the writ of injunction rest upon any mere right of the employes in good faith to abandon their employment. The restraint imposed was with reference to combining and conspiring to abandon the service with the object and intent of crippling the property. Its office was to restrain the carrying into effect of the conspiracy.

Was such a conspiracy unlawful? So long ago as 1821 Judge Gibson, that judge "of great and enduring reputation,"—in the case of *Com. v. Carlsle*, Brightley, 38 (the case of a combination of employers to depress the wages of journeymen by artificial means, declared that "a combination is criminal when the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates." He clearly asserts the principle upon which combinations of men may become unlawful as follows: "It will therefore be perceived that the motive for combining, or what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

The doctrine thus declared is fully established, *State v. Buchanan*, 5 Harr. & J. 317, 9 Am. Dec. 534; *State v. DeWitt*, 2 Hill. L. 282, 27 Am. Dec. 371; *State v. Norton*, 23 N. J. L. 38; *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 648; *State v. Burnham*, 15 N. H. 302; *State v. Glidden*, 55 Conn. 46; *Sherry v. Perkins*, 147 Mass. 212; *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 787; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710; *De Higgins*, 27 Fed. Rep. 443; *Cow v. Alene Consol. & 25 L. R. A.*

*Min. Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 280, 19 L. R. A. 582; *United States v. Workmen's Amalgamated Council of New Orleans*, 64 Fed. Rep. 994.

The reason is that the confederacy of numbers to effect an injurious object creates new and additional power to injure, and congregated numbers supply in law the place of actual violence. *State v. Simpson*, 12 N. C. 504. And therefore, in conspiracy, the unlawful thing proposed, whether as a means or an end, need not be such as would be indictable if proposed to be done by an individual. 2 Bishop, *Crim. L.* 6th ed. § 181. I think the conclusion well summed up by Mr. Wright in his work on "The Law of Criminal Conspiracies," that a combination of men by concerted action, to accomplish some object not criminal, by means which are not criminal, but where mischief to the public is involved; or where neither the object nor the means are criminal, but where injury and oppression are the result,—is a conspiracy condemned by law. That this is the general law of the land, is recognized in those states which, by statute in respect to labor organizations, have changed the general rule. Thus the state of New Jersey passed a statute to this effect: "It shall not be unlawful for any two or more persons to unite, combine, or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage by peaceable means any person or persons to enter into any combination for or against leaving or entering into the employment of any person or persons or corporations."

The supreme court of that state, in the case of *Mayer v. Journeymen Stonecutters' Assn.*, 47 N. J. Eq. 519, 531, declared that by that statute "the policy of the law with respect to such combinations was revolutionized, and what before that time would have been held to have been an unlawful combination and conspiracy, became in this state a lawful association, and acts which had been the subject of indictment became inoffensive to any provision of our law." And to the same effect is the case of *Com. v. Sherry*, 10 Phila. 363, under the Statute of Pennsylvania of June 14, 1872, and the supplemental Act of April 20, 1876.

ing thereby incalculable loss upon the trust property, as well as causing inconvenience and hardship to the public, particularly to the people in that part of the country traversed by the Northern Pacific Railroad, who are dependent upon the regular, continuous operation of that road for commercial facilities of every kind, as well as for fuel, provisions, and clothing.

It will be observed that the motion of the intervenors does not question the power of the court to restrain acts upon the part of the employes or others which would have directly interfered with the receivers' possession of the trust property or obstructed their control and management of it as well as attempts by force, intimidation, or threats or otherwise to molest or interfere with persons who remain in the service of the receivers or with others who were willing to take the places of those withdrawing from such service.

But it was contended that the circuit court exceeded its powers when it enjoined the employes of the receivers "from combining conspiring to quit with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of said receivers with or without notice as to cripple the property or prevent or hinder the operation of said railroad."

This clause embodies two distinct propositions: one, relating to combinations and conspiracies to quit the service of the receivers with the object and intent of crippling the property or embarrassing the operation of the

railroads in their charge; the other, having no reference to combinations and conspiracies to quit or to the object and intent of any quitting, but only to employes "so quitting" as to cripple the property or prevent or hinder the operation of the railroad.

Considering these propositions in their inverse order, we remark that the injunction against employes so quitting as to cripple the property or prevent or hinder the operation of the railroad was equivalent to a command by the court that they should remain in the active employment of the receivers, and perform the services appropriate to their respective positions, until they could withdraw without crippling the property or preventing or hindering the operation of the railroad. The time when they could quit without violating the injunction is not otherwise indicated by the order of the court.

Under what circumstances may the employes of the receivers of right quit the services in which they are engaged? Much of the argument of counsel was directed to this question. We shall not attempt to lay down any general rule applicable to every case that may arise between employer and employes. If an employe quits without cause and in violation of an express contract to serve for a stated time, then his quitting would not be of right, and he would be liable for any damages resulting from a breach of his agreement, and perhaps, in some states of case, to criminal prosecution for loss of life or limb by passengers or others directly resulting from abandoning his post at a time when care and watchfulness was required upon

It becomes necessary, then, to consider whether there is any statute, national or state, applicable to the railway in question, which can be deemed to be a modification of the general law of the land. It was asserted at the argument with great confidence that the act of congress entitled "An act to legalize incorporation of national trades' unions" (24 Stat. at L. chap. 567) had entirely changed the common law. I think the confidence of counsel in the assertion of the proposition was born of zeal, not of judgment. The statute provides for the formation of national trades' unions, with power to establish constitution, rules, and by-laws to carry out its lawful objects, and defines the term "national trades' union" to be "any association of working people having two or more branches in the states or territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages, and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled or unemployed members, or the families of deceased members, or for such other object or objects for which workmen may lawfully combine, having in view their mutual protection or benefit." The most that can be claimed for this statute is that it removes the common-law disability of combination to raise the price of labor, and to establish the conditions of labor. It contains no suggestion of any right to combine or conspire with a view to injure or oppress or interfere with the rights of others. The organization of labor for the purpose specified in the statute is lawful and commendable, but the statute does not sanction the use of a lawful organization for an unlawful purpose. Nor does it permit such organization to invade the rights of others. Under this act, labor may organize to regulate wages, the hours of labor, and the conditions of labor, and for the protection of individual rights in the prosecution of labor; but such lawful organization cannot be employed to injure property, or for the oppression of others, or to harm the public welfare. There is nothing in

the statute which sanctions that which the law, as above declared, condemns.

The Statutes of Wisconsin (Sanborn & Berryman, Rev. Stat. § 446a) render it unlawful for "two or more persons to combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his reputation, trade, business, or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act." By section 446c it is rendered unlawful for any person, by threats, intimidation, force, or coercion of any kind, to hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as wage worker, or to attempt to so hinder or prevent. By section 446d a punishment is provided for any one who, individually or in association with others, shall willfully injure or interfere with or prevent the running or operation or shall destroy any locomotive engine or cars or machinery. These statutes are declaratory of the common law, and wholly condemn all conspiracies to injure or oppress, or to interfere with the rights of others. Their efficacy is in no degree impaired by any statutory recognition of the right of organization for the purpose of promoting the welfare of labor. I have been referred to no statute in any state traversed by the Northern Pacific Railroad, and have been able to find none, which in any way changes the law in this regard. I think no state has gone so far in modification of the general rule as have the states of New Jersey and Pennsylvania. But there, as elsewhere, all labor organizations must be for lawful objects, to be accomplished by lawful means. If the ostensible purpose be legal, and the means for its accomplishment legal, still, if the real and secret purpose be illegal,—as for example, that purpose be of extortion or of injury to another,—the wrong cannot be shielded under the guise of a lawful organization. And where the object is to be accomplished by violence, intimidation, and the destruction of property, by coercion and by injury to the public, the organization, although formed

his part in the discharge of a duty he had undertaken to perform. And it may be assumed for the purposes of this discussion that he would be liable in like manner where the contract of service, by necessary implication arising out of the nature or the circumstances of the employment required him not to quit the service of his employer suddenly and without reasonable notice of his intention to do so.

But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States or in any place subject to their jurisdiction. Courts of equity have sometimes sought to sustain a contract for services requiring special knowledge or peculiar skill, by enjoining acts or conduct that would constitute a breach of such contract. To this class belong the cases of singers, actors, or musicians who, after agreeing for a valuable consideration to give their professional service at a named place and during a specified time for the benefit of certain parties, refused to meet their engagement and undertake to appear during the same period for the benefit of other parties at other

places. *Lumley v. Wagner*, 1 De G. M. & G. 604, 617 (5 De G. & S. 485, 16 Jur. 871); *Montague v. Hockton*, L. R. 16 Eq. 189. While in such cases the singer, actor, or musician has been enjoined from appearing during the period named at a place and for parties different from those specified in his first engagement, it was never supposed that the court could by injunction compel the affirmative performance of the agreement to sing, or to act, or to play. In *Powell Duffryn Steam Coal Co. v. Taff Vale R. Co.* L. R. 9 Ch. App. 331, 335, *Lord Justice James* observed that when what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labor and care, the court has never found its way to do this by injunction. In the same case *Lord Justice Mellish* stated the principle still more broadly, perhaps too broadly, when he said that a court can only order the doing of something which has to be done once for all, so that the court can see to its being done.

The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employé of merely personal services any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of employés engaged to perform personal service to quit that service rests upon the same basis as the right of an employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract be-

for an ostensible legal object, is diverted to illegal purposes, and is to that extent unlawful.

Applying the principles of law, as I thus find them established, to the case in hand as presented by the original petition for the writ, it is clear that the facts charged presented to the court the case of an unlawful conspiracy. If it be conceded that the entire force of 1200 men employed upon this railway had the legal right to abandon the service in a body, that right must be asserted and exercised in good faith. The abandonment of service must be actual not pretentious. The combination cannot be justified on the plea of the lawful exercise of a right when the threatened abandonment of service is a mere pretext, the real intent and design being to cripple the property, and to hinder and prevent the operation of the road; and such was the conspiracy declared to the court,—not denied, but confessed by the present motion. It was a conspiracy to compel by intimidation the receivers of the railway against their will to accede to the demands of the conspirators, and therein failing, to cripple this property, and prevent the operation of the road, the necessary result of which would be to inflict great loss upon the public. The conspiracy disclosed was a conspiracy to extort, and failing to extort, to injure; the pretentious exercise of the right to abandon service being one of the means to effect the object of the conspiracy. If the right to quit service in a body be conceded, the case presented is the ostensible exercise of a lawful right, not in good faith, but for an unlawful purpose, to wit, the intimidation and oppression of others, and the injury to property in their keeping, tending to the prejudice of the public. Such a conspiracy is unlawful. It may also be properly said that the conspiracy was as needless as its results would have been disastrous. This vast property was in the custody of the court, through its receivers. By the schedules which for some years had been in force in the operation of this road, as well as by the new schedules proposed to be adopted by the receivers, a thorough civil service had been established in the management of this railway, recognizing by systematic promotion length of service and skillful and honest performance of labor. The service contemplated was continuous and perma-

nent. No man could be discharged except for cause, of which he was to be informed. The right of a hearing upon such charge was secured to him, with right of successive appeals to the superior officers of the road. The employé, however, had the right to abandon his employment at any time. Thus capital and labor co-operated to assure employment, the reward of skill and faithfulness, and protection from discharge from service, except for justifiable cause. This operated to render the service efficient, conserving the interests of both capital and labor, and advancing the public welfare. It was natural, and to be expected, that in consequence of financial disaster there would arise the question of the reduction of wages. An employé, deeming himself wronged by the action of the receivers in respect thereto, had peaceful remedy. The court was at all times open to him to listen to his complaint, and to redress it, if it should appear to be well-founded. Upon such application the receivers would be bound to obey the order of the court in the premises. The employé, nevertheless, not content with the judgment of the court, would have the right to abandon his employment. The case furnishes, as was suggested by counsel, an exceptional instance, where one party to a proceeding in a judicial tribunal is bound by the decision and the other is not. There was, therefore, neither justification nor excuse for a conspiracy to hinder and prevent the operation of this railway, nor necessity for combination for the assertion of any legal right. But, if there were no remedy for the employé except abandonment of service, the law will not sanction a conspiracy, the purpose of which is to extort from the receivers or from the court concessions which they could not properly yield, and, failing to procure them, to hinder and prevent, by the means declared, the operation of this railway, to the injury of the trust, and to the oppression of the public. Such was the combination and conspiracy here disclosed. It was to the prevention of the injury thus contemplated that this writ was directed. Its issuance, in my judgment, is justified by the law.

The second branch of the motion has reference to the writ of injunction issued upon the supple-



tween the parties, the one injured by the breach has his action for damages, and a court of equity will not, indirectly or negatively by means of an injunction restrain the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal services. Relief of that character has always been regarded as impracticable. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 780, 740, 19 L. R. A. 895, Taft, J., and authorities cited; Fry, Spec. Perf. Cont. 8d Am. ed. §§ 87, 91, and authorities cited.

It is supposed that these principles are inapplicable or should not be applied in the case of employes of a railroad company which, under legislative sanction, constructs and maintains a public highway primarily for the convenience of the people, and in the regular operation of which the public are vitally interested. Undoubtedly the simultaneous cessation of work by any considerable number of the employes of a railroad corporation without previous notice will have an injurious effect and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from the inconsiderate conduct of employes and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employes and employers so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance, and safe management of public highways. In the absence of legislation to the contrary, the right of one in the service of a

quasi public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such corporations to discharge an employé from service whenever they see fit, must be deemed so far absolute that no court of equity will compel one against his will to remain in such service or actually to perform the personal acts required in such employment or compel such managers against their will to keep particular employes in their service. It was competent for the receivers in this case, subject to the approval of the court, to adopt a schedule of wages or salaries, and say to employes: "We will pay according to this schedule, and if you are not willing to accept such wages you will be discharged." It was competent for an employé to say: "I will not remain in your service under that schedule, and if it is to be enforced I will withdraw, leaving you to manage the property as best as you may, without my assistance." In the one case, the exercise by the receivers of their right to adopt a new schedule of wages could not, at least in the case of a general employment without limit as to time, be made to depend upon considerations of hardship and inconvenience to employes. In the other, the exercise by employes of their right to quit in consequence of a proposed reduction of wages could not be made to depend upon considerations of hardship or inconvenience to those interested in the trust property or to the public. The fact that employes of railroads may quit under circumstances that would show bad faith upon their part or a reckless disregard of their contract or of the convenience and interests of both em-

mental petition of the receivers, restraining any combination or conspiracy having for its purpose the inauguration of a strike upon the lines of the railway operated by the receivers, and from ordering, advising, or approving, by communication or instruction or otherwise, the employes of the receivers to join in a strike. This part of the motion presents the issue whether a strike is lawful. The answer must largely depend upon the proper definition of the term. It has been variously defined. By Worcester, "To cease from work in order to extort higher wages as workmen;" by Webster, "To quit work in a body, or by combination in order to compel their employers to raise their wages;" the *Encyclopedic Dictionary*, "The act of workmen in any trade or branch of industry when they leave their work with the object of compelling the master to concede certain demands made by them,—as an advance of wages, the withdrawal of a notice of reduction of wages, a shortening of the hours of work, the withdrawal of any obnoxious rule or regulation, or the like;" the *Imperial Dictionary*, "To quit work in order to compel an increase or prevent a reduction of wages;" the *Century Dictionary*, "To press a claim or demand by coercive or threatening action of some kind; in common usage, to quit work along with others, in order to compel an employer to accede to some demand, as for increase of pay or to protest against something, as a reduction of wages; as to strike for higher pay, or shorter hours of work;" Bouvier defines it: "A combined effort of workmen to obtain higher wages or other concessions from their employers by stopping work at a preconcerted time." The definition sanctioned by the court of appeals of New York in *Delaware, L. & W. R. Co. v. Bowen*, 58 N. Y. 581, and embodied by Mr. Anderson in his *Law Dictionary*, is: "A combination among laborers, or those employed by others, to compel an increase of wages, change in the hours of labor, a change in the manner of conducting the business of the principal, or to enforce some particular policy in the character or the number of men employed, or the like." Mr. Black in his *Law Dictionary* defines it to be: "The act of a party of workmen employed by the same master, in stopping work all together at a preconcerted time, and re-

fusing to continue, until higher wages or shorter time or some other concession is granted to them by the employer." Whichever definition may be preferred,—and possibly no one of them is precisely accurate,—there are running through all of them two controlling ideas: First, by compulsion to extort from the employer the concession demanded; second, a cessation of labor, but not the abandonment of employment. The stoppage of work is designed to be temporary, continuing only until the accomplishment of the design and upon its accomplishment the resumption of employment. The cessation of labor is not a bona fide dissolution of contractual relations and an abandonment of the employment, but is designed as a means of coercion to accomplish the desired result. The cessation of labor is prearranged by the body of men through their organizations, and is to take effect simultaneously at a stated time, for the purpose of preventing the master from continuing his business, and to compel him to submit to the dictation of his servants. The definition of the term proffered to the court at the argument, recognized by the labor organizations of the country, was this: "A strike is a concerted cessation of or refusal to work until or unless certain conditions which obtain or are incident to the terms of the employment are changed. The employé declines to longer work, knowing full well that the employer may immediately employ another to fill his place; also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employes to service, of employing new men, or of forcing conditions under which the old men are glad to return to service under the old conditions." This latter definition recognizes the idea of cessation of labor, but not an abandonment of employment. It suggests that the latter may result at the option of the master. It does not, in terms, declare a combination to extort, or to oppress, or to interfere in any way with the business of the employer, except as injury might result as an incident to the cessation of service. If the latter be the correct definition of a strike, society has been needlessly alarmed. I doubt if, in the light of the history of strikes, the



ployer and the public, does not justify a departure from the general rule that equity will not compel the actual, affirmative performance of merely personal services, or (which is the same thing) require employes against their will to remain in the personal service of their employer.

The result of these views is that the court below should have eliminated from the writ of injunction the words "and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad."

But different considerations must control in respect to the words in the same paragraph of the writs of injunction, "and from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad." We have said that if employes were unwilling to remain in the service of the receivers for the compensation prescribed for them by the revised schedules, it was the right of each one on that account to withdraw from such service. It was equally their right, without reference to the effect upon the property or upon the operation of the road, to confer with each other upon the subject of the proposed reduction in wages and to withdraw in a body from the service of the receivers because of the proposed change. Indeed, their right as a body of employes affected by the proposed reduction of wages, to demand given rates of compensation as a condition of their remaining in the service was as absolute and perfect as was the

right of the receivers representing the aggregation of persons, creditors, and stockholders interested in the trust property, and the general public, to fix the rates they were willing to pay their respective employes. But that is a very different matter from a combination and conspiracy among employes, with the object and intent not simply of quitting the service of the receivers because of the reduction of wages, but of crippling the property in their hands and embarrassing the operation of the railroad. When the order for the original injunction was applied for it was represented—and the intervenors admit by their motion that it was correctly represented—that unless the restraining power of the court was exerted the dissatisfied employes and others co-operating with them would physically disable and render unfit for use the cars and other property in the possession of the receivers, and by force, threats, and intimidation used against employes remaining in their service and against those desiring to take the places of those quitting, would prevent the receivers from operating the roads in their custody and from discharging the duties which they owed on behalf of the corporation to the parties interested in the trust property, to the government and to the public.

The general inhibition upon combinations and conspiracies formed with the object and intent of crippling the property and embarrassing the operation of the railroad, must be construed as referring only to acts of violence, intimidation, and wrong of the same nature or class as those specifically described in the previous clauses of the writ. We do not interpret

child would be recognized by this baptismal name. One who has read the history of the strike at Homestead, with its cruel murders and barbarous torture; one who has read of the various strikes on railroads, when cars were fired, rails torn up, engines demolished, and life destroyed; one who has read of the not infrequent summoning of the militia by the authorities of the state to put down riot and turbulence,—the universal concomitants of a strike,—would hardly yield assent to the definition suggested as even faintly conveying the true idea of a strike, as known of all men. The only force suggested is the force of inertia, the compulsion wrought by cessation from labor. Such a strike would be a harmless affair, and generally inoperative to effect the end designed. It could be availing only by the combination of the entire labor force of the country, in the nature of things impracticable. Unless, by other coercive measures, the employer is prevented from obtaining men in the place of those who should cease to work, a strike would be a mere weapon of straw. That is well understood by these organizations. While, according to the definition, the employe knows "full well that the master may immediately hire another to fill his place," he also knows full well that that must, at all odds, be prevented if the strike is to be made successful. Consequently the organizations provide, as confessed at the argument, for the expulsion and social ostracism of all members of the organizations who should not abandon work when the order to strike is given, or who should seek to fill the place of a striking member. Thus one of the most effective engines of compulsion is brought to bear upon unwilling members to effect the design of the combination. With respect to laborers not members and willing to work, other and not less effective means of intimidation must be and are employed in prevention of labor. The history of strikes declares that this intimidation has always taken the shape of threats and personal violence. Constructive violence has failed in large measure to prevent the continuance of operation of business by the master. Naturally, therefore, we find resort to actual violence, the destruction of property, the disabling of railway trains, and the like.

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Of the ideal strike, in the definition proposed at the argument, the only criticism to be indulged is that it is ideal, and never existed in fact. Undoubtedly, in the absence of restrictive contract, workmen have a right by concerted action to cease work to procure better terms of service, no compulsion being used except that incident to the cessation; subject, however, to the qualification, at least with respect to those employments that directly concern the public welfare, that reasonable notice of the quitting should be given. But such is not the strike of history. The definition suggested is misleading and pretentious. To my thinking, a much more exact definition of a strike is this: A combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand. The concerted cessation of work is but one of, and the least effective of, the means to the end; the intimidation of others from engaging in the service, the interference with, and the disabling and destruction of property, and resort to actual force and violence, when requisite to the accomplishment of the end, being the other, and more effective, means employed. It is idle to talk of a peaceable strike. None such ever occurred. The suggestion is impeachment of intelligence. From first to last, from the earliest recorded strike to that in the state of West Virginia, which proceeded simultaneously with the argument of this motion, to that at Connelleville, Pa., occurring as I write, force and turbulence, violence and outrage, arson and murder, have been associated with the strike as its natural and inevitable concomitants. No strike can be effective without compulsion and force. That compulsion can only come through intimidation. A strike without violence would equal the representation of the tragedy of Hamlet with the part of Hamlet omitted. The moment that violence becomes an essential part of a scheme, or a necessary means of effecting the purpose of a combination, that moment the combination, otherwise lawful, becomes illegal. All combinations to interfere with perfect freedom in the proper management and control of one's lawful business, to dictate the terms upon which such business shall be con-

the words last above quoted as embracing the case of employes who, being dissatisfied with the proposed reduction of their wages, merely withdraw on that account, singly or by concerted action, from the service of the receivers, using neither force, threats, persecution nor intimidation towards employes who do not join them, nor any device to molest, hinder, alarm or interfere with others who take or desire to take their places. We use the word "device" here as applicable to cases like that of *Sherry v. Perkins*, 147 Mass. 212, in which it appeared that parties belonging to a labor organization displayed and maintained certain banners in front of the plaintiff's place of business for the purpose of deterring workmen from remaining in or entering his service. As the acts complained of were injurious to the plaintiff's business and were a nuisance, it was held that they could be reached and restrained by injunction. So in *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, equity interfered by injunction to restrain the conduct of parties, officers of a trades union, who gave notice to workmen by means of placards and advertisements that they were not to hire themselves to the plaintiff pending a dispute between the union and the plaintiff. See also *United States v. Kane*, 28 Fed. Rep. 743; *Emack v. Kane*, 84 Fed. Rep. 46; *Onvey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135, 12 L. R. A. 193; *Walker v. Cronin*, 107 Mass. 555.

These employes having taken service first

with the company and afterwards with the receivers under a general contract of employment which did not limit the exercise of the right to quit the service, their peaceable co-operation, as the result of friendly argument, persuasion, or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public. If in good faith and peaceably they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they cannot be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation and could not be attributed to employes exercising lawful rights in orderly ways or to the receivers when in good faith and in fidelity to their trust they declare a reduction of wages and thereby cause dissatisfaction among employes and their withdrawal from service.

The combinations or conspiracies which the law does not tolerate are of a different charac-

ducted, by means of threats or by interference with property or traffic or with the lawful employment of others, are within the condemnation of the law. It has well been said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the cessation of labor by the conspirators, but the necessary prevention of labor by those who are willing to assume their places, and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master; and so, by intimidation and by the compulsion of force, to accomplish the end designed. I know of no peaceable strike. I think no strike was ever heard of that was or could be successful unaccompanied by intimidation and violence. Counsel at the argument could recall but one which he was willing to indorse as peaceable. That was the strike upon the Lehigh Valley Railroad during the year 1883. The history of that occurrence does not carry out the declaration of counsel. There, as I understand, the running of trains was constantly interfered with, engines and cars disabled and wrecks caused by the violence of the strikers. The president of the company reported to his board of directors that the loss to freight and equipment by reason of the strike—which continued for less than three weeks—was \$77,000, of which amount \$46,000 was for damage done to locomotives alone. And that strike was not successful, the violence being insufficient. The history and legality of strikes has been well told by Mr. Justice Brewer, of the Supreme Court of the United States, in an admirable address before the New York Bar Association in January, 1893, in language that should be taken to heart by every one who has regard to the safety and peace of society, and the protection of our institutions.

"The common rule," says Mr. Justice Brewer, "as to strikes is this: Not merely do the employes quit the employment, and thus handicap the employer in the use of his property, and perhaps in the discharge of duties which he owes to the public, but they also forcibly prevent others from taking their places. It is useless to say that they only advise; no man is misled. When a thousand laborers gather around a railroad track, and say to those who seek employment that they had better not,

and when that advice is supplemented every little while by a terrible assault on one who disregards it, every one knows that something more than advice is intended. It is coercion; force; it is the effort of the many, by the mere weight of numbers, to compel the one to do their bidding. It is a proceeding outside of the law, in defiance of the law, and in spirit and effect an attempt to strip from one that has that which of right belongs to him,—the full and undisturbed use and enjoyment of his own. It is not to be wondered at that deeds of violence and cruelty attend such demonstrations as these; nor will it do to pretend that the wrongdoers are not the striking laborers, but lawless strangers who gather to look on. Were they strangers who made the history of the Homestead strike one of awful horror? Were they women from afar who so maltreated the surrendered guards, or were they the very ones who sought to compel the owners of the property to do their bidding? Even if it be true that at such places the lawless will gather, who is responsible for their gathering? Weigh, the head of a reputable labor organization, may open the door to lawlessness, but Beckman, the anarchist and assassin, will be the first to pass through; and thus it will be, always and everywhere. . . . This is the struggle of irresponsible persons and organizations to control labor. It is not in the interests of liberty; it is not in the interest of individual or personal rights. It is an attempt to give to the many a control over the few,—a step towards despotism. Let the movement succeed, let it once be known that the individual is not free to contract for his personal services, that labor is to be farmed out by organizations, as to-day by the Chinese companies, and the next step will be a direct effort on the part of the many to seize the property of the few."

No word of mine could give added strength to the thought suggested. The strike has become a serious evil, destructive to property, destructive to individual right, injurious to the conspirators themselves, and subversive of republican institutions. Certainly no court should give encouragement to any combination thus destructive of the very fabric of our government, tending to the disruption of society, and the obliteration of legal and natural rights. Whatever other doctrine may be asserted by reckless agitators, it must ever remain the duty of the courts, in the protection of society,

ter. According to the principles of the common law, a conspiracy upon the part of two or more persons with the intent by their combined power to wrong others or to prejudice the rights of the public, is in itself illegal although nothing be actually done in execution of such conspiracy. This is fundamental in our jurisprudence. So a combination or conspiracy to procure an employé or body of employés to quit service in violation of the contract of service would be unlawful, and in a proper case might be enjoined if the injury threatened would be irremediable at law. It is one thing for a single individual or for several individuals each acting upon his own responsibility and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing in the eye of the law for many persons to combine or conspire together with the intent not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public, is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent and under circumstances that give them when so combined a power to do an injury they would not possess

as individuals acting singly, has always been recognized as in itself wrongful and illegal.

The general principle is illustrated in *Callan v. Wilson*, 127 U. S. 540, 555, 32 L. ed. 228. That was an information in the police court of the District of Columbia charging the defendants Callan and others with a conspiracy to prevent certain named persons, who had been expelled from a local association, a branch of a larger one known as the knights of labor of America, from pursuing their calling of musicians anywhere in the United States. This result, the information charged, was to be effected by the defendants refusing to work as musicians or in any other capacity with the persons so named, or with or for any person, firm, or corporation working with or employing them; by procuring all other members of those organizations, and all other workmen and tradesmen, not to work in any capacity with or for them or either of them or for any firm or corporation that employed either of them; and by warning and threatening every person, firm, or corporation employing such obnoxious persons that if they did not forthwith cease to employ and refuse to employ them, they should not receive the custom or patronage either of the persons so conspiring or of other members of said organizations. The question in the case was whether the accused were entitled to a trial by jury or whether the offense charged was of the class called "petty," for the trial of which a defendant could not at

and in the execution of the laws of the land, to condemn, prevent, and punish all such unlawful conspiracies and combinations. Of this duty it was forcibly said by Judge Baker, of the district of Indiana, under like circumstances, in the *Lake Erie & Western Cases*: "It may do for men that are reckless of the welfare of human society, who care nothing for its peace and good order, to imperil life, property, and liberty, and the perpetuity of our institutions by teaching such doctrines; but the judge who tolerates it ought to be stripped of his gown, and be driven from the sacred temple of justice."

The wrongs of labor are not to be righted by war upon society, by turbulence and disorder, by oppression and force. Such action alienates sympathy and provokes resentment. In this land, only by peaceable means in the courts, and through the lawmaking power, can wrongs be redressed, and justice be established. Let combined labor deal with combined capital, but only in ways sanctioned by the law. When this lesson is learned, and becomes the rule of conduct, labor will acquire in a decade greater privileges and surer protection from wrong than could be extorted by a century of violence.

By the Act of Congress of July 2, 1890 (26 Stat. at L. chap. 647), every combination in restraint of trade or commerce among the several states is declared to be illegal. Under this act it was held by Judge Speer in *Waterhouse v. Comer*, 55 Fed. Rep. 149, 19 L. R. A. 408, that a strike, if it ever was effective, can be so no longer; and this view seems to have been held by Judge Billings in the case of *United States v. Workmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 304. On the other hand, Judge Putman, in *United States v. Patterson*, 55 Fed. Rep. 608, is inclined to the view that the statute has no relation to labor organizations. I do not find it needful to enter into this field of discussion, or to express an opinion upon the subject, being content to rest my conclusion upon the grounds discussed.

One clause of the supplemental injunction has been characterized as wholly unwarranted. That clause is: "And from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad on January 1, 1894, or at any other time." In fairness, this clause must be read in the light of the state-

ments of the petition. It was therein asserted to the court that the men would not strike unless ordered so to do by the executive heads of the national labor organizations, and that the men would obey such orders instead of following the direction of the court. This clause is specially directed to the chiefs of the several labor organizations. The use of the words, "order, recommend, approve, or advise," was to meet the various forms of expression under which by the constitution or by-laws of these organizations the command was cloaked, as, for instance, in the one organization the chief head "advises" a strike, in another he "approves" a strike, in another he "recommends" the quitting of employment. Whatever terms may be employed the effect is the same. It is a command which may not be disregarded, under penalty of expulsion from the order and of social ostracism. This language was employed to fortify the restraints of the other portions of the writ, and to meet the various disguises under which the command is cloaked. It was so inserted out of abundant caution, that the meaning of the court might be clear, that there should be no unwarrantable interference with this property, no intimidation, no violence, no strike. It was perhaps unnecessary, being comprehended within the clause restraining the heads of these organizations from ordering, recommending, or advising a strike, or joining in a strike. It is said, however, that the clause restrains an individual from friendly advice to the employes as a body or individually, as to their or his best interest in respect of remaining in the service of the receivers. Read in the light of the petitions upon which the injunction was founded, I do not think that such construction can be indulged by any fair and impartial mind. It might be used as a text for a declamatory address to excite the passions and prejudices of men, but could not, I think, be susceptible of such strained construction by a judicial mind. The language of a writ of injunction should, however, be clear and explicit, and, if possible, above criticism as to its meaning. Since, therefore, the language of this particular phrase may be misconceived, and the restraint intended is, in my judgment comprehended within the other provisions of the writ, the motion in that respect will be granted, and the clause stricken from the writ.

In all other respects the motion will be denied.

common law claim, of right, a jury. The court held that the offense charged was not a petty or trivial one but one of a grave character, affecting the public at large, and for the trial of which a jury was therefore demandable as of right.

Among the authorities cited in that case were *Com. v. Hunt*, 4 Met. 111, 121, 38 Am. Dec. 846, in which it was said that "the general rule of the common law is that it is a criminal and indictable offense, for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal to the injury of the public, or portions or classes of the community, or even to the rights of an individual; *State v. Burnham*, 15 N. H. 306, 401, where it was held that "combinations against law or against individuals are always dangerous to the public peace and to public security; to guard against the union of individuals to effect an unlawful design is not easy, and to detect and punish them is often extremely difficult;" and *Reg. v. Parnell*, 14 Cox, C. C. 508, where the court observed, that "an agreement to effect an injury or wrong to another by two or more persons is constituted an offense, because the wrong to be effected by a combination assumes a formidable character; when done by one alone it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of a combination."

One of the cases cited in *Callan v. Wilson* is *Com. v. Carlisle*, Bright. (Pa.) 36, 39, 40, in which Mr. Justice Gibson considered the law of conspiracy with care and among other things said: "There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and action, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest or that of any other individual beyond the limits of fair competition; but the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual."

There are many other adjudged cases to the same effect. In *State v. Stewart*, 59 Vt. 273, 286, 59 Am. Rep. 710, it was held after an extended review of the authorities that "a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy. Such combinations are equally illegal whether they promote objects or adopt means that are *per se* indictable, or promote objects or adopt means that are *per se* oppressive, immoral, or wrongfully prejudicial to the rights of others. If they seek to restrain trade, or tend to the destruction of the material prop-

erty of the country, they work injury to the whole people." In *State v. Buchanan*, 5 Harr. & J. 317, 352, 355, 9 Am. Dec. 534, the court of appeals of Maryland adjudged that "every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected, which may be perfectly indifferent, and makes no ingredient of the crime, and, therefore, need not be stated in the indictment." Again: "There is nothing in the objection, that to punish a conspiracy where the end is not accomplished, would be to punish a mere unexecuted intention. It is not the bare intention that the law punishes, but the act of conspiring, which is made a substantive offense by the nature of the object to be effected." In *State v. Glidden*, 55 Conn. 46, the court said: "Any one man, or any one of several men acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its number increases. . . . The combination becomes dangerous and subversive of the rights of others, and the law wisely says that it is a crime." In *Reg. v. Kenrick*, 5 Q. B. 49, Chief Justice Denman said that by the law of conspiracy as it had been administered for at least the previous hundred years any combination to prejudice another unlawfully was considered as constituting the offense, and that the offense consisted in the conspiracy and not in the acts committed for carrying it into effect.

See also *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Old Dominion S. S. Co. v. McKenna*, 80 Fed. Rep. 48; *Caur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 260, 267, 19 L. R. A. 382; 3 Whart. Crim. L. 8th ed. §§ 1337 *et seq.*; 2 Archbold, Cr. Pr. & Pl. Pomeroy's ed. 1830, *note*; 2 Bishop, Crim. L. §§ 180 *et seq.*

It seems entirely clear upon authority that any combination or conspiracy upon the part of these employes would be illegal which has for its object to cripple the property in the hands of the receivers and to embarrass the operation of the railroads under their management, either by disabling or rendering unfit for use, engines, cars or other property in their hands, or by interfering with their possession, or by actually obstructing their control and management of the property, or by using force, intimidation, threats or other wrongful methods against the receivers or their agents or against employes remaining in their service, or by using like methods to cause employes to quit or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and the personal liberty of individuals who, in the exercise of their inalienable privilege of choosing the terms upon which they will labor, enter or

attempt to enter the service of those against whom such combinations are specially aimed. And as acts of the character referred to would have defeated a proper administration of the trust estate, and inflicted irreparable injury upon it, as well as prejudiced the rights of the public, the circuit court properly framed its injunction so as to restrain all such acts as are specifically mentioned, as well as combinations and conspiracies having the object and intent of physically injuring the property or of actually interfering with the regular, continuous operation of the railroad by the receivers.

Some reference was made in argument to the Act of Congress of June 29, 1886, legalizing the incorporation of national trades unions. 24 Stat. at L. 86, chap. 567. It is not perceived that this reference is at all pertinent to the present discussion. That act does not in any degree sanction illegal combinations. It recognizes the legal character of any association of working people having two or more branches in the states or territories of the United States, and established "for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members of the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit." Associations of that character are authorized to make and establish such constitutions, rules, and by-laws as they deem proper to carry out their lawful objects. Those objects as defined by congress are most praiseworthy and should be sustained by the courts whenever their power to that end is properly invoked. What we have said about illegal combinations has no reference to such associations, but only to combinations formed with the intent to employ force, intimidation, threats or other wrongful methods whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seems best.

The principle that a combination or conspiracy of two or more persons to injure the rights of others is illegal, although nothing may have been done in execution of that intent, has been embodied in the statutes of Wisconsin, in which state the present cause is pending. By an act passed April 2, 1887, it was declared that "any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be punishable by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars." And by a subsequent act, passed April 25, 1887, it

was declared that "any two or more employers who shall agree, combine, and confederate together for the purpose of interfering with or preventing any person or persons seeking employment, either by threats, promises, or by circulating or causing the circulation of a so-called black list, or by any means whatsoever, or for the purpose of procuring and causing the discharge of an employé or employés, by any means whatsoever, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished be imprisonment in the county jail for a period of not more than one year, or by a fine of not less than fifty dollars, or by both." 1 Wis. Laws 1887, pp. 299, 380, chaps. 287, 349; 2 Wis. Rev. Stat. §§ 4468a, 4466b.

This legislation was followed by an act published May 8, 1887, providing: "§ 1. Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wageworker, or who shall attempt to so hinder or prevent, shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not more than six months, or by both fine and imprisonment in the discretion of the court. Section 2. Any person who shall individually or in association with one or more others, willfully break, injure, or remove any part or parts of any railway car or locomotive, or any other portable vehicle or traction engine, or any part or parts of any stationary engine, machine, implement or machinery, for the purpose of destroying such locomotive, engines, car, vehicle, implement or machinery, or of preventing the useful operation thereof, or who shall in any other way willfully or maliciously interfere with or prevent the running or operation of any locomotive, engine, or machinery, shall be punished by fine not exceeding one thousand dollars or by imprisonment in the county jail or the state prison not exceeding two years, or by both fine and imprisonment in the discretion of the court." 1 Wis. Laws, chap. 427, p. 463.

It thus appears that combinations and conspiracies by two or more persons, with the intent to injure the rights of others were illegal at common law, and are public offenses in the state where this cause is pending.

For the reasons stated, we are of opinion that the circuit court properly refused to strike from the writs of injunction the words, "And from combining and conspiring to quit with or without notice the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad."

We come next to that clause in the writ of injunction of December 22, 1893, expressly relating to "strikes."

What is to be deemed a strike within the meaning of the order of the circuit court? In the opinion of the circuit judge, made a part of the record, we are informed that at the argument below the definition proffered to the court by the intervenors as one recognized by the labor organizations of the country was as follows: "A strike is a concerted cessation of or refusal to work until or unless certain conditions which obtain or are incident to the terms

of employment are changed. The employé declines to longer work, knowing full well that the employer may immediately employ another to fill his place, also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employé to service, of employing new men, or of forcing conditions under which the old men are glad to return to service under the old conditions."

The learned circuit judge said that a more exact definition of a strike was "a combined effort among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business until compliance with the demand." And he said: "It is idle to talk of a peaceful strike. None such ever occurred. The suggestion is an impeachment of intelligence. All combinations to interfere with perfect freedom in the proper management of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic, or with the lawful employment of others, are within the condemnation of the law. It has been well said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the cessation of labor by the conspirators, but by the necessary prevention of labor by those who are willing to assume their places, and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master; and so, by intimidation and by the compulsion of force to accomplish the end designed."

Under this view of the nature and object of strikes the injunction was directed, generally against combinations and conspiracies upon the part of employés with the design or purpose of causing a "strike" on the lines of railroads operated by the receivers, against the ordering, recommending, advising, approving the employés to join in a "strike," and against the ordering, recommending, or advising any committee or class of employés to "strike" or to join in a "strike."

If the word "strike" means in law what the circuit court held it to mean, the order of injunction, so far as it relates to "strikes," is not liable to objection as being in excess of the power of a court of equity; indeed, upon the facts presented by the receivers and admitted by the motion of the intervenors, it was made the duty of the court to exert its utmost authority to protect both the property in its charge and the interests of the public against all strikes of the character described in the opinion of the circuit judge.

But in our judgment the injunction was not sufficiently specific in respect to strikes. We are not prepared, in the absence of evidence, to hold as matter of law that a combination among employés having for its object their orderly withdrawal in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages, is not a strike within the meaning of that word as commonly used. Such a withdrawal,

although amounting to a strike, is not, as we have already said, either illegal or criminal. In *Farrer v. Olcott*, L. R. 4 Q. B. 602, 612, *Sir James Hannen*, afterwards Lord of Appeal in Ordinary, said: "I am, however, of opinion that strikes are not necessarily illegal. A strike is properly defined as 'a simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend on the means by which it is enforced and on its objects. It may be criminal, as if it be a part of a combination for the purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an engagement entered into between employers and employés, or any other lawful purpose."

In our opinion the order should describe more distinctly than it does the strikes which the injunction was intended to restrain. That employés and their associates may not unwittingly place themselves in antagonism to the court's authority and become subject to fine and imprisonment as for contempt, the order should indicate more clearly than has been done that the strikes intended to be restrained were those designed to physically cripple the trust property or to actually obstruct the receivers in the operation of the road, or to interfere with their employés who do not wish to quit, or to prevent by intimidation or other wrongful modes, or by any device, the employment of others to take the places of those quitting, and not such as were the result of the exercise by employés in peaceable ways of rights clearly belonging to them and were not designed to embarrass or injure others or to interfere with the actual possession and management of the property by the receivers.

In our consideration of this case we have not overlooked the observations of counsel in respect to the use of special injunctions to prevent wrongs which, if committed, may be otherwise reached by the courts. It is quite true that this part of the jurisdiction of a court of equity should be exercised with extreme caution and only in clear cases. *Brown v. Newall*, 2 Myl. & C. 558, 570. *Mr. Justice Baldwin*, in *Bonaparte v. Camden & A. R. Co.*, 1 Baldw. 205, 217, properly said: "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity that never ought to be extended, unless in cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones not coming within well established principles; for if it issues erroneously an irreparable injury is inflicted, for which there can

be no redress, it being the act of a court, not of the party who pays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its own suitors and its own principles to administer the only remedy the law allows to prevent the commission of the act." The authorities all agree that a court of equity should not hesitate to use this power when the circumstances of the particular case in hand require it to be done in order to protect rights of property against irreparable damage by wrongdoers. It is, *Justice Story* said, because of the varying circumstances of cases "that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld." "And," the author proceeds, "there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction of these courts, thus operating by special injunction, is manifestly indispensable for the purposes of social justice in a great variety of cases, and, therefore, should be fostered and upheld by a steady confidence." *Story, Eq. Jur. § 959b.*

In using a special injunction to protect the property in the custody of the receivers against threatened acts which it is admitted would, if not restrained, have been committed and would have inflicted irreparable loss upon that property and seriously prejudiced the interest of the public as involved in the regular, continuous operation of the Northern Pacific Railroad, the circuit court (except in the particulars indicated) did not restrain any act which upon the facts admitted by the motion it was not its plain duty to restrain. No other remedy was full, adequate, and complete for the protection of the trust property, and for the preservation of the rights of individual suitors and of the public in his due and orderly administration by the court's receivers. "It is not enough," the court said in *Boyce v. Grundy*, 28 U. S. 8 Pet. 210, 7 L. ed. 655, "that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity." And the application of the rule that equity will not interfere where there is an adequate remedy at law must depend upon the circumstances of each case as it arises. *Watson v. Sutherland*, 72 U. S. 5 Wall. 74, 79, 18 L. ed. 580, 582. That some of the acts enjoined would have been criminal, subject-

ing the wrongdoers to actions for damages or to criminal prosecution, does not therefore in itself determine the question as to interference by injunction. If the acts stopped at crime or involved merely crime, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involved irreparable injury to and destruction of property for all the purposes for which that property was adapted, as well as continuous acts of trespass, to say nothing of the rights of the public, the remedy at law would have been inadequate. "Formerly," *Mr. Justice Story* says, "courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if, the acts done, or threatened to be done, to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity did not interfere in cases of this sort, there would (as has been truly said) be a great failure of justice in this country." 2 *Story, Eq. Jur. § 928.* So, in respect to acts which constitute a nuisance, injurious to property, if "the injury is of so material a nature that it cannot be well or fully compensated for the recovery of damages, or be such as from its continuance or permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the court by way of injunction." *Kerr, Inj. 1666*, chap. 64, and authorities there cited. This jurisdiction, the author says, was formerly exercised sparingly, and with caution, "but it is now fully established, and will be exercised as freely as in other cases in which the aid of the court is sought for the purpose of protecting legal rights from violation."

In the course of the argument some reference was made to the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." It is not necessary in this case to decide whether, within the meaning of that statute, the acts and combinations against which the injunction was aimed would have been in restraint of trade or commerce among the several states. This case was not based upon that act. The questions now before the court have been determined without reference to the above act and upon the general principles that control the exercise of jurisdiction by courts of equity.

For the reasons we have stated the order complained of is *reversed in part* and the cause is remanded with directions to sustain the motion to strike out, and modify the injunction, to the extent indicated in this opinion.

## WASHINGTON SUPREME COURT.

STATE of Washington, *Appt.*,

v.

James BUTLER, *Respnt.*

(8 Wash. 194.)

**Mere solicitation to commit adultery is not an attempt to commit the crime.**

(February 6, 1894.)

**A**PPPEAL by the state from an order of the Superior Court for Douglas County granting defendant's motion to arrest judgment after a verdict convicting him of an attempt to commit adultery. *Affirmed.*

The facts are stated in the opinion.

*Mr. E. K. Pendergast*, for appellant:

Adultery is a crime in the state of Washington.

2 Hill's Code, P. C. § 198.

Although "adultery" is not defined by the statute, and although adultery is not a criminal offense at common law, yet the statute is

valid, for as far as the definition of adultery is concerned, resort is had, by our courts, to the definition given the term by the ecclesiastical courts.

See 2 Whart. Crim. L. 9th ed. §§ 1717, 1720, 1721. Also *Com. v. Call*, 21 Pick. 509, and note to 82 Am. Dec. 289.

A person may be convicted of an attempt to commit a crime whether such attempt is successful or unsuccessful.

See 2 Hill's Code, P. C. §§ 302, 303.

An attempt to commit adultery is a common-law offense.

*State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105.

A common form of "attempt" is the soliciting of another to commit a crime.

*Ibid.*; 1 Bishop, Crim. L. 7th ed. §§ 767, 768b, 768c, 768d; 1 Whart. Crim. L. 9th ed. § 179; *Stabler v. Com.* 95 Pa. 818, 40 Am. Rep. 656.

Under our statute it is immaterial about the name given to the crime, if the facts set out in the information show that an offense has been committed (whether it be an unlawful "at-

**NOTE.—Criminality of solicitation to crime which is not consummated.**

I. *How far punishable as assault.*

II. *How far punishable as attempt.*

III. *How far punishable as solicitation.*

The numerous attempts which have been made to punish solicitation to crime indicate a popular feeling that such conduct should be punished.

I. *How far punishable as assault.*

In certain cases of sexual crimes the contention has been made that solicitation constituted an assault and was punishable as such, but the courts have uniformly refused to countenance such contention, and have held that mere solicitation was not and could not be an assault.

Thus mere verbal solicitation of a woman for sexual intercourse does not constitute an assault. *State v. White*, 52 Mo. App. 285; *State v. Priestly*, 74 Mo. 24.

Solicitations, persuasions, and arguments are not sufficient to constitute an assault with intent to commit rape. *People v. Fleming*, 94 Cal. 306.

So a charge of attempt to assault by soliciting and persuading is not good. *Rex v. Butler*, 6 Car. & P. 366.

And an indictment for assault with intent to commit rape is not supported by evidence of mere solicitation. *State v. Owsley*, 102 Mo. 673.

II. *How far punishable as attempt.*

The authorities are not so uniform upon the question how far solicitation is an attempt. But the weight of authority is in accord with *STATE v. BUTLER*, that it is not an attempt. The very definition of attempt precludes the possibility of its including a mere solicitation.

A solicitation to set fire to a building is not within a statute providing for the punishment of an attempt to set fire to buildings. *McDade v. People*, 29 Mich. 50.

A solicitation to commit incest is not indictable as an attempt. *Cox v. People*, 82 Ill. 191.

Mere delivery of poison to another and soliciting him to place it where it will kill a third person, is not an attempt at murder. *Stabler v. Com.* 95 Pa. 818, 40 Am. Rep. 653.

85 L. R. A.

See also 47 L. R. A. 108.

Soliciting a person to administer poison to another is not punishable under a statute providing for the punishment of attempts. *Hicks v. Com.* 86 Va. 223.

So delivering poison to an agent with directions to him to cause it to be delivered to another for the purpose of killing him, is not an attempt under the statute. *Reg. v. Williams*, 1 Car. & K. 589, 1 Den. C. C. 89.

So mere solicitation to a child to permit an act of sexual intercourse is not an attempt to commit rape within the provisions of a statute punishing such attempt. *State v. Harney*, 101 Mo. 470.

There are, however, authorities on the other side.

Thus in *Griffin v. State*, 26 Ga. 493, the court held that a solicitation to another to commit larceny is indictable as an attempt.

And in some cases the court has found that the addition of other acts to the solicitation has been sufficient to constitute an attempt.

Thus an attempt to commit a felony is committed by soliciting a person to set fire to the dwelling house of another, and giving him matches for that purpose, besides offering him a reward, although the matches are not used for that purpose, and the offer is rejected. *State v. Bowers*, 15 L. R. A. 199, 35 S. C. 282.

So preparing materials for the commission of an arson, followed by a solicitation and attempt to hire another to commit it, are within a statute punishing an attempt. *McDermott v. People*, 5 Park. Crim. Rep. 102.

So procuring poison and giving it to a child with directions to place it where it will kill a third person, is an attempt to murder. *Collins v. State*, 8 Helsk. 14.

If, as a result of the counsel and encouragement, an attempt to commit arson is made, the one giving the encouragement may be indicted as a principal in the attempt. *Reg. v. Clayton*, 1 Car. & K. 123.

III. *How far punishable as solicitation.*

In some cases solicitation is made punishable by statute.

Thus the Statute 10 Geo. II., chap. 24, § 10, made solicitation to commit murder a capital felony. See *Reg. v. Murphy*, *Jebb*, C. C. (Ir.) 315.



tempt" or an unlawful "solicitation") it is sufficient, and the name of the offense may be omitted altogether, or if the name is given it may be rejected as surplusage.

*State v. Carey*, 4 Wash. 434; *Watson v. State*, 2 Wash. 304.

In *Smith v. Com.*, 54 Pa. 209, 93 Am. Dec. 690, nothing but a bare solicitation was charged, "and the manner of this is not even hinted." This is far different from the case at bar, where it is charged that the solicitation was by direct invitation, by word of mouth, and by offer of the payment of money, etc., and further, an overt act is charged equivalent to the sending of a letter, to wit, the laying on of hands in a lewd and lascivious manner.

The promise of the payment of money to incite the doing of a criminal act is equivalent to the actual tender of the money.

*Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569; *People v. Ah Fook*, 62 Cal. 493; *O'Brien v. State*, 6 Tex. App. 665.

At present all attempts to commit either statutory or common-law felony or misdemeanor are misdemeanors.

1 Bishop, Crim. L. 7th ed. § 728, p. 432, § 772, p. 464; Bishop, Statutory Crimes, 2d ed. § 183, p. 126.

So the Statute 24 & 25 Vict., chap. 100, § 4, makes guilty of a misdemeanor a person endeavoring to persuade to the commission of murder. *Reg. v. Most*, L. R. 7 Q. B. Div. 244, 14 Cox. C. C. 583, 50 L. J. M. C. 116, 44 L. T. N. S. 823, 29 Week. Rep. 760, 45 J. P. 696.

So the Massachusetts Act of 1863, chap. 91, made punishable the enticing or soliciting of a person to leave the commonwealth for the purpose of entering into the military service elsewhere. *Com. v. Jacobs*, 9 Allen, 274.

And it has been held that solicitation to commit arson is an "act toward the commission of" arson within a statute making such act punishable. *State v. Hayes*, 73 Mo. 307.

But under a statute against persuading others to enlist with enemies at war with the country, one cannot be punished unless the incitation is successful, and the person solicited actually enlists. *Republica v. Roberta*, 1 Dall. 89.

Of course in such cases there can be no question and the difficulty comes when the claim is made that solicitation is punishable at common law.

#### Charging solicitation slanderous.

There are a number of cases in which it has been held slanderous *per se* to charge one with soliciting the commission of crime. The earlier cases of this class are not put distinctly on the ground that the charge implies a crime, and are not very valuable authorities upon this question. In fact Lord Holt in the case of *Rex v. Higgins*, 2 East, 5, refused to consider them altogether. The later cases, however, are put distinctly upon the ground that such words charged the commission of a crime and were therefore actionable. They are therefore given here for what light they may throw upon the question.

It is actionable to charge that plaintiff sent a letter to one, and therein willed him to poison his wife. *Pascoe v. Mondford*, Cro. Eliz. 747.

It is actionable to charge that plaintiff would have robbed the house of J. S. if J. D. would have consented to it. He persuaded J. D. unto it. *Levermore v. Smith*, Cro. Eliz. 710.

It is actionable to say of plaintiff that he "went to 25 L. R. A.

There is only one case where a court can arrest the judgment in a criminal action, where the proceeding is by information, to wit:

On the ground that the facts stated in the information do not constitute a crime of misdemeanor.

Laws 1891, § 82, p. 62.

For a criticism on *Shannon v. Com.* 14 Pa. 226, see 2 Bishop, Crim. L. 7th ed. § 184, note.

See section 604 of volume I., of same in respect to hiring one to commit a crime; and for summary, see volume I., section 772a.

No appearance for respondent.

**Scott, J.**, delivered the opinion of the court:

The defendant was charged with attempting to commit adultery, and was tried and convicted. The body of the information is as follows: "Comes now E. K. Pendergast, prosecuting attorney for Douglas county, in the state of Washington, and by this, his information, as provided by law, charges one James Butler with the crime of attempting to commit adultery in the following manner, to wit: He, the said James Butler, on the 3d day of September, A. D. 1892, in the

D's house, and would have had him to rob B's house." *Froude v. Froude*, 2 Lev. 205.

It was held libelous to charge that "T. and one G., agreed to have hired a man to kill me." *Tibbott v. Haynes*, Cro. Eliz. 191. The ground of the decision was that for such conduct T. might be bound to his good behavior.

Charging giving a woman with child money to get a drug to kill the child is actionable for by it the person's credit is impaired. *Cookaine v. Witnam*, Cro. Eliz. 49.

In *Deane v. Eton*, 1 Bulstr. 201, it was held that words spoken of a sheriff that he had placed a woman in a certain person's house to poison her were actionable, as tending to the discredit of the one of whom they were spoken, and a case was cited in which it was held that words charging a woman with having written a letter to another to secure him to poison her husband were actionable.

In *Cardinal's Case* cited in *Eaton v. Allen*, 4 Coke 16, it was held actionable to say, "If I had consented to M. C. T. H. had not been alive", but in *Eaton v. Allen* it was held not actionable to say of one, "he is a brabler and quarreler, for he gave his champion counsel to make a deed of gift of his goods to kill me, and then to flee out of the country." But the ground on which that decision is put does not seem to be very clear. Coke says that it was because the purpose or intent of a man without act is not punishable, while Croke (*Cro. Eliz.* 684), says it was because the first part of the clause is not actionable, and the latter part is merely a qualification of the first, and is, therefore, not itself actionable.

In *Demarest v. Haring*, 6 Cow. 76, an action for slander, in which the charge was a solicitation to commit murder, the court held it to be actionable *per se* on the ground that it was a high misdemeanor for one person to solicit another to commit murder.

So charging one with attempting to bribe another to burn a straw stack is actionable *per se*. *Womack v. Circle*, 29 Gratt. 192.

In *Crofts v. Brown*, 8 Bulstr. 167, a charge against plaintiff that he "keepeth men to rob me" was held not actionable on the ground that it charged no act, but the judges seemed to agree that if the charge had been that he "had hired men to rob me"

county of Douglas and state of Washington, did unlawfully, willfully, maliciously, and feloniously intend then and there to have carnal knowledge of the body of one Caroline Skett, the lawful wife, then and there, of one Julius Skett, who was then alive; and the said James Butler, in pursuance of the said unlawful, willful, malicious, and felonious intent, then and there falsely, wickedly, unlawfully, and maliciously, by means of promises of the payment of money, and by direct invitation by word of mouth, and by laying on of hands by the said James Butler upon the person of the said Caroline Skett in a lewd and lascivious manner, and in the absence of all other persons except the said James Butler and the said Caroline Skett, and by various other means, did solicit and incite, and endeavor to persuade and procure, the said Caroline Skett to have sexual intercourse, then and there, with him, the said James Butler; and the said James Butler was then and there the lawful husband of one certain person other than the said Caroline Skett, and whose true name is to said prosecuting attorney unknown,—all of which is contrary to the statute in such case made and provided, and against the peace and

dignity of the state of Washington." A motion in arrest of judgment, on the ground that the information did not charge any offense, was made, which the court granted, and ordered the defendant discharged. The state appeals.

No brief has been filed by the respondent. From the argument of appellant it seems that some question was raised as to whether adultery is a crime in this state; but without going into the question as to whether our statutes upon this subject, which were enacted while we were under a territorial form of government, were repealed by virtue of certain congressional legislation affecting the territories, we will, for the purposes of this case, take it for granted that they are in force. No statement of facts was settled, and the testimony introduced at the trial is not here. The only question presented and argued by appellant is as to whether solicitation to commit adultery is an attempt to commit adultery. It is not contended that Caroline Skett was a consenting party, or willing to commit the act with the defendant. The information contains no such allegation, and the case stands as though she was an unwilling and resisting party. It is not contended that there

such words would be actionable, for then an act would be charged to have been done.

In *Bray v. Andrews, F. Moore, 63*, the court divided on the question whether or not it was actionable to say that plaintiff "sent his man to kill me."

And it was held not actionable to charge "thou hast hired one W. to kill me," in *Murrey's Case, 2 Bulstr. 203*.

#### *Solicitation a crime in itself.*

There is practical agreement among the courts that solicitation to the commission of some crimes is a crime in and of itself. As to what solicitations come within this rule the courts are not in accord and probably never will be. With reference to some offenses there would be little ground for difference of opinion either that solicitation to commit them was or was not a crime. But with reference to others, individual judgments will differ even as to the advisability of making them statutory offenses.

In *State v. Bowers, 15 L. R. A. 199, 35 S. C. 262*, it is said that soliciting another to commit a felony is a crime distinct from that of attempting to commit a felony.

So it is an indictable offense at common law for one to solicit another to commit a felony or other aggravated offense, although the solicitation was of no effect, and the crime counseled is not in fact committed. *Com. v. Flagg, 135 Mass. 545*. In that case the offense solicited was the burning of a barn.

*Com. v. Willard, 23 Pick. 476*, was a prosecution for unlawfully selling intoxicating liquor, and the question before the court was as to the power to compel the purchaser to testify against the defendant, when he declined to testify on the ground that it would tend to criminate himself. This question is not within the scope of this note for the reason that in it the solicitation was effective but as the reasoning of the court seems to have had much influence upon the discussion of the question in other cases, it seems a necessary part of the law upon the subject. Although the offense was consummated, the court from its reasoning and the cases cited, seems to make no distinction between ineffectual and effectual solicitation. It says: It is

difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offense proposed to be committed, by the counsel, advice, or enticement of another is of a high and aggravated character, tending to breaches of the peace or other great disorder or violence, being what are usually considered *mala in se* or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law. . . . We know of no case, where an act which, previously to the statute, was lawful or indifferent, is prohibited under a small specific penalty, and where the soliciting or inducing another to do the act, by which he may incur the penalty, is held to be itself punishable. Such a case perhaps may arise, under peculiar circumstances, in which the principle of law, which in itself is a highly salutary one, will apply; but the courts are all of opinion that it does not apply to the case of one who, by purchasing spirituous liquors of an unlicensed person, does, so far as that act extends, induce that other to sell in violation of the statute.

The attempt to draw the line between offenses the solicitation to which is indictable and those in which it is not has not been very successful. Many of the cases have been made to turn, as will be seen *infra*, on whether or not they are felonies or misdemeanors, or as suggested in *Com. v. Willard, 23 Pick. 476*, upon whether they were *mala prohibita* or *mala in se*.

But in *Rex v. Butler, 6 Car. & P. 368*, the judge states that he recollects a case in which a person was tried and convicted for soliciting an engraver to make a plate from which false bills of exchange might be made, at a time when the making of such engraving was only a misdemeanor.

In *State v. Baller, 26 W. Va. 90, 53 Am. Rep. 66*, the court says: "Except in those few cases in which the common law makes solicitation to do certain

was any act on the part of the defendant going to an attempt beyond soliciting the said Caroline Skett, and endeavoring to obtain her consent. Is mere solicitation an attempt to commit adultery? It being impossible for one alone to commit adultery, as that requires the co-operation of two persons, it would seem to follow logically that one acting singly could not make an attempt. One person could no more attempt to commit adultery than he could attempt to commit a riot, which, under our statutes, requires the participation of three or more persons. The instances given in the books where the solicitation of another to commit a crime is held to be an offense generally relate to those acts or crimes which can be performed or committed by one person, or where the solicitation to commit the crime is an offense in itself, as distinguished from an attempt. It is urged that a person may be convicted of adultery, or of an attempt to commit adultery, although not a direct participant in the act, by reason of aiding or abetting; but in such a case, where an attempt is charged against such third person, it should appear that there were two persons willing to commit the act of adultery, and that something was done in the way of an

attempt. The cases upon this subject are very limited in number. The case of *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105, cited by counsel for appellant, which was decided in 1828, does not sustain his contention. That case was based upon a letter sent by the defendant to the wife of another man, containing words importing that she had acted libiduously towards the writer, and inviting her to an assignation for adulterous purposes; and it was held that the writing and sending of such letter was libelous. It was further said that it was immaterial to inquire whether the facts stated in the information amounted to a libel, or a solicitation to commit a greater crime, for, if they constituted an indictable offense within the jurisdiction of the superior court, it was sufficient for the purposes of that case. It was not decided that solicitation was an attempt to commit adultery. In *Smith v. Com.* 54 Pa. 209, 98 Am. Dec. 690, decided in 1867, it was held that such solicitation did not amount to an attempt.

A distinction has been sought to be drawn, in this particular, to the effect that solicitation to commit adultery is indictable as an attempt in those states where adultery is a

acts a substantive crime, . . . solicitation to commit a crime is generally not a substantive crime, and never can be properly an attempt to commit a crime."

But that rule does not allow for the growth of the common law which is certainly a thing of growth. In fact, indictments for solicitation to crime are of comparatively modern origin, and in some cases have not been used until quite recently.

The true rule would seem to be that suggested by Judge Lawrence in *Rex v. Higgins*, 2 East, 5, who made the question of indictability depend upon whether or not it is prejudicial to the community. This would have to be determined by the average sense of the community which is the ultimate source of all human law. Of course the average sense of different communities will differ, but no more than on any other question.

#### *Solicitation to murder.*

As stated *supra*, there has for some time been a statute in England making punishable solicitation to murder. But it seems that it was an indictable offense even before the passage of the statute. In *Rex v. Higgins*, *supra*, Lawrence, J., refers to a case, *Rex v. Guy*, in which an indictment was sustained for soliciting to murder.

Under an indictment for murder the evidence was that the accused gave a person poison to administer to another, which was done, but discovered in time so that the victim was not killed. Accused was found guilty, and a majority of the judges held both indictment and conviction proper in treating the prisoner as a principal soliciting, and not as an accessory before the fact. *Reg. v. Murphy*, Jebb, C. C. (1r.) 315.

One sending a letter to a person about to be delivered of a child, advising her to kill it in a certain way pointed out, which letter is intercepted before it reaches the addressee, may be convicted of an attempt to solicit and incite to the murder of the child. *Reg. v. Banks*, 12 Cox, C. C. 393.

Solicitation to commit murder, accompanied by an offer of money as a reward for so doing, is an offense at common law. *Com. v. Randolph*, 146 Pa. 52. In that case the court evaded the effect of the decision in *Smith v. Com.* 54 Pa. 209, 98 Am. Dec. 25 L. R. A.

698 (solicitation to adultery), by making a direct distinction between solicitation to commit felony and to commit mere misdemeanors.

#### *Solicitation to fight a duel.*

Somewhat analogous to the cases of solicitation to murder are those of solicitation or challenge to fight a duel. In many of the states this is made a crime by statute. But it is also held to be indictable at common law.

To challenge another to fight a duel is a misdemeanor. *Rex v. Rice*, 3 East, 551.

So endeavoring to provoke the sending of a challenge is a misdemeanor. *Rex v. Phillips*, 6 East, 464, 2 Smith, 560.

Sending a challenge to fight a duel is indictable. *State v. Taylor*, 1 Treadway, Const. 107, 3 Brew. 243.

In *Com. v. Tibbs*, 1 Dana, 524, the court intimates that an intimation of a desire to fight a duel might provoke such a combat, and so be indictable as a misdemeanor.

The Philadelphia court of criminal sessions held that giving a challenge to fight with fists was indictable in Pennsylvania. *Com. v. Whitehead*, 3 Law Rep. 143.

Sending a challenge to fight a duel is indictable under the North Carolina statutes. *State v. Farrier*, 8 N. C. 487.

#### *Arson.*

In *People v. Bush*, 4 Hill, 183, the court said with reference to an indictment for soliciting arson, that the mere solicitation to commit a felony is an offense, whether having been actually committed or not. But in that case there were facts sufficient, in the opinion of the court, to constitute an attempt.

And the argument in *State v. Bowers*, 15 L. R. A. 199, 25 S. C. 232, tends to show that the court regards solicitation to arson as indictable although the facts in that case were held sufficient to make out an attempt.

#### *Larceny.*

In *Rex v. Higgins*, 2 East, 5, it was held that to solicit a servant to steal his master's goods is a misdemeanor. Lord Kenyon said: "The offense im-

felony, which was the case in the state of Connecticut, while in Pennsylvania adultery was but a misdemeanor. The distinction attempted to be drawn, it seems to us, is not sound in principle. It is based on the ground that in trivial misdemeanors the law will look upon an attempt to commit them as not of sufficient gravity to justify or call for punishment. The decision of the case last cited, however, was not founded upon this distinction, although it recognizes the fact that such a one has been sometimes made, in citing *State v. Avery*. The court evidently entertained a different view. The opinion says: "An attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute or was an offense at common law. These were the words of *Baron Parke* in the case of *Rex v. Roderick*, 7 Car. & P. 795, delivered in the year 1837. They have been adopted by the compilers on criminal law. 1 Russell, Crimes, 46; 1 Archbold, Cr. Pl. 19; Whart. Crim. L. 79, 873." And apparently this had the sanction of the court. The reasons given in that case showing why

solicitation should not be held an attempt to commit adultery apply with equal force whether adultery be a misdemeanor or a felony. These relate to the difficulty of determining what is a solicitation. "What expressions of the face," says the court, "or double entendres of the tongue, are to be adjudged solicitation? What freedoms of manners amount to this crime? Is every cyprian who nods or winks to the married men she meets upon the sidewalk indictable for soliciting to adultery? And could the law safely undertake to decide what recognitions in the street were chaste, and what were lewd? It would be a dangerous and difficult rule of criminal law to administer." If adultery is a crime in this state, it is a felony, and, if solicitation is an attempt to commit adultery, it is a criminal offense here. Pen. Code, § 803. It will be observed that this section makes no distinction between an attempt to commit a felony and an attempt to commit a misdemeanor, except as to the degree of punishment; and the distinction above mentioned could not be recognized

puted to this defendant is of the most serious kind, no less than that for his own wicked gains he solicited and incited a servant to rob his master. And can it be a question in a country professing to have laws subservient to justice and morality, whether this be an offense? So it is, however, that a great number of cases had been cited, some of which, I confess, tended not to enlighten but to perplex my mind. But it is a matter of satisfaction that the more modern cases have gotten rid of a great deal of jargon on the subject. I dismiss at once from my consideration all the cases of actions for slander. Lawrence, J., makes the question of the indictability of the offense depend upon whether or not it is prejudicial to the community. And all the judges agreed that the solicitation was an offense in and of itself, and did not treat it as an attempt.

In that case Lawrence, J., refers to *King v. Broom*, an indictment for soliciting the commission of a felony.

*Rex v. Higgins*, was followed in *Reg. v. Quail*, 4 Fost. & F. 1078.

And *Reg. v. Gregory*, 10 Cox, C. C. 459, L. R. 1 O. C. 77, 36 L. J. M. C. 60, 18 L. T. N. S. 388, 15 Week. Rep. 774.

In *Reg. v. Daniell*, 6 Mod. 99, which was an indictment for enticing an apprentice to leave his master's service, there are some dicta of Lord Holt to the effect that advising one to rob or kill is not indictable, but he also said that persuading a servant to steal his master's goods might be indictable.

But there are statements in *Reg. v. Callingwood*, 2 Ld. Raym. 1116, 6 Mod. 288, which are to the effect that an indictment for soliciting a servant to take away his master's goods must allege that he took them away. In that case, however, it seems that defendant had received the goods, and this statement is explained in *Rex v. Higgins*, so as to deprive it of its weight as authority against the position that solicitation is a crime. The case went off, however, upon another count in the indictment, so that all that was said upon the subject of taking the goods was dicta.

#### Assault.

It is a misdemeanor to persuade, instigate, or incite another to commit an assault and battery, although it is not in fact committed. *United States v. Lyles*, 4 Cranch, C. C. 469.

25 L. R. A.

#### Sexual crimes.

In England the spiritual court had jurisdiction of solicitation of chastity. *Rigaut v. Gallifard*, 7 Mod. 78; *Lockey v. Dangerfield*, 2 Strange, 1100.

And therefore a mere solicitation of chastity was not indictable in the common-law courts. *Reg. v. Pierson*, Balk. 832.

But there were sexual crimes which were indictable.

Thus sending a soliciting letter to a boy inciting him to commit an unnatural crime is indictable, although the letter is intercepted before it reaches him, so that he never reads it. *Reg. v. Ransford*, 13 Cox, C. C. 9.

But solicitation to commit sodomy is not an infamous crime within 4 Geo. IV., chap. 54, § 2, providing for punishment of threats to accuse one of an infamous crime, with a view to extort money. *Rex v. Hickman*, 1 Moody, C. C. 84.

In this country where there is no spiritual court and sexual offenses have become punishable, in the law courts, there is a direct conflict upon the question whether or not solicitation to adultery is indictable.

In Connecticut the court are committed to the opinion that an information will lie against one for soliciting a woman to commit adultery. *State v. Avery*, 7 Conn. 268, 18 Am. Dec. 105.

In Pennsylvania, however, it has been held that an indictment charging that one had "solicited, incited, and endeavored to procure" a married woman to commit adultery is not good. *Smith v. Com.* 54 Pa. 209, 38 Am. Dec. 686. In that case the court distinguishes *State v. Avery*, on the ground that in Connecticut adultery is a felony, while in Pennsylvania it is not. And there is a further distinction made that in the Connecticut case there was the overt act of sending a letter, while in the Pennsylvania case there is no overt act shown.

There is no way of harmonizing these cases except upon the ground that in Connecticut adultery is regarded as a much more serious offense than it is in Pennsylvania, and that solicitation to commit the offense is regarded as prejudicial to the community in the one state while in the other it is not.

In *Reg. v. Tyrrell* [1894] 1 Q. B. 710, it was held to be no indictable offense for a girl under sixteen to solicit a man to a criminal knowledge of her although the act was consummated, and rendered

here, even if adultery was but a misdemeanor under the statutes. It may be well to note, however, what some of the courts and law writers have said relating to the subject under consideration. In the case of *Com. v. Willard*, 23 Pick. 476, it was held that the purchaser of spirituous liquor sold in violation of the statute does not subject himself to any penalty, either at common law, as inducing the seller to commit a misdemeanor, or under the statute. It was said in that case: "It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is that the offense proposed to be committed by the counsel, advice, or enticement of another is of a high and aggravated character, tending to breaches of the

peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law." In the case of *Com. v. Harrington*, 3 Pick. 26, it was held that the letting of a house for the purposes of prostitution, with the intent that it should be thus used, was an offense at the common law. The keeping of such a disorderly house was not a felony, but a misdemeanor of a high and aggravated character tending to general disorderly breaches of the peace, and a common nuisance to the community. There was no statute in Massachusetts relating to it. In Wharton on Criminal Law, 9th ed. § 179, in speaking of solicitations, the author says: "Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they, in themselves, involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public jus-

the man liable to punishment under the terms of the statute.

In Maryland it has been held that a solicitation to a pregnant woman to take drugs for the purpose of effecting a miscarriage is not a misdemeanor. *Lamb v. State*, 37 Md. 524. In that case the argument of both the court and the dissenting judge seems to turn upon the further question of whether or not a solicitation was an attempt.

#### *Avoidance of legal process.*

There is an early English case on this subject against the indictability of such an offense but the ground upon which the decision was placed is not in accord with the reasoning of later cases.

An indictment for persuading an apprentice to withdraw himself from his master so that he would not be taken on a warrant which had been procured against him for an offense which he had committed, was held bad because it did not appear that the apprentice had withdrawn himself from the warrant "and if he did not so, the persuasion was nothing." *Vaughan's Case*, Popham, 134.

#### *Bribery.*

Many kinds of bribery are made punishable by statute, but the principle seems to be in accord with the common-law rule.

Offering money to a counselor of the king for procuring an appointment to office is a misdemeanor at common law. *Rex v. Vaughan*, 4 Burr. 2494.

In *United States v. Worrall*, 2 Dall. 385, the indictment contained two counts. One charged that defendant "wickedly contriving and contending to bribe and seduce" a public officer from the performance of the trust and duty imposed in him, wrote a letter, which is set out, and which offered money if a public contract was awarded to defendant. The other count charged that defendant "wickedly, advisedly, and corruptly did solicit, urge, and endeavor to procure" the officer to give defendant a preference in the awarding of the contract. It does not seem to have been doubted that an offense had been committed, but the court was divided in opinion as to its power to punish it in the absence of statute, but a light sentence was finally imposed upon defendant.

An offer to receive a bribe must be regarded as a solicitation to bribe, and as such is punishable at 26 L. R. A.

common law. *Walsh v. People*, 65 Ill. 53, 16 Am. Rep. 569.

An information will lie for attempting to bribe a voter at an election. *Rex v. Plympton*, 2 Ld. Raym. 1377.

So in *Hefelton v. Lister*, Cooke, 88, a defendant was committed to the fleet for offering money to plaintiff's attorney to go out of court and permit the justification of certain worthless bail whom defendant had offered.

#### *Interference with witnesses.*

An unsuccessful endeavor to prevent a witness from attending to testify before the grand jury is a substantive offense punishable at common law. *State v. Carpenter*, 20 Vt. 2.

Endeavoring to cause a witness to absent himself from a prosecution is an indictable offense. *State v. Keyes*, 3 Vt. 57, 30 Am. Dec. 460.

To solicit a witness recognised to appear in a criminal case to absent himself from the trial is indictable. *State v. Ames*, 64 Me. 363.

In *Rex v. Lady Lawly*, Fitzg. 203, an indictment was sustained against defendant for endeavoring to keep away from a trial a witness material to prove an offense for which a third person was indicted.

An offer to bribe a witness is punishable by statute in Texas. *Jackson v. State*, 43 Tex. 421.

In *Schofield's Case*, Cald. 400, an anonymous case is cited in which it was held a misdemeanor to attempt to suborn a witness.

In *Reg. v. Turvy*, Holt, 364, Lord Holt said: To persuade and solicit to perjury is a crime.

So in later cases it has been held that solicitation to perjury is indictable. *State v. Holding*, 1 McCord, L. 81; *Rex v. Johnson*, 3 Show. 1.

But in *State v. Baller*, 26 W. Va. 90, 53 Am. Rep. 66, the court decided that giving one money to give to a witness to induce him to stay away from a trial, is not an attempt to induce the witness to stay away.

#### *Interference with jury.*

In *State v. Sales*, 2 Nev. 289, the court held that there could be no indictment for attempting to commit embezzlement, but that there might be an indictment for soliciting another to commit the crime.

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tice; as, where a resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged." "But," says the author, "is a solicitation indictable when it is not either (1) a substantive indictable offense, as in the instances just named, or (2) a stage towards an independent consummated offense?" And he says: "The better opinion is that, where the solicitation is not in itself a substantive offense, or where there has been no progress made towards the consummation of the independent offense attempted, the question whether the solicitation is, by itself, the subject of penal prosecution, must be answered in the negative;" and he maintains that solicitation is not an attempt to commit adultery. In speaking of the subject further, he says: "For we would be forced to admit, if we hold that solicitations to criminality are generally indictable, that the propagandists, even in conversation, of agrarian or communistic theories, are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed. It would be hard, also, we must agree, if we maintain such general responsibility, to defend, in prosecutions for soliciting crime, the publishers of Byron's *Don Juan*, of Rousseau's *Emile*, or of Goethe's *Elective Affinities*. Lord Chesterfield, in his letters to his son, directly advises the latter to form illicit connections with married women. Lord Chesterfield, on the reasoning here contested, would be indictable for solicitation to adultery. Undoubtedly, when such solicitations are so publicly and indecently made as to produce public scandal, they are indictable as nuisances or as libels; but to make bare solicitations or allurements indictable as attempts not only unduly and perilously extends the scope of penal adjudication, but forces on the courts psychological questions which they are incompetent to decide, and a branch of business which would make them despots of every intellect in the land. What human judge can determine that there is such a necessary connection between one man's advice and another man's action as to make the former the cause of the latter? An attempt, as has been stated, is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this cannot be affirmed of advice given to another, which advice such other person is at full liberty to accept or reject. Following such reasoning, several eminent European jurists have declined to regard solicitations as indictable, when there is interposed between the bare solicitation, on the one hand, and the proposed illegal act, on the other, the resisting will of another person, which other person refuses assent and co-operation." In a somewhat later work (1 Bishop, *Crim. L.*), a partially contrary view is indorsed. This author goes further. In section 768 he says: "Though, to render a solicitation indictable it is, as in other attempts, immaterial, in general, whether the thing proposed to be done is technically a felony or a misdemeanor, still, as the solic-

iting is the first step, only, in a gradation reaching to the consummation, the thing intended must, on principles already explained, be of a graver nature than if the step lay further in advance." He is of the opinion that solicitation is an attempt to commit adultery as a necessary step or ingredient in the offense. Section 767.

The question is a somewhat vexed one under the conflict of authorities relating to the various phases of the subject. The inquiry in this case is not whether solicitation to commit adultery is an offense in itself of a distinct character but whether it is an offense because it is an attempt to commit adultery. The instances of such solicitation which have been brought to the attention of the courts are but few indeed, extending over a long period of years, but resort can be had to some of a kindred nature, or perhaps, more properly, which have a bearing on some of the principles involved. In the case of *Rex v. Butler*, 6 Car. & P. 368, decided in 1834, sometimes cited, it was said: "An attempt to commit a misdemeanor created by statute is a misdemeanor itself;" citing *Rex v. Harris*, 6 Car. & P. 129. In *Shannon v. Com.*, 14 Pa. 226, it was held that a conspiracy to commit adultery was not an offense; and in *Miles v. State*, 58 Ala. 890, a similar decision was arrived at. Adultery was but a misdemeanor, however, in that state also, though it is not apparent that any importance was attached to this fact in either of these cases. In *Cox v. People*, 82 Ill. 191, it was held that solicitation to commit incest was not an attempt to commit the crime of incest, which was a felony. We have not failed to note the criticism of this case, and the citation it relies on from Wharton's *Criminal Law*, above quoted by Mr. Bishop in his valuable work. But the case also relies on *Smith v. Com.* and *Com v. Willard*, *supra*; and these cases are authority, as we view them, with other authorities herein cited, on the ground that the distinction mentioned sometimes drawn between attempts to commit felonies and attempts to commit misdemeanors, or between attempts to commit grave, as distinguished from trivial, misdemeanors, is not a well-established one, nor well founded, when viewed merely as an attempt, and not as a substantive offense.

Now, it seems to us that solicitation to commit adultery is no part of the act of adultery itself, and consequently cannot be held to be an attempt. What is it? It involves the expression of a desire and a willingness on the part of one person to commit the act of adultery with another, and an attempt to get that person's consent, but no more. Follow it a step further. Suppose the consent of the other person is obtained, and, in pursuance of it, if there is no immediate opportunity to gratify the then mutual desire, a conspiracy is entered into to commit the offense between these persons, which involves the expressed consent and agreement of both of them, and some understanding between them as to when and where the offense shall be committed, and the naming of a propitious time and place to commit it. It seems that this would be much more in the way of an

attempt than the case presented here; and, if that does not amount to an offense or an attempt, how can it be said that such an intention and willingness, coupled with solicitation upon the part of one person only, can

amount to an attempt to commit the offense? We are of the opinion that *the judgment of the Superior Court should be affirmed.*

**Dunbar, Ch. J., and Hoyt, Stiles, and Anders, JJ., concur.**

## UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF NEW YORK.

### WEST PUBLISHING CO. v. LAWYERS' CO-OPERATIVE PUBLISHING CO.

1. A valid copyright may be held by one reporting judicial decisions for his original work published in connection with the opinions and syllabi prepared by the judge.
2. The compiler of a digest has no monopoly of the opinions, decisions, and syllabi prepared by the courts and judges, even though he has previously published them in copyrighted pamphlets.
3. Copyrighted headnotes suitable for use in a digest prepared by the publisher of a series of reports and a digest cannot be used by a subsequent compiler of a digest either directly or by way of suggestion to lighten his labors, except as a guide to verify the accuracy of his work or detect errors, omissions, or other faults.
4. The doctrine of confusion of goods is not applicable to a suit to enjoin the publication of a digest of judicial decisions as an infringement of a copyright, where there is no con-

nection between the pirated paragraphs and those which are the result of original and honest labor.

5. Proof that a digest containing 38,000 paragraphs separate and distinct from each other contains 803 paragraphs which infringe the copyrights of another raises no presumption that the remainder of the work is an infringement.
6. Complainant in a suit for infringement of a copyright of a digest is not relieved of the burden of proving the infringement by the fact that he proves part of his case and convinces the court that it will be difficult to prove the rest.
7. Mala fides cannot be imputed to the compiler of an annual digest of judicial decisions in using copyrighted reports published during the year for the purpose of making such digest.
8. The publication of a digest of judicial decisions will not be enjoined on proof that less than one per cent of the number of paragraphs therein infringe the copyrights of another publisher, as such infringing paragraphs can readily be separated from the remainder of the book.

(November 7, 1894.)

**NOTE.**—This appears to be the first case upon the question of the right to use published opinions for digest purposes, and the authorities bearing upon it are all cited by court or counsel. The novelty of the subject is sufficient to justify the publication of the opinion delivered upon the motion for the preliminary injunction which was as follows:

**Coxe, District Judge:**

I have delayed deciding this motion until the last moment before starting for the New York circuit, and have given to its consideration all the time which could be spared from other matters even more pressing. I have reached the conclusion that the temporary stay should be vacated; that the defendant should enter into a bond, if required to do so, conditioned to keep an account of all digests sold and for the payment to the plaintiff of such damages as the court may award in case the final decree is for the plaintiff; that an injunction should issue restraining future infringements of the plaintiff's copyrights, and also restraining the selling of the present digest to all persons except the defendant's regular subscribers, and those with whom it has contracted to deliver copies by agreements made before the service of these motion papers.

I do not pretend that this order does absolute justice, but I think that it approaches as near to that result as any order that can be made, while the matters in dispute are undetermined. My reasons for this conclusion may be hastily summarized as follows: Both parties compile and publish law digests. The moving papers present some 55 instances of alleged piracy in the defendant's digest. Since the argument, another statement, containing 108 similar instances, has been forwarded; making in all 163 alleged cases of piracy. Some of these employ language so nearly identical with the copyrighted language that the presumption is well-nigh conclusive that it was copied from the plaintiff's books. As to others the contention is made by the defendant that the similarity of language is accounted for by the fact that both paragraphs were

copied verbatim from the opinion of the court. It is impossible to verify this contention without a long, wearisome and complicated comparison, which the court has no time to make, and should not be called upon to make. I am confident that if this examination is sent to a referee it will delay the matter for several weeks at least. The plaintiff having failed to satisfy the court, in view of the defendant's affidavits, that an injunction should issue at once, the court will hardly be justified in permitting the preliminary stay to continue in order that the plaintiff may have time to make a stronger case. If the stay continues it will work great injury to the defendant, for which there is little, if any, redress. Should it subsequently appear that the defendant is right as to a large proportion of the paragraphs in dispute it will be too late to offer any reparation for the serious injury which has been done. The court should be very sure, much surer than it can be at present, that the plaintiff is right before dealing so fatal a blow to the defendant.

The defendant's digest has been issued during the past year in semi-monthly pamphlets which have been regularly sent to the plaintiff, who is a subscriber. Their contents, presumably, were known to the plaintiff several months ago. The plaintiff has waited until the defendant's digest is printed and ready for delivery, and now seeks to have the alleged pirated paragraphs stricken out or the entire volume suppressed. If this action had been commenced two months ago the court would have had ample opportunity to determine with accuracy what is and what is not pirated. The defendant would then have been directed to omit objectionable matter, which could have been done without great injury or expense. Now, however, an injunction will compel the mutilation of a completed edition, and perhaps, a printing of a new edition, with its attending expense and delay. I cannot think that the court will be justified in so harsh a measure where the infringing matter is so small a proportion of the entire work. It is said that the total number of cases digested in defend-

ON final hearing of a suit brought to enjoin the alleged infringement of copyrights by a digest containing about 88,000 paragraphs and to recover damages for such infringement. *Decree making permanent a temporary injunction against 303 paragraphs and denying general injunction asked for.*

The opinion handed down upon the granting of the temporary injunction was reported in 58 Fed. Rep. 265.

**Statement by Coxe, District Judge:**

This is an action in equity to restrain the infringement of five hundred and seven copyrights covering that number of pamphlets, published by the complainant, containing reports of decided causes in the state and federal courts.

A motion for an injunction *pendente lite* having been made the question of infringement was referred to a master who filed a report finding infringement in three hundred and three paragraphs. The master also filed the following opinion, which sufficiently states the facts in controversy.

"This is a reference to the master to hear and determine the issues raised on motion for injunction *pendente lite* in a copyright case and to report the portions of defendant's publications that infringe the copyright of complainant.

"There is practically no dispute on the facts alleged in regard to publication and copyright, the question of piracy being the real issue.

"The complainant, the West Publishing Company, assumes to report decisions of all the courts of last resort (and some of the intermediate courts) in this country in what is called the National Reporter System. The

system is made up of various parts or reporters, the United States being divided territorially into convenient and appropriate districts for the purpose, about a dozen in number. Each reporter is published weekly in pamphlet form, and contains the current opinions of the courts of its respective district, preceded by headnotes and preliminary statements. These opinions are obtained by complainant from official sources at great expense, and with few exceptions are by far the earliest publication thereof. Ninety per cent at least of the opinions published are published for the first time in complainant's system, and in some cases, as in this court, it is practically the only publication made.

"The original work of complainant in these weekly parts—that is, the headnotes and preliminary statements (excepting those prepared by the courts or foreign reporters)—and all other matter therein, except the opinions, are copyrighted. Taking the headnotes of these weekly parts as a basis, complainant constructs and publishes a digest in monthly parts, which monthly parts, with additions of selected cases and references to official reports, go to make up its Annual Digest—a single volume, called the 'American Annual Digest.' The volume for the year 1892 (with the monthly parts and reporters on which it is based) is the one in suit, the digest year being from September to September.

"The defendant, the Lawyers' Co-operative Publishing Company, publishes, among other publications, the General Digest of the United States, a work of the same purport as the American Annual Digest, and compiled in the main from parts which they publish semi-monthly, the General Digest Annual for the year 1892

ant's book is 19,000. The disputed paragraphs, therefore, assuming that all are pirated, amount to less than 1 per cent. It is apparent that the damage to the defendant, should an injunction issue as prayed for, would be entirely out of proportion to the damage which the plaintiff will suffer if the preliminary writ is refused. The plaintiff has already supplied its customers with the digest published by it for 1892. It has had no interference from the defendant, and it cannot be maintained, therefore, that the defendant's digests are likely to displace any of the plaintiff's digests or entice away any of the plaintiff's customers.

It is the duty of the court in all these cases to take into consideration the situation of both parties, and not to issue the writ except in the plainest cases, where the result will be irreparable injury to the defendant without corresponding advantage to the plaintiff. It is always wiser, in such cases, to wait for the final proofs.

In *Sargent v. Seagrave*, 3 Curt. C. C. 553, 557, Judge Curtis said: "The court looks to the particular circumstances to see what degree of inconvenience would be occasioned to one party or the other by granting or withholding the injunction."

In *McNeill v. Williams*, 11 Jur. 844, the vice-chancellor said: "The court has, of late years especially, given great weight to the consideration of the question, which of the two parties to the dispute is more likely to suffer by an erroneous or hasty judgment of an interlocutory nature against them; and to the consideration also of the very possible if not probable effect which an injunction may have to the defendant's prejudice in an action. I have in this case to weigh, on the one hand, the suspicious nature of the defendant's case, for suspicious, I confess, upon the present materials, it appears to me to be, and the probable mischief from not interfering at present in his favor, if he should ultimately prove to be right; and, on the other hand, the possibility—the rational possibility—for I am unable to bring myself to deny the rational possibility—that the plaintiff may be right. I have also to consider the mischief generally that

may be done by interfering in this stage of the cause if the defendant shall ultimately appear to be right, including particularly the possible prejudice which may be created against them in an action by the existence of an injunction. Upon the whole, I think the ends of justice in this case will be better answered by abstaining from granting the injunction at present."

In *Brumwell v. Balcomb*, 3 Myl. & C. 782, the chancellor said: "It is obvious that it is the interest of both parties that the injunction should be dissolved; for if, in consequence of piracy, the defendant is, in fact, selling the plaintiff's work, the plaintiff will have the profits of the publication; but if, on the contrary, no piracy has been committed, a very great hardship is inflicted on the defendant."

In *Spottiswoode v. Clarke*, 3 Phil. Ch. 157, the facts were in many respects similar to those in the case at bar. The chancellor said: "But the greatest of all objections is that the court runs the risk of doing the greatest injustice in case its opinion upon the legal right should turn out to be erroneous. Here is a publication which, if not issued this month, will lose a great part of its sale for the ensuing year. If you restrain the party from selling immediately you probably make it impossible for him to sell at all. You take property out of his pocket and give it to nobody. In such a case, if the plaintiff is right, the court has some means at least of indemnifying him, by making the defendant keep an account; whereas, if the defendant be right, and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order in that event will be to commit a great and irreparable injury."

See also, *High on Injunctions*, § 1093; Walker, *Patents*, § 702; *Drone, Copyright*, pp. 517, 518.

It is thought that the plaintiff will be fully protected if its copyrights are respected in the future and damages are paid for whatever injury it may have sustained from past infringements, and especially so, if the defendant is enjoined from selling its digests to new customers until it has proved its innocence of the present charge.



being the volume claimed by complainant to contain pirated matter in infringement of complainant's copyright.

"The defendant is a subscriber to the various reports of complainant, and receives them in the usual weekly parts, and in these publications are found at least nine tenths of the opinions used by them from which their digest paragraphs are claimed to be written. These weekly parts are distributed on their receipt among the defendant's several editors who from these pamphlets write the digest paragraphs which appear first in the semi-monthly parts of the General Digest and thereafter in the Annual.

"From the testimony of the defendant it appears that its digest paragraph writer, when using the reporter, has before him in his work the syllabus and preliminary statement prepared by complainant, the same being directly followed by the opinion, and that without referring to the syllabus in any manner he constructs his digest paragraph from the opinion and that alone.

"Defendant's publication is principally the work of eight editors, who have each been sworn and given similar testimony to the effect that they had instructions never to consult the headnotes of other publications, unless the same were made by the court; that they never used in any way the headnotes of complainant's publication, and some of them that they never read the headnotes either before or after they had finished their work, even for comparison. One of the editors, however, Mr. Coffin, in his deposition stated that he invariably read the syllabi of complainant the first thing, but he made no use of them in his work; and Mr. Greenhoot that he sometimes did read them and sometimes not; but with two exceptions, where he could not find different expressions, he never made use of complainant's headnotes. Another, Mr. Hill, testified that after he had formulated his headnotes he sometimes compared his work with complainant's for curiosity merely.

"These editors in reply to questions as to the average amount of work they are capable of performing in a day in writing digest paragraphs from the opinions in complainant's publications, state variously, but it is between twenty and forty cases in a day's work; Mr. Greenhoot testifying that he averaged between eight and ten in an evening's work; Mr. Rich and Mr. Herrick that they averaged between thirty and forty in a day, and Mr. Haviland between twenty and thirty in a day.\*

"In reply to this line of testimony complainant produces as many editors of its own staff, who testify to the impossibility of doing in a day the amount of original paragraph writing claimed by defendant's editors. Their testimony shows that from their experience the average is between four and seven cases a day, but that in preparing paragraphs from the headnotes of their own reporters for use in the digest they could then do between thirty and

forty cases in a day. Mr. Appleton, one of the complainant's principal editors, testifies that defendant's editor Greenhoot, who testified that his capacity was eight to ten cases in an evening's work, when employed by complainant in 1889 and for several years prior, was unable to do more than three cases in a day's work of eight hours.

"The only witness produced not in some way connected with the parties was Mr. Sickels, the New York Court of Appeals reporter, who was called by complainant. In a number of respects he substantiated the testimony of complainant's editors. He testified mainly from his own extensive experience as a reporter, stating that he considered himself a rapid worker; that he averaged in reporting but little more than four cases a day; that if a digester had before him and utilized the headnotes of other writers it might be possible to do as many as twenty to thirty cases in a day's work; otherwise, he did not deem it possible to average more than from four to six cases in a day.

"With these facts set forth complainant introduces and points out to the master some five hundred paragraphs taken from defendant's General Digest with the corresponding paragraphs from complainant's reporters and digesters from which it is claimed defendant's paragraphs are pirated. These represent, of course, but a small portion of the complete work, which consists of some thirty-eight thousand digest paragraphs, and complainant insists that many more can be presented, but that it is unable to do so within the time limited, and the examples furnished are sufficient to show for the purposes of this motion.

"The master has examined with much labor and care all the opinions from which these headnotes have been taken and made comparison with headnotes of the same cases wherever they have since been made by official reporters.

"The identity between the paragraphs of most of the examples on first inspection is, indeed, remarkable. When taken in connection with the opinions, however, some are found to be simply direct quotations therefrom; some in which a portion are quotations from the opinion and the original work is entirely different, and some expressing in similar terms and phrases quite a different idea. Such cases where there is nothing else indicating piracy the master has first endeavored to eliminate.

"The cases in which errors have been copied, of which there are a number, are, as a rule, sufficient unto themselves as a proof of piracy.

"The cases in which clearly original language and construction are followed—not phrases and modes of expression common to every digester, but such original language or construction that it does not seem that two reporters separately digesting the same opinion could possibly use with such marked similarity—these there has been no hesitancy in reporting.

"In a number of cases it seems as though defendant's digester, after reading the headnotes of the reporter, had gone through the opinion to see if the wording of the headnote was to be found therein. If it were found there, even in disconnected phrases, he used it also, making use of the original labor of selection and ar-

\*To demonstrate their ability to do this work at the rate stated, an offer was made of an actual test of work by defendant's editors in the presence of the master, and under such conditions as he thought proper to impose, but this was opposed by the complainant, and the master did not allow the demonstration.—[Ed.]

range ment. If the language were not there *in hac verba*, he employed synonyms, and, if necessary, resorted to rearrangement and transposition.

"In many instances reported the paragraphs are practically verbatim copies, and it seems as though rearrangement has been resorted to to make the paragraphs comply with the different theories on which the two digests are based, complainant using the concrete method, endeavoring to express the actual point decided with reference to the actual facts, so as to distinguish a case from others, while defendant uses the abstract method, giving the principle of law decided and endeavoring to make it general.

"That this cause is an anomaly in copyright litigation is in some respects true, but the contention that subsequently the case of *Myers v. Callaghan* in no wise furnishes a precedent for its determination can hardly be sustained. In some respects the cases are analogous, and, in so far as they are, a precedent is certainly furnished. In both cases complainant's publications are used by defendant in editing or digesting; in both defendant's editors state their work to be independent; in both, in the majority of cases, there is the appearance of independent labor without regard to complainant's work, yet in both it is apparent that complainant's work has been used, and, in some instances, words and sentences copied without change; in others changed in form only. Judge Drummond, in his opinion (5 Fed. Rep. 726), afterwards concurred in by the Supreme Court, says: 'The conclusion is irresistible that, for a large portion of the work performed in behalf of the defendants, the editors did not resort to original sources of information, but obtained that information from the volumes of Mr. Freeman (the complainant). Undoubtedly it was competent for an editor to take the opinions of the Supreme Court, and possibly from the volumes of Mr. Freeman, and make an independent work; but it is always attended with great risk for a person to sit down, and with the copyright of a volume of law reports before him, undertake to make an independent report of a case. It is not difficult to do this, going to the original sources of information—to the decisions of the court, the briefs of counsel, the records on file in the clerk's office—without regard to the regular volumes of reports. Any one who has tried it can easily understand the difference between the headnotes of two persons, equally good lawyers, and equally critical in the examination of an opinion, where they are made up independent of each other; and, bearing in mind this fact, it seems to be beyond controversy that, although in many, and perhaps most, instances there is a very considerable difference between the headnotes of the defendant's volumes and those of the plaintiff, the latter have been used in the preparation of those of the former.'

"The simple question for the master is, Are these digest paragraphs presented the work of independent labor or not?

"There is little doubt but that in almost every instance defendant's digester read the opinion, and there is no testimony to the contrary, and it may be that defendant's digesters are more rapid workers than complainant's, or

that one may construct more original digest paragraphs than syllabi in a given time; but that many of complainant's paragraphs have been more or less utilized by some of defendant's digesters cannot be gainsaid. Neither can it be said that both parties have gone to the same sources of information in the same sense that the expression is generally used.

"No fair-minded person can compare the headnotes in pamphlet No. 12, of Volume 29, Pacific Reporter (and there are other like cases),\* with the digest paragraphs made by defendant's editor from the opinions in this number, and published in the General Digest, and doubt for a moment piracy, and particularly when the digester had before him headnotes already prepared, even when his testimony goes to show that no use has been made of the headnotes.

"It is claimed by defendant that its work is the result of independent labor, and that the resemblances are simply innocent coincidences. In some of the examples, perhaps, this is so; in others, certainly, it is not; and the master's report sets out in detail such cases that seem to be from themselves, in connection with the various opinions, clearly cases of piracy. In some cases where doubt has arisen as to the possibility of the work having been performed without reference to complainant's headnotes, this being a preliminary and not a final hearing, defendant has been given the benefit of the doubt.

"It is the duty of the master to report the facts and to identify such of the paragraphs presented to him as appear to have infringed the copyright. It does not seem to be within the province of the master to go further than this, though the briefs suggest it, and it seems that the report presented herewith fulfills all the requirements.

"May 22, 1893.

"W. S. Doolittle,  
Master."

**Mr. Rowland Cox, for complainant:**

Defendants entered our field and took our grain and ground it into flour.

As any separation of that which they own from that which they have stolen is impossible, their book from cover to cover, is piratical.

When the bill of complaint was filed defendant answered unreservedly, without the semblance of caution, that in no form or manner had it been guilty of piracy.

An examination of the master's report will satisfy the court that concerning the charge of piracy there is not the beginning of any room for difference of opinion.

"If," said *Vice-Chancellor Wood*, "the defendant had absolutely denied having received any assistance from the plaintiff's work, the court would have had a plain course, the *animus furandi* being made out."

Drone, Copyright, 403, and cases cited.

The defendant, in its purpose to save labor and expense by the use of our publications,

\*Number 12 of volume 29 Pacific Reporter was one of a small number of books which contained most of the cases in which infringements were found, and which during a time of extra hurry were sent to be digested by persons at a distance, and who were not on the regular editorial staff of defendant.—[Ed.]

did not intend to copy a single original word therefrom. Probably it did not intend to recognize the conceptions of complainant's editors as found in their compositions. It may even be true that defendant's editors studiously endeavored to avoid the adoption of what they considered complainant's original matter. Their object, the theory of their scheme, contemplated the appropriation of neither words, nor ideas, which were original with complainant.

A digest is nothing more than an index, which is accurate or inaccurate to the extent that it hits or misses the operation of the judicial mind.

The ideas, propositions, and suggestions of every opinion are, being understood, necessarily the same to every mind. The court reaches a conclusion, and the conclusion is the same thing to all men. When it is embodied in a headnote, there is no original thought of any kind. The reporter simply formulates a statement or definition of the conclusion. The thought that is back of his headnote, the idea which he clothes in words, is always and under all conditions a matter of public right.

In this way a digest is neither more nor less than a road-book or directory; and as far as the defendant made use of the same ideas that we did, apart from its omission to seek and find for itself, it committed no wrong.

The defendants received each week ten of complainant's publications. [Reporters.]

These numbers the defendants received and used. They did not use them for the purpose of reproducing, in disguised form, the touch and finish, which constitute the personal equation of their contents. They used them merely to save time and labor, to save themselves the necessity of going to the original sources of information, and to reduce the outlay of time and thought which the task before them, if honestly executed, involved.

Their use was of the most comprehensive character.

They used, in brief, every copy-righted part of every copy-righted number [Reporter] as it came to them, and all these things they used for the purpose of producing a book [Digest] which would compete in the market and take the place of our book. [Digest.]

From the language of the opinions they took whatever they saw fit on the assumption that there was no possible impropriety in their doing so.

The general test of piracy is the same as in the case of compositions wholly original. The principle is well established that the later compiler can escape the penalty of piracy only by going to the common sources for materials and information, and producing a work by his own labor.

Drone, Copyright, 417.

All original materials from which maps are made are open to all. But no one has the right to avail himself of the enterprise, labor, and expense in the ascertainment of those materials, and the combining and arrangement of them, and the representing them on paper.

*Farmer v. Calvert Lithographing, Engraving & Map Pub. Co.* 1 Flipp. 223.

The defendant has been most completely mistaken in what he assumes to be his right to

deal with the labor and property of others. In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done.

He is not entitled to take one word of the information previously published without independently working out the matter for himself so as to arrive at the same result from the same common source of information; and the only use he can legitimately make of a previous publication is to verify his own calculations and results when obtained.

"The defendant could not take a single line of the plaintiff's directory for the purpose of saving himself labor and trouble in getting his information."

*Kelly v. Morris*, L. R. 1 Eq. 701.

The later compiler of a rival publication must go to the common sources for materials, and his composition must be the product of his own labor. If, to a material extent, he copies from the protected work, or appropriates the results there found, it is piracy.

Drone, Copyright, p. 394, and numerous cases cited.

In all cases, he must obtain the information at his own expense and by his own labor, independently of the copyrighted work which may be used only as a guide.

Drone, Copyright, p. 396; *Banks v. McDivitt*, 18 Blatchf. 166.

Where there has been an intermingling of that which is lawful with that which is unlawful, in such a way that the two cannot be separated, the wrongdoer will be made to bear the consequences of his act and the whole book will be treated as a piracy.

Story, Bailm. ¶ 40; 2 Bl. Com. 205; *Mawman v. Tegg*, 2 Russ. 385; *Callaghan v. Myers*, 128 U. S. 666, 32 L. ed. 562.

There can be no doubt that by using type of different sizes an examination of the opinion was greatly facilitated. The particular arrangement represented complainant's labor and outlay, and is protected by the law of copyright.

It is not material to inquire to what extent the defendant availed itself of the subject of the copyrights. That which was copyrighted to some extent assisted the defendant in every paragraph it made.

*Myers v. Callaghan*, 5 Fed. Rep. 733.

The things done by complainant in connection with its publications supplemented and added to and gave a new character to the original sources of information. The crude metal was molded into an efficient tool. The iron was shaped to form a hammer, and was provided with a handle. The defendant had the right to go to the public mine where the iron was found, and take at will; but it took our hammer—took it by the handle in its hand, and used it.

If we accept the statements of the defendant and its editors—that, using our publications, they were able to digest thirty or more cases a day—and the statements of complainant and its editors that working as they worked, from original sources, only five or six

cases a day could be disposed of—there is no escape from the conclusion that the things which represented our labor and outlay, and which were covered by our copyrights, were used by the defendant.

The doctrine which is involved is not unlike that applied in *Falk v. Howell*, 37 Fed. Rep. 202; *Schumacher v. Schwencke*, 25 Fed. Rep. 466.

The defendant has been guilty of piracy, and it has used the copyrighted publications and by using them it has accomplished what was impossible by using the original sources. It has had the profit and advantage of our labor and outlay; but it challenges us to point out exactly and in detail just what it has stolen. It is in possession of the fruits of our labors. It got for nothing what cost us many thousands of dollars and years of industry and it got it by using our copyrighted publications.

*Callaghan v. Myers*, 128 U. S. 666, 32 L. ed. 562.

As soon as piracy is established the *onus* is shifted and the pirate is called upon to explain, and unless he solves the difficulty the presumption is that all he has done is the work of a pirate and to be condemned as such.

Drone, Copyright, p. 428.

The defendant employed its editors to work "by the case." It laid complainant's syllabi open before them. The presumption is that it knew the character of those it employed. In brief, it selected "a negligent agent" and furnished him with the tools which would make his negligence a sure source of injury to the complainant. And, when the "negligent agent" is convicted, it refuses to make any effort to segregate his piratical paragraphs; in effect insisting upon using them. Under such circumstances, its conduct admits of no justification, and all that it has done must be condemned.

*Kelly v. Morris*, L. R. 1 Eq. 702.

In view of common errors the presumption is against the book that contains them.

Drone, Copyright, p. 429.

When a considerable number of passages are proved to have been copied by the copying of the blunders in them, other passages which are the same with passages in the original book must be presumed *prima facie* to be likewise copied, though no blunders occur in them.

*Mawman v. Tegg*, 2 Russ. 394.

The law by which the case is governed is expounded by the Supreme Court in *Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 550.

*Mr. Peyton Boyle*, Vice-President of complainant, also filed a brief, of which the following is an abstract:

Defendant's Digest was published in combination with a series of selected cases to be used as a substitute for complainant's "National Reporter System."

In nearly every instance a digest of a set of reports is intended to be used as a key to such reports. The digest in such case facilitates the use and stimulates the sale of the reports, and is a direct benefit to the owner of the reports. In this case defendant's digest is not intended to be used as a key to the reporters digested, but to be used as a substitute for those reporters. In order to effect this purpose, defendant's digest is published in combination with defendant's reports of selected cases, known as the Lawyers Reports Anno-

tated, which digest and reports constitute in their entirety a single reporting scheme or system of current reports and digests.

The Lawyers' Reports Annotated report all the "generally valuable" cases in full, and the Digest gives abstracts ("safe for citation without full report") of all the cases reported by complainant. This system is as comprehensive in its scope as the "National Reporter System," though less full in detail.

The system of the defendant, as in the case of the complainant, is also published in the first instance in pamphlet parts, and in most instances in advance of the publication of the official reports.

It is clear from the reasoning in *Sweet v. Benning*, 16 C. B. 482, that a digest infringes the copyrights of the reports digested, when, as in this case, it is published in a form which renders it an effective substitute for such reports.

*Mr. William F. Cogswell* for the defendant.

Defendant having substituted new paragraphs for those condemned by the master immediately upon the filing of his report, counsel for defendant confined his argument to the public right to use published opinions, and to defendant's fair use of complainant's publications, in digesting, without attempting to controvert the master's finding of 303 infringing paragraphs.

*Coxe, J.*, delivered the following opinion:

It must be regarded as settled law in the United States that an author has no exclusive property in a published work except under some act of congress, and then only when he complies with the provisions of the act. *Wheaton v. Peters*, 33 U. S. 8 Pet. 593, 8 L. ed. 756; *Banks v. Manchester*, 23 Fed. Rep. 143, affirmed 128 U. S. 244, 252, 32 L. ed. 425, 429.

A reporter can have no copyright in the opinions delivered by the court or in the syllabi prepared by the judges. *Wheaton v. Peters*, and *Banks v. Manchester*, *supra*; *Banks v. West Pub. Co.* 27 Fed. Rep. 50; *Nash v. Lathrop*, 142 Mass. 29.

A reporter may acquire a valid copyright for the headnotes, footnotes, tables of cases, indexes, statements of facts and abstracts of the arguments of counsel, where these are prepared by him and are the result of his labor and research. So he may have a copyright for a digest or synopsis of judicial decisions and the selection and arrangement of cases relating to a particular branch of the law. The copyright protects only the original work of the reporter. *Myers v. Callaghan*, 5 Fed. Rep. 726, 10 Biss. 139, 20 Fed. Rep. 441, affirmed, *Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 550; *Connecticut v. Gould*, 34 Fed. Rep. 319; *Gray v. Russell*, 1 Story, C. C. 11; *Davidson v. Wheelock*, 27 Fed. Rep. 61; Drone, Copyright, 159, 160.

The compiler of a digest has no monopoly of the opinions, decisions, and syllabi prepared by the courts and judges, even though he has previously published them in copyrighted pamphlets. These opinions, decisions, and syllabi are free alike to all digesters. But when notes suitable for use in a digest have been prepared from these common sources of information and properly secured by copy-

rights a subsequent compiler in the same field is not permitted to avail himself of this original work and save time and labor for himself by copying from the property of others. He may use the copyrighted matter as a guide in the preparation of his own work to verify its accuracy, or detect errors, omissions or other faults, but in all other respects he must investigate for himself. He may take the original opinions and prepare from them his own notes, "but he cannot exclusively and evasively use those already collected and embodied by the skill and industry and expenditures of another." *Banks v. McDivitt*, 18 Blatchf. 163, and cases cited; *Gray v. Russell*, *supra*; *Drone*, Copyright, p. 394.

Where the pirated portions can be separated from the portions not subject to criticism the injunction should go, not against the entire work, but against the infringing portions. The doctrine of "confusion of goods" which has sometimes been invoked to suppress an entire publication is not applicable where the infringing portions cannot be pointed out and separately condemned. *Banks v. McDivitt*, *supra*; *Lawrence v. Dana*, 4 Cliff. 1, 84, 85; *Mawman v. Tegg*, 2 Russ. 385; *Greene v. Bishop*, 1 Cliff. 186, 203; *Little v. Gould*, 2 Blatchf. 165, 166; *Story v. Holcombe*, 4 McLean, 806; *List Pub. Co. v. Keller*, 80 Fed. Rep. 772; *Farmer v. Elsner*, 33 Fed. Rep. 494; *Drone*, Copyright, pp. 527, 530.

Apply these principles to the case at bar.

The complainant has valid copyrights for the original work prepared by its editors and published in the various pamphlets composing its systems of reports.

The opinions of the judges and the syllabi prepared by them are not covered by the complainant's copyrights and these the defendant, considering the matter from a purely legal point of view, had a perfect right to use. The defendant had a right to copy the opinions, decisions, and syllabi prepared by the court from the complainant's publications, or from any other source, and use them precisely as other matter which is free to the public. The defendant could lawfully prepare notes, abstracts, and paragraphs from these free sources of information, collect them and publish them in a digest of its own. In doing this its editors had no right to avail themselves of the complainant's original work. They were forbidden not only from copying the work of the complainant's editors, but also from using that work in any way to give them suggestions or to lighten their labors. In short, they were not at liberty to appropriate directly or indirectly the matter which the complainant has protected by copyrights.

The master to whom the question of infringement was referred has, with great diligence, compared the suspected paragraphs pointed out by the complainant with the alleged corresponding paragraphs in the copyrighted works and has reported three hundred and three instances of piracy.

The court has examined the master's report sufficiently to be convinced that it is a conservative report and, without reviewing his work in detail, accepts it as establishing the fact that the above number of paragraphs infringe.

As the defendant's digest contains about thirty-eight thousand paragraphs the infringement thus established is considerably less than one per cent. At the trial for the first time complainant presented some seven hundred additional paragraphs which it asserted to be infringements. Assuming as to these that the same proportion of pirated paragraphs should be established as in those submitted to the master, still the infringing matter would amount to less than three per cent. In this connection it should be remembered that the complainant has had the defendant's book in its possession for two years. As the result of two years' examination, assuming that the court should find with the complainant upon every one of the paragraphs pointed out by it as infringing its copyrights the total pirated matter would amount to less than four per cent. It must, of course, be conceded that a large part of the defendant's book, having been compiled from other publications and from syllabi prepared by the courts, is not covered by the complainant's copyrights.

The situation then is this:

Matter proved to be piratical about five eighths of one per cent.

Other designated matter, alleged to be piratical, between one and two per cent.

Matter not affected by the complainant's copyrights about twenty-eight per cent.

Regarding the remaining portions of the work,—about seventy per cent,—no direct proof is offered.

The defendant contends that this seventy per cent must be presumed to be innocent until proved to be guilty. The complainant, on the contrary, insists that it must be presumed fraudulent from the proof already adduced.

The complainant argues that the defendant's editors had the copyrighted books before them when they prepared their digest paragraphs; that they are shown to have done five times more work than other editors engaged in like occupation; that they are proved to have pirated three hundred and three paragraphs and the presumption is that the entire book is so tainted with fraud that it should be suppressed.

The court is of the opinion that in a work like a digest which has the general characteristics of a directory, an index or a road-book, where each paragraph is separate and distinct from every other and can be removed without in any way destroying the effect of the remaining paragraphs, it would be establishing a most dangerous precedent to condemn the entire work when less than one per cent is proved to be piratical. This would be substituting conjecture for proof and in a case, too, where the proof is accessible.

Where infringement exists in copyright cases it is usually susceptible of proof. There are always some indications which disclose the presence of the pirate. The court does not understand that this is denied, but it is said that it will consume a decade to examine and compare all the remaining paragraphs and that the complainant should not be required to enter upon such task.

Bluntly stated the proposition is this: A party, upon whom the *onus probandi* rests, is entitled to a decree for the entire relief demanded if, instead of proving his case, he

proves a part and convinces the court that it will be difficult to prove the rest.

Were this the case of an ordinary book like a history or a novel and the court were convinced that though disguised the plot and plan of the work had been appropriated and the characters reproduced, though under different names, there would be no hesitation in condemning the entire work.

Here, on the other hand, there is no connection whatever between the pirated paragraphs and the paragraphs which are the result of original and honest labor. The former can be removed and the complainant's rights protected and without depriving the defendant of the fruits of the work which is fairly its own. It is not a case where the doctrine of "confusion of goods" is applicable because the complainant's goods can be separated from the defendant's; it will take time, but it can be done.

If the complainant is given the sweeping decree asked for the defendant will be prevented from publishing even the twenty-eight per cent of matter to which the complainant does not pretend to lay claim. If the defendant should eliminate from its work every paragraph which the complainant has pointed out as infringing, the remaining thirty-six thousand paragraphs could not be sold by the defendant. Indeed, should the defendant issue a new edition with every paragraph eliminated which has been designated as open to the slightest suspicion of piracy it would still be under the ban of such a decree. The court cannot believe that such a decree would be just.

Though the defendant, through some of its editors, has been guilty of inequitable conduct in appropriating to its use the result of the complainant's labors the punishment it should receive should not be out of all proportion to the offense. To charge the defendant with thirty-eight thousand piracies because it is shown to be guilty of three hundred and three is pushing the law of presumptive evidence far in advance of any reported case.

Equity seems to demand that the defendant be permitted to use what is honestly its own and restrained from using what it has taken from the complainant. By such a decree the rights of all will be preserved.

The learned counsel for the complainant argue the cause as if the defendant was, in effect, reproducing the copyrighted pamphlets of the complainant and was endeavoring to supersede and supplant these publications. It is thought that such is not the case. The defendant does not publish reports, except of selected cases, and the bill does not charge that these infringe the complainant's copyrights. The book with which the defendant's digest actually competes is the complainant's digest which is issued after the defendant's.

The defendant's digest in no way supplants the copyrighted reports. Indeed, by advertising them extensively, it would seem that it must assist in extending their sale.

It appears to the court that this is an import-

ant distinction which should not be lost sight of. It is not a case where, as in *Callaghan* and *Myers*, the defendant's books were published in order that they might be substituted for the complainant's books; where the paging, order of cases, statements of facts, etc., were intended to be similar. In short it is not a case where in every volume there are unmistakable indicia that the defendant worked from the copyrighted portions of the complainant's volume and intended to produce an almost identical book. In a case like *Callaghan* and *Myers* the fact that the infringer worked from the copyrighted books is, of course, a most important factor, but in the case of an index or a digest the compiler is not guilty of bad faith in using the book that he is digesting. He must use this book. Not only should a digest tell, in brief, what has been decided, but it should also inform the reader where the decision is to be found in full. This of necessity requires an examination of the reports. To prepare a digest without such an examination would be an impossibility. A digest prepared only from the manuscripts of the judges would be a ludicrous excrescence which would not be harbored in any library. It would be about as valuable as a city directory which contains the names of the citizens, but omits to mention where they reside.

As the complainant, by reason of its large facilities, is able, as a rule, to place the decisions of the courts before the profession in advance of other publishers, it is obvious that any one who makes a true and useful digest of "the year's grist" must examine the complainant's publications. If the complainant's contention is correct that a digester may not take a "copyrighted book in his hands" the making of digests is at an end.

The court is unable to perceive how *mala fides* can be imputed to the defendant because, in making an annual digest, it uses the reports which have been published during the year.

Without pursuing the subject further it is thought that the complainant must be contented when it has maintained and vindicated its privileges under the law of copyright; that the defendant should be punished to the extent that it has been guilty of an infraction of that law and held accountable for every infringement which can be fairly laid at its door. Beyond this the court cannot go; it cannot consider matters not embraced in the issues joined by the pleadings or enter upon a course of speculation and presume wholesale piracy from the proof now before the court or from the alleged unfair business methods of the defendant in its relations with the complainant.

The court can discover nothing in the case of *Callaghan v. Myers*, which is at variance with these views.

As the complainant at the argument waived further accounting, it follows that *the complainant is entitled to a decree making the temporary injunction permanent, with costs.*

## NORTH CAROLINA SUPREME COURT.

STATE of North Carolina

v.

Raphael BEHRMAN.

(.....N. C. ....)

1. All who claim to know the provisions of the unwritten laws of a foreign country are competent to explain them, un-

(NOTE.—Oral proof of foreign laws.

- I. In general.
- II. The unwritten or common law.—*Lex non scripta*.
- III. The written law.—*Lex scripta*.
  - a. Of sister states.
  - b. Of foreign countries.
- IV. Modifications of the common law.
- V. Construction of written laws.
- VI. Proof of practices under statutes.
- VII. State statutes.
- VIII. The English doctrine.

The decision in the principal case, so far as it relates to proof of foreign laws, is based upon the construction placed by the court upon the provisions in the North Carolina code, and is quite comprehensive.

In the opinion in chief the court states that "any person" otherwise competent may testify as to such laws "after having stated that he has had opportunity to learn what they are," but holds that the statute relieves it from all doubt and difficulty by allowing "all who claim to know the provisions of foreign laws the privilege of explaining them to courts and juries."

The dissenting opinion of the chief justice would seem to be more in keeping with the majority of the decisions of other courts and also with that of the same court in *Moore v. Gwynn*, 37 N. C. 187, referred to in such opinion.

In most of the states in the Union the statutes and codes contain very similar provisions, but it does not appear from the decisions that they have received such a liberal construction.

The courts have mostly held that such laws, if unwritten, must be proved as facts by parol evidence of competent persons instructed in the law; by witnesses skilled in the law; by those conversant with the law; by persons acquainted with such law; by experts; by attorneys practicing in the courts of such foreign states; by one appearing to be well informed therein whether a lawyer or not.

There are, however, decisions of other courts which seem to be more liberal, it having been held that the evidence of a witness informed in such law whether a lawyer or not was competent to prove such law; that an intelligent person or one familiar with such laws might give evidence thereof. So a person who has placed himself in a position to make himself acquainted with such law has been held competent.

The English decisions show that in that tribunal the evidence must be that of properly qualified witnesses whose knowledge and experience have been gained by study and practice; of witnesses of competent skill; of witnesses learned in the law; by anyone who though not a lawyer or a person who by reason of his having filled any public office may be presumed to be acquainted with the law, is or has been in a position where the probability is that he has become acquainted therewith.

It has also been taken from the opinions of learned professors and eminent writers.

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der a statute allowing such laws to be proved as a fact by oral evidence.

2. An alleged marriage contract, which a woman testifies was signed by her and her alleged husband at the time of the marriage, is admissible, not simply as corroborative, but as substantive testimony of the marriage.

3. A writing on the back of a picture sent by a man to a woman, in which he

## I. In general.

In the absence of proof to the contrary, the common law of one state will be taken to be the same as that of a sister state and such is the legal presumption. *Seaborn v. Henry*, 30 Ark. 400; *Hickman v. Alpaugh*, 21 Cal. 222; *Hill v. Grigsby*, 32 Cal. 60; *Brown v. San Francisco Gas Light Co.* 53 Cal. 427; *Martens v. Lash*, 61 Cal. 624; *Rape v. Heaton*, 9 Wis. 333; *Walsh v. Dart*, 12 Wis. 635; *Hadley v. Gregory*, 37 Iowa, 157; *Bean v. Briggs*, 4 Iowa, 403; *Webster v. Hunter*, 50 Iowa, 215; *Sayre v. Wheeler*, 31 Iowa, 112, 32 Iowa, 550; *Neese v. Farmer's Ins. Co.* 55 Iowa, 604; *Crafts v. Clark*, 31 Iowa, 77, 33 Iowa, 237; *Church v. Crossman*, 49 Iowa, 444; *Holmes v. Broughton*, 10 Wend. 75, 35 Am. Rep. 533; *Stephens v. Williams*, 43 Iowa, 540; *Leibert v. Union Pac. R. Co.* 49 Iowa, 633.

And this presumption must prevail unless a different rule is shown to exist, either by some modification of that law peculiar to that state, or in consequence of some statute. *Inge v. Murphy*, 19 Ala. 335; *Du Val v. Marshall*, 30 Ark. 230.

Yet such presumption does not exist in the case of the Indian nations, whose usages and customs establishing their own laws must be proved. *Du Val v. Marshall*, *supra*.

The states, although united under a federal head, are as to their local laws as distinct from each other as any foreign nations can be, and no legal presumption can exist that the judges or citizens of one state can have any knowledge of the laws of another; they must be placed upon the same legal grounds with foreign laws, and then the rule applies that the best evidence which the nature of the case admits of must be produced. *State v. Twitty*, 9 N. C. 441, 11 Am. Dec. 779.

As to the manner of authenticating the law, there is no general rule except this, that no proof shall be received which presupposes better testimony behind and attainable by the party. *Ennis v. Smith*, 45 U. S. 14 How. 400, 14 L. ed. 472; *Phillips v. Gregg*, 10 Watts, 153, 36 Am. Dec. 153.

The general principle is that the best testimony or proof shall be required that the nature of the thing admits of. *Phillips v. Gregg*, *supra*; *Molina v. United States*, 6 Ct. Cl. 209; *Dougherty v. Snyder*, 15 Serg. & R. 34, 16 Am. Dec. 520; *Isabella v. Peoot*, 3 La. Ann. 337.

It applies to foreign laws as it does to all other facts. *Church v. Hubbard*, 6 U. S. 2 Cranch, 137, 2 L. ed. 249; *Hall v. Costello*, 43 N. H. 176, 2 Am. Rep. 207.

With respect to the laws of other countries, the rigid rule should be followed. *The Pawashick*, 3 Low. Dec. 142.

There is no difference between the laws of a foreign country and the laws of the different states of the Union in this respect. *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Phillips v. Gregg*, 10 Watts, 153, 36 Am. Dec. 153.

No reason exists for holding that the laws of other states shall be ascertained in a different manner, when deciding on the effect of a record, from that in which they are ascertained in other cases. *Rape v. Heaton*, 9 Wis. 332.

Whatever the court may take notice of, or learn

calls himself her husband, is competent as an acknowledgment by him of their relations.

4. A paper purporting to be the original certificate of marriage by a rabbi in a foreign country, verified by the signature and seal of the official minister, is admissible as *res gestæ* to prove the marriage, in a criminal prosecution, where one of the parties testifies that it was given to her at the time of the marriage.

5. The constitutional right of an accused to confront the witness against him does not exclude, in a criminal prosecution, the use of a certificate of marriage made at the very time of the marriage by the rabbi who performed the marriage ceremony.

(*Shepherd, Ch. J., dissents from Proposition 1.*)

(March 12, 1894.)

from reported decisions, it may also be informed of by the testimony of witnesses learned in the foreign law. *McDeed v. McDeed*, 67 Ill. 545; *Hoes v. Van Alstyne*, 20 Ill. 202.

Foreign laws, whether written or unwritten, are to be proved as facts, the only difference between the two being the mode of proof. *Holman v. King*, 7 Met. 384; *Haven v. Foster*, 9 Pick. 130, 19 Am. Dec. 353; *Ames v. McCamher*, 124 Mass. 85; *Mostyn v. Fabrigas*, Cowp. 174; *Male v. Roberts*, 3 Esp. 164; *Millar v. Heinrich*, 4 Campb. 155; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Ingraham v. Hart*, 11 Ohio, 255; *Pelton v. Platner*, 13 Ohio, 209, 42 Am. Dec. 197; *Evans v. Reynolds*, 32 Ohio St. 163; *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *State v. Stæde*, 1 D. Chp. 303; *Tyler v. Trabue*, 8 B. Mon. 305; *Hooper v. Moore*, 50 N. C. 130; *Biddis v. James*, 6 Binn. 321, 6 Am. Dec. 456; *Bock v. Lauman*, 24 Pa. 425; *Woodbridge v. Austin*, 2 Tyler, 384, 4 Am. Dec. 740; *Lincoln v. Battelle*, 6 Wend. 475; *Chanoine v. Fowler*, 3 Wend. 173; *Zimmerman v. Helser*, 32 Md. 374; *Bryant v. Kelton*, 1 Tex. 434; *Allen v. Watson*, 3 Hill, L. 813; *Rape v. Heaton*, 9 Wis. 323; *Peck v. Hibbard*, 26 Vt. 608, 62 Am. Dec. 605; *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254; *Hempstead v. Reed*, 6 Conn. 480; *Dyer v. Smith*, 12 Conn. 384; *Wilson v. Smith*, 5 Yerg. 399; *Hobbs v. Memphis & C. R. Co.* 9 Heisk. 872; *Talbot v. Seeman*, 5 U. S. 1 Cranch, 1, 2 L. ed. 15; *Smith v. Bartram*, 11 Ohio St. 690; *Baltimore & O. R. Co. v. Glenn*, 23 Md. 237, 92 Am. Dec. 638; *De Sobry v. De Laistre*, 2 Harr. & J. 191, 8 Am. Dec. 536; *Gardner v. Lewis*, 7 Gill, 379; *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 520; *Scot v. Coleman*, 5 Litt. (Ky.) 349, 15 Am. Dec. 71; *Boggs v. Reed*, 5 Mart. (La.) 673, 12 Am. Dec. 482; *Holley v. Holley*, Litt. Sel. Cas. 505, 12 Am. Dec. 342; *Mason v. Wash*, 1 Ill. 39, 12 Am. Dec. 138; *Cragin v. Lamkin*, 7 Allen, 686; *Monroe v. Douglass*, 5 N. Y. 447; *Territt v. Woodruff*, 19 Vt. 182; *Kline v. Baker*, 99 Mass. 253; *Knapp v. Abell*, 10 Allen, 435.

Where the averments did not indicate whether the law was statutory or established by the precedents of the Illinois courts, it was held that the law of another state, when depended upon in a court of a sister state, was nothing but a fact, and must be pleaded as any other fact, with sufficient distinctness so that the court upon a statement of facts might judge what the effect of the law was. *Roots v. Merriwether*, 8 Bush, 401; *Carey v. Cincinnati & C. R. Co.* 5 Iowa, 387; *Taylor v. Bunyan*, 9 Iowa, 522; *Williams v. Finlay*, 40 Ohio St. 342; *Barr v. Closterman*, 2 Ohio C. Ct. Rep. 387; *Roberts v. Briscoe*, 44 Ohio St. 599; *Louisville, N. A. & C. R. Co. v. Shires*, 108 Ill. 617.

The mode of proof of the written law is to be by the production of a duly authenticated copy. *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143.

It was so held in *Brimhall v. Van Campen*, 8 Minn. 12, 38 Am. Dec. 118. The note upon which the action was founded was made in New York, and on a Sunday, and there was no finding as to what the New York laws upon the subject were.

And the evidence is addressed to the court and not to the jury. *Pickard v. Bailey*, 26 N. H. 152; *Hooper v. Moore*, 50 N. C. 130; *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207.

The courts of a country are presumed to be acquainted only with their own laws. *Monroe v. Douglass*, 5 N. Y. 447.

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What is the law of another state, or of a foreign country, is as much a question of law as what is the law of our own state, but the court is presumed to know judicially the public laws of its own state, while in respect to private laws and the laws of other states and foreign countries, this knowledge is not presumed but must be proved as facts, otherwise the court cannot know or take notice of them. *Hooper v. Moore*, *supra*.

So with respect to a private law. *Biddis v. James*, 6 Binn. 321, 6 Am. Dec. 456.

But it is a fact not necessarily to be found by a jury. *Book v. Lauman*, 24 Pa. 425.

Like other facts they must be proved to exist before they can be received in a court of justice. *Church v. Hubbard*, 6 U. S. 2 Cranch, 187, 2 L. ed. 249.

It has been held that whatever the court may take notice of, or may learn from reported decisions, it may also be informed of by the testimony of witnesses learned in the foreign law. *Hoes v. Van Alstyne*, 20 Ill. 202.

A witness called to prove the laws of a foreign country should be first asked whether the law, as to which he is about to testify, is a written or an unwritten law. *Isabella v. Peoot*, 3 La. Ann. 537.

The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual. *Church v. Hubbard*, *supra*.

Whether written or unwritten the law must be verified by an oath. If written it must also be verified by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer lawfully authorized by law to give the copy, which certificate must be duly proved, or by statutes received by the government from foreign governments under authority of law authorizing reciprocal interchange of statutes. *Molina v. United States*, 6 Ct. Cl. 290.

Such methods of authentication may, however, be relaxed or changed as necessity, either physical or moral, may require where there is reason to believe they are attainable, and where a rigid adherence to them would probably produce extreme inconvenience or manifest injustice. *Phillips v. Gregg*, 10 Watts, 153, 39 Am. Dec. 153.

To require, respecting laws or other transactions in foreign countries, that species of testimony which their institutions and usages do not admit of would be unjust and unreasonable, and will never be required by the court, it being testimony which is not attainable. *Church v. Hubbard*, *supra*.

Such modes of proof are not, however, to be considered exclusive of others, especially of codes of laws, and accepted histories of the law of the country. *Ennis v. Smith*, 55 U. S. 14 How. 400, 14 L. ed. 472.

The best proof of the proceedings of a foreign court are the original records. *Spaulding v. Vincent*, 21 Vt. 501.

Foreign laws, promulgated by our government, have been allowed to be read without further proof. *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *Talbot v. Seeman*, 5 U. S. 1 Cranch, 33, 2 L. ed. 37.

They can only be known so far as they are proved.



**A**PPEAL by defendant from a judgment of the Superior Court for Edgecombe County convicting him of fornication and adultery. *Affirmed.*

Sarah Behrman testified: "I came from Riga, Russia. Know defendant. Was married to him in Riga, December 25, 1884, by a rabbi. Was given the paper, of which the following is a translation. "The rabbi of the city

of Riga herewith attests to the marriage of Raphael Behrman, from Oknian, with Sarah Dinah, daughter of Noah Strauch, from Tuckum, on December 25th, 1884, held in the city of Riga. (Signed) M. Shapira.

"This is certified by the signature and seal of the official minister. (L. S.)"

This paper was received from the court; it was signed by the rabbi, who married them. He put his stamp on it, and she carried it back

and no evidence of them can be admitted which was not offered at the trial, or otherwise made a part of the case reserved. *Kline v. Baker*, 90 Mass. 354.

The existence of such foreign law is a question for the jury. *Charlotte v. Chouteau*, 33 Mo. 194.

When evidence is given of these laws, the court is to judge of their applicability when proved to the case in hand. *Hooper v. Moore*, 50 N. C. 180.

The qualification of the experts, or other questions of competency, or evidence, must be passed upon by the court. *Kline v. Baker*, *supra*.

The [peculiar circumstances of each case must, however, enter into the consideration of the question of the competency of the evidence. *Phillips v. Gregg*, 10 Watta, 158, 36 Am. Dec. 158.

#### II. The unwritten or common law.—*Lex non scripta.*

When the question arises, What is a foreign law? if an unwritten law, it must be proved by the testimony of disinterested and intelligent witnesses. *Woodbridge v. Austin*, 2 Tyler, 364, 4 Am. Dec. 740.

No other testimony than that of witnesses is attainable. *Isabella v. Pecot*, 2 La. Ann. 387.

The general laws of a foreign state or country may be proved by parol, where it does not appear that such law exists as statute or written law, and of which law an authenticated copy of the record might be produced. *Re Roberts' Will*, 3 Paige, 446, 4 L. ed. 497; *Lincoln v. Battelle*, 6 Wend. 475; *Dyer v. Smith*, 12 Conn. 384; *Merritt v. Merritt*, 20 Ill. 65; *McDeed v. McDeed*, 67 Ill. 545; *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622; *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 530; *Martin v. Payne*, 11 Tex. 232; *Consequa v. Williams*, Pet. C. C. 225; *Phillips v. Gregg*, 10 Watta, 158, 36 Am. Dec. 158; *Tyler v. Trabue*, 8 B. Mon. 306; *Talbot v. Seeman*, 5 U. S. 1 Cranch, 38, 2 L. ed. 27; *Inge v. Murphy*, 10 Ala. 885; *Milwaukee & St. P. R. Co. v. Smith*, 74 Ill. 197.

Even though the law is only a usage that has acquired the force of law, it must be proved as such. *Bryant v. Kelton*, 1 Tex. 424.

In admiralty as in other courts. *The Pawashick*, 2 Low. Dec. 142; *Talbot v. Seeman*, *supra*; *The Prince George*, 4 Moore, P. C. C. 21; *The Peerless*, 1 Lush. Adm. 108, 13 Moore, P. C. C. 494, 30 L. J. Adm. 36; *Le Louis*, 2 Dod. Adm. 201.

They must ordinarily be proved by parol evidence of competent witnesses, instructed in the law under oath. *Phillips v. Gregg*, *Tyler v. Trabue*, *Talbot v. Seeman*, *Inge v. Murphy*, *Milwaukee & St. P. R. Co. v. Smith*, and *McDeed v. McDeed*, *supra*.

By eminent jurists, and other legal characters, who have opportunities to become experienced therein. *Wilson v. Smith*, 5 Yerg. 399.

By some intelligent person of the country whose law is to be proved. *Chanoine v. Fowler*, 3 Wend. 173; *Kenny v. Clarkson*, 1 Johns. 385, 3 Am. Dec. 336.

By the testimony of witnesses skilled therein. *McNeill v. Arnold*, 17 Ark. 154, 167; *Barkman v. Hopkins*, 11 Ark. 157; *Biesensthal v. Williams*, 1 Duv. 329, 35 Am. Dec. 629.

By the testimony of witnesses conversant with such laws. *Territt v. Woodruff*, 19 Vt. 184; *Mowry v. Chase*, 100 Mass. 79; *Greasons v. Davis*, 9 Iowa, 219; *Molina v. United States*, 6 Ct. Cl. 289.

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By witnesses acquainted with the law. *Zimmerman v. Helser*, 32 Md. 274; *Robinson v. Clifford*, 3 Wash. C. C. 1; *Gardner v. Lewis*, 7 Gill, 379; *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 530.

If unwritten by the testimony of experts. *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287, 62 Am. Dec. 688; *De Sobry v. De Laistre*, 2 Harr. & J. 191, 3 Am. Dec. 536; *Gardner v. Lewis*, *supra*; *Condit v. Blackwell*, 19 N. J. Eq. 193; *Frith v. Sprague*, 14 Mass. 455; *Molina v. United States*, *supra*; *Kniss v. Smith*, 55 U. S. 14 How. 400, 14 L. ed. 472.

By an attorney duly admitted to practice in all the courts of such state. *Brenner v. Luth*, 28 Kan. 581.

By any one appearing to be well informed therein whether a lawyer or not. *Hall v. Costello*, 28 N. H. 178, 2 Am. Rep. 207.

By those acquainted with the law, but this rule may be varied by statute. *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 264.

Parties conversant with the unwritten law of a foreign state are considered as experts. *Greasons v. Davis*, *supra*.

All persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand are experts so far as expertness is required. *Bird v. Com*, 21 Gratt. 800.

A foreign law may be proved by any person familiar with it, whether a lawyer or one who has acted under it as a justice of the peace, or other officer, or a mere layman. *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 234.

A lawyer residing in another state and of mature age is *prima facie* competent as an expert to prove the law of that state without further evidence of qualification. *Ibid*.

It may be proved by any person who, though not a lawyer, or not having filed any public office, is, or has been, in a position to render it probable that he would make himself acquainted with it. *American L. Ins. & T. Co. v. Rosenagle*, 77 Pa. 507.

Whether a professed lawyer or not, who appears to the court to be well informed on the point. *Hall v. Costello*, *supra*.

They may be proved by parol evidence of such a nature as the institutions and usages of the foreign country admit of. *Isabella v. Pecot*, 2 La. Ann. 387.

And when so proved, such laws are for the construction of the court. *Consequa v. Williams*, Pet. C. C. 225.

They may be proved as well by public history, and decided cases as by witnesses. *Inge v. Murphy*, 10 Ala. 885; *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 530.

Books of reports of a sister state are conceded to be proper evidence. *Ibid*; *Raynham v. Canton*, 3 Pick. 238; *McRae v. Mattoon*, 13 Pick. 63.

Common law may be considered as custom which may be proved by parol which cannot be otherwise proved in the absence of reports. *Raynham v. Canton*, *supra*.

In *Ames v. McCamber*, 124 Mass. 90, it was held that the books of reports of cases adjudged in the courts of any of the states of the United States were competent evidence of the unwritten or com-

to the court and it was stamped by the court. She produced also a paper, of which the following is a translation:

"On the third day of the tenth month, according to the Hebrew calendar, in the year 5640, at that time the son, Raphael, of the father by the name of Aaron, said to Sarah Dinah, the daughter from Noah, that she will be his wife according to the laws of Moses.

He says he will support her and take care of her from that day until they are separated by death. It is mutually agreed by them to be man and wife, and he will clothe her and take care of her, as becomes necessary from husband to wife. He further agreed that she shall share with him all his wealth, and, if any should come and try to take any of it from him, she shall have the preference of it. This

mon law of that state, under section 84 of chapter 181 of the General Statutes of Massachusetts. *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244, 71 Am. Dec. 753, to the same effect.

As a general rule, the decisions of courts of justice are the evidence of what is common law. *McDeed v. McDeed*, 67 Ill. 545.

The text-writers furnish us with their statements of the law, and that would certainly be good evidence upon the same principle which renders histories admissible. *Picton's Case*, 30 How. St. Tr. 492.

The unwritten law of England may be proved here, not by experts only, but also by text-writers of authority, and by the printed reports of adjudicated cases, and be construed with the aid of text-books as well as experts. *The Pawashick*, 2 Low. Dec. 142.

But it has been held that reports of adjudged cases are not evidence of what is the law of the state or country in which they are pronounced. *Gardner v. Lewis*, 7 Gill, 379.

Unwritten laws in the practice of the courts of other states are provable by parol evidence. *McRae v. Mattoon*, 18 Pick. 53.

A custom or usage, before it has ripened into a law, so to be judicially noticed by the courts, may be proved by parol as a fact. *Innerarity v. Heirs of Mims*, 1 Ala. 660.

It cannot be proved in any other mode. *Ibid.*; *Merritt v. Merritt*, 20 Ill. 65.

The certificate of a consul of the United States under his seal was held not sufficient evidence of a foreign law. *Church v. Hubbard*, 6 U. S. 2 Cranch, 187, 2 L. ed. 249.

And as it is competent to prove it by evidence of those who are conversant with it, it is equally competent to prove in the same manner the practice and usage under the written or statute law. *Greason v. Davis*, 9 Iowa, 219.

In *Livingston v. Maryland Ins. Co.*, 10 U. S. 6 Cranch, 274, 8 L. ed. 222, it was held that if foreign laws and regulations respecting trade be not proved to have been in writing as public edicts, they must be proved by parol.

If the rate of interest upon a note depends upon usage having the force of law it may be proved by parol, if shown to depend upon usage. *Tryon v. Rankin*, 9 Tex. 595.

There is no difference whether it is a law regulating trade, or a law on any other subject, the rule from its nature is universal. *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 520.

One witness shown to be skillfully conversant by long practice of the foreign law, who adds the sanction of an oath, answers the demands of the law and the evidence is sufficient to prove such foreign law. *Molina v. United States*, 6 Ct. Cl. 269.

The common law, as modified by the decisions of the state courts, may be proved by the production of the accredited reports of the decisions. *Ingo v. Murphy*, 10 Ala. 855.

But this is not the only means for obtaining the requisite information, and the ecclesiastical and admiralty courts of England sometimes act on the certificate of officers accredited by government where laws are certified. *Ibid.*

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A priest or minister is a competent witness to prove the law of another state or country upon the subject of marriage. *Bird v. Com.* 21 Gratt. 800.

The laws of a foreign state assigned for the direction of its own affairs cannot be noticed in the courts of other states, unless proved as facts. *Allen v. Watson*, 2 Hill, L. 319.

The laws of a sister state are provable like other foreign laws, and cannot be taken notice of in the absence of proof. *Rape v. Heaton*, 9 Wis. 323, 75 Am. Dec. 269.

A gentleman practicing before the privy council is not an expert to give evidence concerning the law of those countries, for which the privy council is the ultimate court of appeal. *Cartwright v. Cartwright*, 25 Week. Rep. 684.

Where parol evidence of the laws of the state of Mississippi, in relation to the mode of transferring slaves, was refused by the court without proof that it was not governed by statute, the court held that parol evidence must be admitted of the *lex non scripta* but not of the *lex scripta*, and that to require evidence of the absolute silence of the *lex scripta* was error, the proper course being to permit the evidence to be given and to stop when parol evidence of the contents of a statute is adduced. *Newsom v. Adams*, 2 La. 153, 22 Am. Dec. 126.

The common law of a foreign country may be proved by respectable and intelligent witnesses, but foreign statutes cannot be so proved. *Kenny v. Clarkson*, 1 Johns. 385, 3 Am. Dec. 338, in which case it was sought to prove the effect of English Statute, 25 Geo. III., chapter 60, as to the effect of the non-insertion of a certificate of registry of a bill of sale.

In *Barkman v. Hopkins*, 11 Ark. 157, the plaintiff offered the depositions of one skilled in the laws and familiar with the practice of the state of Louisiana, and also the laws of the state of Louisiana purporting to be published under the authority of the state. It was held, the depositions being regularly taken, that the evidence was competent legal evidence for the purpose of proving the laws and practice of that state.

Where in an action to establish a will, a witness, an attorney and counsellor at law, offered to prove the practice and usage regarding the execution of wills with respect to the witnesses signing in the presence of each other, for the purpose of showing what the law was, the court rejected the testimony, the evidence being offered upon a question of law and not upon a question of fact for the jury. *Gaylor's App.* 48 Conn. 83.

The common law, for the most part made up of customs, may be proved by parol, so held where an attorney was called to prove by parol the law of New York in regard to the delivery of a promissory note. *Merritt v. Merritt*, 20 Ill. 65.

Where, in an action on an Ohio note, it was urged that by common law in that state it was usurious, and that effect should be given to the laws of that state in determining the validity of the instrument, the court held, no law of Ohio having been proved on the trial as it should have been in order to justify the court in acting under it, under 2 Revised Statutes, such law must be proved by putting in evidence the books of reports of decisions of the

agreement holds from this day as long as they shall live.

(Signed) Raphael and Dinah Behrman."

This paper was signed by the rabbi and given to witness at the time of the marriage.

A picture was shown to witness containing the following:

"To remembrance from your dear husband,

Raphael Behrman, who resides in the city of Norfolk, Virginia, at No. 48 Bank Street.

(Signed) Raphael Behrman."

"Give the enclosed picture to our dear child, so that he will know his unbeknown father.

(Signed) Raphael Behrman."

She testified "This is a picture of my husband; he sent it to me from Norfolk, Va., to

supreme court of that state. *Billingsley v. Dean*, 11 Ind. 331.

Evidence showing marriage law to be the same as the law in that state was held good in the absence of proof to the contrary. *State v. Nadal*, 69 Iowa, 473.

It is competent to prove the law of a foreign state by an attorney of that state, duly admitted to practice in all its courts. So held in a case wherein it was sought to prove the rate of interest obtainable in California, but the evidence did not show whether the rate established was imposed by statute, or had grown up as a custom and usage of the state, the court holding such evidence *prima facie*, competent and sufficient. *Brenner v. Luth*, 28 Kan. 561.

Where the law attempted to be proved was not a statutory or written law of the state of Pennsylvania, but the unwritten law as established and expounded by judicial decisions of the supreme court of that state, it was held it could be proved by the testimony of witnesses instructed in the laws of that state. *Tyler v. Trabue*, 8 B. Mon. 306.

Where a member of the bar was called to prove the plaintiff's right to recover under the particular case in the courts of his own state, it was held his evidence was properly received to prove, by the common law as it existed in such state, that the plaintiff was entitled to his action. *Layton v. Chalon*, 4 La. Ann. 313.

Where in replevin, the plaintiff read in evidence a deed, proving it by the testimony of the subscribing witnesses made before the lord mayor of London and certified under his official signature and seal of office, the court held that as such authentication would be sufficient to authorize the deed to be read as evidence of title by the laws of that province, if properly proven, the property being such in that province, and the deed sufficient to pass the title there, it should be so regarded here. *Owen v. Boyle*, 15 Me. 147, 22 Am. Dec. 143.

An exception exists in the courts of the United States, by receiving the printed volume of the laws of the states of the Union as *prima facie* evidence. *Ibid*.

In *Armstrong v. Risteau*, 5 Md. 271, 59 Am. Dec. 115, the common opinion of eminent jurists, whose learning and experience were often employed in ejectment cases under the provisional and state governments, was allowed as evidence of what the law was then considered to be, on a point upon which there were no cases to the contrary.

Where witnesses learned in the law stated as their opinion that the clauses and provisions of a deed of trust, according to the laws of Kentucky, were legal and sufficient to convey to the grantee the property set forth therein, and that no statute of that state was known to such witnesses affecting their opinion or bearing upon the point, the reputation and professional standing of the witnesses entitling them to credit, it was held they were wholly unimpeachable and entitled to credit. *Wilson v. Carson*, 12 Md. 54.

In *Consolidated Real Estate & Fire Ins. Co. v. Cashow*, 41 Md. 59, the evidence of a witness at the sale in question, made after due public notice and advertisement as required by the laws of the state of New York, he being an expert learned in the law, was held admissible, the court stating that the

fact that the witness practiced in that state and was a lawyer by profession authorized in the absence of opposing proofs the inference that he practiced his profession in the state or city of his residence, which made him competent to testify in respect to the matter about which he was examined.

A witness not a lawyer but a magistrate of several years having, from his mercantile employments, become acquainted with the law in relation to notarial instruments, was admitted as a witness as to the laws of Canada upon the point. *Pickard v. Bailey*, 26 N. H. 132.

Where it was sought to prove the validity of a Canadian marriage law, by the evidence of an English barrister practicing in Canada, the evidence was refused upon the grounds above stated. *Cartwright v. Cartwright*, 26 Week. Rep. 684.

Where it was sought to establish the due execution of a will, the court held that the laws, which were incorporated and formed the general laws of Cuba, and the other Spanish colonies, were not to be considered in the nature of statute laws, and admitted the testimony of the witnesses as to the due execution of the will, according to the law of the testator's domicile. *Re Roberts' Will*, 8 Paige, 446, 4 L. ed. 497.

In *Brush v. Wilkins*, 4 Johns. Ch. 506, 1 L. ed. 218, a will being executed with the solemnities required to pass real estate, which descended to the heir-at-law subject to the dower of the wife, the laws of Denmark on the point being proved as a matter of fact by a person acquainted with the laws of that place, who had long resided there and sustained a judicial office, it was held the evidence produced was competent and sufficient in the absence of all other proof.

Where the question in issue was the manner of the colonial laws of Spain, as to the mode of celebrating marriages, it was held that the testimony of witnesses, who were not read in the law prior to the year 1791, as to the custom of the marriage of Protestant settlers in the Spanish colony of Mississippi by a justice of the peace, was receivable in evidence to establish a marriage, no better evidence to the contrary being produced, the witness showing that such marriages were held valid by the political power of the state. *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158.

In *Jones v. Maffet*, 5 Serg. & R. 523, it was held that the unwritten laws of a foreign country might be proved by professional men or others conversant with and having the means of knowledge.

In the above case the evidence given was that of an Irish barrister conversant with the laws of the country, to the effect that he received printed acts from the king's printer in Ireland, who delivered them to him as authenticated copies of the several acts of parliament, printed by him and his predecessor in office, by virtue of the king's patent, and that such copies would be received in all courts in Ireland as authentic documents, and that the printed statute book or copies of the particular acts printed by the king's printer, were receivable in evidence without any proof of their having been compared with the original rolls, such evidence was admissible.

In an action by a wife against her husband's executor to recover money loaned to the husband

London, and the writing on the back is his." She came to Norfolk from London on a ticket sent her by defendant. Witness stated that she was familiar with the marriage law in Russia, and that she was married according to that law.

Zander and Album were sworn as court interpreters, and testified that the marriage cer-

tificate was written in German and the marriage contract in Chaldean.

Album testified that he was familiar with the law of marriage among the Jews in Russia, and that in Riga it is left with the rabbi, who gives the certificate, which is then carried to the court and the Russian stamp put on it. That defendant had admitted to witness that

while the parties resided in New Orleans, after which the husband went to Philadelphia where he resided until his death, plaintiff produced in evidence a written document, and proved the advance by the deposition of two witnesses, the defendant pleading *inter alia*, coverture of the wife, which she met by offering to prove by a witness and advocate of Louisiana, conversant in the laws enacted under the territorial state government, the validity of such contract with reference to property held by her paraphernalia right and the law in respect thereto; such evidence being objected to as proving the laws of a foreign county by parol, the court held that the unwritten laws must be proved by the testimony of persons acquainted with them, by public history, or by cases decided, but that an edict registered must be proved by a copy under the national seal, or by a sworn copy collated by a witness, and in this as well as in any other case of trial of fact, the best evidence which the nature of the case will admit of must be produced. *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 530.

In the above case the court held the evidence properly admitted. *Ibid*.

So where the witness swore that he was the custodian of records which had existed for centuries, which had been kept by him in accordance with the laws in force at the time the entries were made therein, extracts from such records giving a family genealogy, sworn to by him, the same was held admissible in evidence. *American L. Ins. & T. Co. v. Rosenagle*, 77 Pa. 507.

A Spanish lawyer who had practiced law in Cuba was allowed to testify from a printed copy of the Spanish code of commerce, as to the laws regulating special partnerships in Cuba. *Barrows v. Downs*, 9 R. I. 448, 11 Am. Rep. 283.

Where the witnesses stated they knew a document was a perfect title to the land claimed, the practice which had long existed in the Texas courts of receiving the evidence of intelligent Mexicans, not lawyers, in reference to the laws of Spain and Mexico, in a litigation pertaining to lands, was held only admissible, in so far as it tended to information as to previous or contemporary construction of the laws of Spain and Mexico, by the officers executing them, but was no evidence as to what constituted a title to such land. *State v. Cuellar*, 47 Tex. 236.

Where it was objected on demurrer that the pleas in bar were defective in not setting forth the different acts of the provincial parliament under which the defendant obtained his discharge in bankruptcy, it was held that such laws were foreign and must be stated and proved as facts and set forth in the plea. *Peck v. Hibbard*, 26 Vt. 608, 63 Am. Dec. 605.

Where a witness testified to a marriage in a foreign state, solemnized in the manner usual and customary in such state, by a person duly authorized to celebrate the rights of marriage, and that the parties afterwards lived together as man and wife it was held satisfactory evidence of the validity of the marriage, and that it was not necessary to prove the laws of such state or to offer further evidence of a compliance with their provisions. *Bird v. Com.* 21 Gratt. 800.

In *Wilcocks v. Phillips*, 1 Wall. Jr. 47, where a

Chinaman, who, as a witness, did not state positively what the law upon a subject was, the court stated that it would have been inclined to admit such evidence, although he was not a member of the legal profession, owing to the practical necessities of mankind, and the nature and isolated and peculiar condition of the Chinese nation, nearly all that was known of the government, laws, and institutions of the country being derived from the relations of merchants, missionaries, and other persons who had been there, and that it would be too much, in the then present condition of the country, to require a party to produce certified copies of its statutes; and further that of facts, such as those, the court would take judicial notice.

In the above case the witness's statement was rejected, not being direct, responsive, and full, the court stating that if it had been it would have been received in evidence, as an exception to the rule of law, whose obligation in most cases is admitted. *Wilcocks v. Phillips*, *supra*.

Where the law in question was unwritten, being that of a custom of immemorial usage in Spain, of necessity and by authority, provable by parol evidence, the witness testifying showing himself instructed in the laws, customs, and usages of Spain, and by actual experience and practice of his profession for many years in Cuba under the Spanish law, the court held that the right of citizens of the government to sue for claims against the government was sufficiently proved by such witness. *Molina v. United States*, 6 Ct. Cl. 269.

And where a witness was introduced to prove a foreign law, who was not a practicing lawyer and member of the French bar, but whose examination showed that he had studied law as a professor in France, graduated at the University of Paris, and had since studied law as his profession from 1849 to 1854, and had engaged in legal pursuits and has been employed at Washington by the French government, to study, examine, and give information in reference to claims delivered over to him by the French legation, he was admitted as a witness and allowed to testify. *Dauphin v. United States*, 6 Ct. Cl. 221.

But a certificate of the proceedings of the court under the seal of a person who states that he was the secretary of foreign affairs, was held no evidence of foreign laws. *Church v. Hubbard*, 6 U. S. 3 Cranch, 187, 2 L. ed. 249.

The decrees of the Portuguese colonies, transmitted to the seat of government and there registered in the department of state, and a certificate of the fact under the great seal with a copy of the decree authenticated, was held sufficient prima facie evidence of such laws. *Ibid*.

The testimony of a lawyer of Norway, as to the law of that country, was held admissible under the statutes of Minnesota, which provide that the existence, and the tenor or effect of all foreign laws may be proved as facts by parol evidence, but if it appears that the law in question is contained in a written statute or code, the court may in its discretion, reject any evidence of such law that is not accompanied by a copy thereof. *Pierce v. Indesth*, 106 U. S. 546, 27 L. ed. 254.

### III. The written law—*Lex scripta*.

#### a. Of sister states.

The relation of the states to each other, as to

he was married to Sarah Behrman and also to another woman.

Defendant stated that he was reared by wealthy parents in Russia near to Riga. When sixteen or seventeen years old met the woman claiming to be his wife in a house of ill-fame and maintained illicit relations with her for some time, then left her and went to Hamburg, because he had reason to believe she had

robbed him. She followed him to Hamburg and he had her sent back; he then went to London, to Canada, to Norfolk, and married his wife in Washington. He had never married any other woman; had never seen the alleged license; the writing on the back of the photograph was not his; did not send for her to come over from London; had lived in Atlanta, Philadelphia, Suffolk, Rocky Mount, and

matters not surrounded by the general government, is that of "foreign states in close friendship" and whatever relaxation such close friendship ought to induce or may have induced in the strict rules of proof, yet upon strict principles of evidence, the laws and public documents of one state, can be proved in the courts of another only as other foreign laws. *Rape v. Heaton*, 9 Wis. 323, 78 Am. Dec. 260.

In *Hempstead v. Reed*, 6 Conn. 480, the written laws of the different states were held foreign, provable as facts, and not receivable as judicial notice. To the same effect, *Dyer v. Smith*, 12 Conn. 384.

In *Tyler v. Kent*, 52 Ind. 553, the court held that a person claiming to recover under the laws of another state must aver his rights under such laws, and set forth such laws so as to enable the court to determine whether such person is entitled to the relief demanded.

When the question arises, What is a foreign law? if a written law it must be produced. *Woodbridge v. Austin*, 3 Tyler, 364, 4 Am. Dec. 740; *McNeill v. Arnold*, 17 Ark. 154, 167; *Byrant v. Kelton*, 1 Tex. 434.

The general rule is well settled, that parol evidence of the contents of a written document cannot be given, except where such original is lost or destroyed, and the fact that the paper or entry belongs to a public office and cannot be removed has never been held to allow the opening of the door to parol evidence. *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49; *Emery v. Berry*, 23 N. H. 473, 61 Am. Dec. 622; *Line v. Mack*, 14 Ind. 390; *Merritt v. Merritt*, 20 Ill. 66; *Barton v. Anderson*, 1 Tex. 98; *Martin v. Payne*, 11 Tex. 292.

To allow such parol proof would be a violation of the rule requiring the best evidence to be adduced that the case admits. *Compere v. Jernegan*, 6 Blackf. 375.

And error. *McDeed v. McDeed*, 67 Ill. 545.

Where the action is founded upon such a statute, a copy thereof should be filed with the complaint. *Tyler v. Kent*, 52 Ind. 553.

Written law exists in records and may be proved with certainty. *Raynham v. Canton*, 8 Pick. 298.

Under the New York Statute of 1848, however, a printed volume of the statute laws of any other state is to be admitted as prima facie evidence of such laws. *Toulondou v. Lachenmeyer*, 6 Abb. Pr. N. S. 215, 1 Sweeny, 45, 37 How. Pr. 145.

The general rule of law with reference to foreign written laws is that the statute produced must be proved to be published by authority and the copy produced must be properly authenticated. *Pierce v. Indeeth*, 108 U. S. 546, 27 L. ed. 254; *Molina v. United States*, 6 Ct. Cl. 269; *Territt v. Woodruff*, 19 Vt. 184; *Danforth v. Reynolds*, 1 Vt. 235; *Taylor v. Bank of Alexandria*, 5 Leigh, 471; *Zimmerman v. Helsner*, 32 Md. 274; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49; *Phillips v. Gregg*, 10 Watts, 153, 36 Am. Dec. 158; *Webster v. Beece*, 23 Iowa, 209; *Beissner v. Texas Exp. Co.* 1 Tex. App. Civ. Cas. (White & W.) 457; *Martin v. Payne*, 11 Tex. 292.

When so published they must be accepted and cannot be treated as mere private or unauthorized publications. *Wilt v. Cutler*, 33 Mich. 189.

Proof thereof must be authenticated by written

evidence. *Kenny v. Clarkson*, 1 Johns. 885, 8 Am. Dec. 336; *Phillips v. Gregg*, *supra*.

Such documents are usually authenticated by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be authenticated. *Phillips v. Gregg*, *supra*.

Certified copies from the secretary of state, or a copy printed by said authority, are evidence thereof. *Line v. Mack*, 14 Ind. 390; *State v. Cheek*, 34 N. C. 114; *Taylor v. Bank of Illinois*, 7 T. B. Mon. 576. In criminal as well as civil cases. *State v. Patterson*, 24 N. C. 346, 38 Am. Dec. 699.

Foreign written laws may be received, when found in a statute book with proof that the book has been officially published by the government which made the law. *Martin v. Payne*, *supra*.

When they show upon their face that they have been so printed, and contain such laws, they are prima facie evidence. *Emery v. Berry*, 23 N. H. 473, 61 Am. Dec. 622.

And when so published they are admissible without further proof or authentication. *Taylor v. Bank of Alexandria*, 5 Leigh, 471.

A printed statute book of any government would seem to be evidence of the statutes of that government. *Taylor v. Bank of Alexandria*, *supra*, wherein the printed statute book was held evidence of the acts of the general assembly in Virginia.

They must be verified in the same manner as foreign judgments, by the exemplification of a copy under the great seal of the state, or by a sworn copy. *Emery v. Berry*, *supra*.

If the foreign law be a written law, the highest evidence should be produced in the form of an authenticated copy, or a copy proved to be a true copy by a witness who has examined and compared it with the original. *Isabella v. Peoot*, 2 La. Ann. 387.

An exemplification in due form is the best legal method of proving the contents of a public record. *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49.

In New York and Connecticut the rule is to require the statutes of sister states to be proved in the same manner as foreign laws. *Emery v. Berry*, *supra*.

Such records do not in each case, when so presented, make their own proof, this must be shown *afundis*. *Bryant v. Kelton*, 1 Tex. 434.

Foreign laws, which have been promulgated as such by our own government, have been allowed to be read without further proof. *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *Talbot v. Seeman*, 5 U. S. 1 Cranch, 38, 2 L. ed. 27.

The rule requiring foreign laws to be verified with the sanction of an oath is relaxed in cases of the statute of sister states, on account of the constitutional ties binding the states together. *Mullen v. Morris*, 2 Pa. 85.

Yet it is competent for the states to admit public acts of sister states as evidence, even though not authenticated as required by the act of congress. *Taylor v. Bank of Illinois*, 7 T. B. Mon. 576.

Statute books of another state purporting to be under the state authority were held admissible as

Whittakers. Sarah Behrman had him arrested once in Atlanta, but did not appear, and he was discharged.

Further facts appear in the opinion.

**Mr. Frank I. Osborne, Atty-Gen.,** for the State.

**Avery, J.,** delivered the opinion of the court:

The statute provides that "the unwritten

or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence." Code, § 1888. The plain intendment of the law is that any person who is competent to testify as to other facts, of which such person professes to have knowledge, shall be permitted to state the pertinent provisions of the unwritten laws of a foreign country, after having stated that he has had opportunity to learn what they

evidence of the statute laws of that state, there being no proof to the contrary showing their repeal. *State v. Abley*, 29 Vt. 80, 67 Am. Dec. 754.

The statutes of the different states will only be taken notice of in the courts of the United States, when found in the official statute books of the said states. *Martin v. Payne*, 11 Tex. 232.

A copy of the laws printed under order of congress by the public printer, and distributed by law to the executives of the several states, for the purpose of distribution among the people, were held good evidence of such acts without further authentication. *Taylor v. Bank of Alexandria*, 5 Leigh. 471.

In the United States courts, and in the courts of the several states, printed volumes of the laws of the states of the Union are received as prima facie evidence. *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143.

So in *Crake v. Crake*, 18 Ind. 156, the statute book of Ohio, printed by authority and by the state printer, was received in evidence as prima facie the law of the state.

And the same rule applies to courts of admiralty. *The Pawashick*, 2 Low. Dec. 142; *Talbot v. Seeman*, 5 U. S. 1 Cranch, 88, 2 L. ed. 27; *The Prince George*, 4 Moore, P. C. C. 21.

Statutes of sister states are proved prima facie by the production of the statute book purporting to be published by authority of the state. *Inge v. Murphy*, 10 Ala. 388.

The printed volume purporting on its face to contain the laws of a sister state, is to be received as prima facie evidence of the statute laws of such state independent of any statutory regulation. *Blesenthall v. Williams*, 1 Duv. 329, 35 Am. Dec. 629.

In *Paine v. Lake Erie & L. R. Co.* 31 Ind. 233, the same doctrine was applied.

In *Ellis v. Marston*, 19 Mich. 186, 2 Am. Rep. 51, it was held that the court would not presume that the legislature of another state had adopted the statutes of that state, and that the same must be proved before they would be passed upon, and that where it was alleged that a contract was required to be in writing, the statute making such law must be produced. *Kermott v. Ayer*, 11 Mich. 151, and *People v. Lambert*, 5 Mich. 349, 73 Am. Dec. 48, recognized and approved.

By the positive law of Michigan, printed copies of the statutes and resolves of any of the United States, if purporting to be published under the authority of the proper government, are required to be admitted in all proceedings in our courts as prima facie evidence under § 5985 of the Compiled Laws. *People v. Calder*, 30 Mich. 85.

It is better evidence than the testimony of any individual, who may know the general purport of the law, but cannot carry in his mind so minute a knowledge as may sometimes be necessary for the application of the law. *Raynham v. Canton*, 3 Pick. 293.

They may be rebutted by evidence proving them to be inaccurate. *Bradley v. West*, 60 Mo. 34.

The distinct authority for printing and publishing the laws need not appear in any case where they purport to be published under the authority of the government. *Will v. Outler*, 33 Mich. 139, 25 R. I. A.

When such statutes are authenticated in the manner pointed out by the act of congress, they must be received as evidence. *Taylor v. Bank of Illinois*, 7 T. B. Mon. 576.

In *Hunt v. Johnson*, 44 N. Y. 37, 4 Am. Rep. 631, it was held that the code simplified the mode of proof, the printed volume being made presumptive evidence of the existence of a statute, but that such proof must be produced on the trial like other facts, and could not afterwards be produced on appeal.

A sworn copy or extract from a statute, setting apart a particular day for a fast day, was allowed to be proved by parol in the same manner as other facts of general notoriety. *Chamberlain v. Maitland*, 5 B. Mon. 443.

In *Raynham v. Canton*, 3 Pick. 293, it was held that a volume purporting on the face of it to contain the laws of that state, was the best evidence next to an exemplification or authenticated copy.

Where a properly authenticated foreign statute cannot be procured, then oral evidence might be admissible. *Raynham v. Canton*, *supra*; *Consequa v. Willings*, Pet. C. C. 225.

There must, however, be some showing why secondary evidence becomes necessary; this is the settled American doctrine. *Kermott v. Ayer*, 11 Mich. 151.

Sworn copies of records of another country can be given in evidence, when better testimony cannot be procured, the party using them showing that they are the records of the court by other testimony. *Bryant v. Kelton*, 1 Tex. 434.

In an action of assumpsit on a written guaranty for the "ultimate payment" of goods the plaintiff read in evidence sections of the civil code of Louisiana to show the law of that state in relation to such guaranty, the contract of guaranty being consummated in that state; but no evidence of lawyers or persons skilled and instructed in the laws of that state to either interpret the written law, or afford the courts the means of constructing it being given, the court held the question, as to the language of the written law of Louisiana, was settled by the production of that language itself from the civil code. *Walker v. Forbes*, 31 Ala. 9.

In *Lee v. Mathews*, 10 Ala. 632, 44 Am. Dec. 493, it was sought to prove that it was necessary, under the Alabama laws, to record a deed by the evidence of a witness, but the court held that the law must be proved that such evidence was not sufficient.

Where the action was brought upon a promissory note in Alabama and afterwards removed to Mississippi where the note was transferred, it was held that the revised code of Mississippi was competent evidence in proof of the statutes incorporated therein. *Clanton v. Barnes*, 50 Ala. 290.

In *Clarke v. Bank of Mississippi*, 10 Ark. 516, 39 Am. Dec. 243, the printed statute book of Mississippi, published by authority, was allowed to be received in evidence, such book proving the powers and capacity of the corporation to contract, the burden to discredit such book being on the defendant.

Where the defendant sought to show that the plaintiff's deeds were based upon an illegal and

are. The legislature intended, evidently, that all persons who might profess to have an acquaintance with such laws should be permitted to testify what were their requirements as to the celebration of marriages, or entering into any other contracts. It is only where, by reason of peculiar skill and experience, certain persons are enabled to draw inferences from facts which the ordinary,

untrained mind cannot deduce, that the services of experts become desirable, if not essential, for the enlightenment of courts and juries. Rogers, *Expert Testimony*, § 10, p. 18. When the question is once addressed to the common sense, and involves only the common experience and sound judgment of mankind for its solution, the opinions of experts are not admissible. *Id.* p. 14. What-

usurious contract, reading in evidence extracts from interest statutes, of Tennessee authenticated by the certificate of a notary public of Memphis, it was held such evidence of the usury statutes of Tennessee was not admissible; that the modes of proving the laws of the states were plainly indicated by the case of *McNeill v. Arnold*, 17 Ark. 154, 167, *et supra*.

A book said to contain the statutes of Vermont and printed by a private printer, was held not admissible as evidence of the statutes of Vermont. *Canfield v. Squire*, 2 Root, 300, 1 Am. Dec. 71.

The title page of a volume showing that the book was published by the authority of the Ohio legislature was held good evidence. *Egan v. Connelley*, 107 Ill. 458.

But the publication must be authorized under seal of foreign state, the seal of the secretary of state is not enough. *Slak v. Woodruff*, 15 Ill. 15.

Under the evidence, Act of February 17, 1838, Revised Statutes of Indiana, p. 272, making printed statute books of any of the states of the Union, purporting to be published by authority, *prima facie* evidence in the courts of that state of the laws published in them, it would be incompetent to prove orally the laws of such state, and parol testimony would be insufficient for that purpose. *Comparet v. Jernegan*, 5 Blackf. 375.

In *Heberd v. Myers*, 5 Ind. 94, the witness, introduced to prove the laws of New York by parol, stated that there was a written code of law for said state. The court held the question and answer taken together sufficiently showed the written law, and that under the statute its admissibility rested in the discretion of the court, which, being exercised without any obvious abuse, was not the subject of review.

Where it was merely shown that the statutes in question were printed at a certain place by a certain firm, in a given year, it not being shown that the printers were constituted state printers, or that they had done such printing by virtue of authority derived from the state, and there was nothing to rebut the conclusion that the printing was that of private enterprise, it was held such book was not receivable in evidence of the revised statutes of Ohio. *Magee v. Sanderson*, 10 Ind. 261.

In *Magee v. Sanderson*, *supra*, it was held that under the statute, a statute book of a sister state was not evidence, unless it purported to have been printed under the authority of such state.

Where the action was brought upon four promissory notes, the laws of Ohio, being pleaded, were proved by a certified copy from the secretary of state under the seal of the state, as evidence of the rate of interest in that state. *Hall v. Harris*, 16 Ind. 180.

In *Vaughn v. Griffith*, 16 Ind. 553, a copy of the statutes of Ohio, purporting to be printed by authority of the general assembly, and published in pursuance of an act of the general assembly, were offered and received in evidence, it appearing that they purported to be published by public authority, thus distinguishing the case from *Magee v. Sanderson*, *supra*.

In order to prove that the public library of Kentucky was a duly incorporated institution, a bound volume entitled "Acts of the General Assembly of 25 L. R. A.

the Commonwealth of Kentucky, passed at the adjourned session (January, 1871) of the General Assembly which was begun and held in the city of Frankfort, published by authority, containing what purported to be an act of incorporation of such library," was held admissible, the fair and reasonable inference from the title page showing that the volume purported to be, and was, published by authority of the state. *Rothrock v. Perkinson*, 61 Ind. 39.

The evidence of three witnesses, residents of Pennsylvania, thoroughly conversant with the laws as contained in *Dunlap's Laws and Purdon's Digest*, which they offered as evidence of the statute law of that state, was held not subject to exception, the fact that the books were received as evidence of the law being properly proved before the books were read for the law, the testimony proving the practice and usage under the statute. *Greasons v. Davis*, 9 Iowa, 219.

The case of *Greasons v. Davis*, *supra*, was distinguished from that of *Taylor v. Runyan*, 8 Iowa, 475, by reason of the averments in the petition in relation to the effect of the entries of the judgment in the record in Pennsylvania, and the evidence introduced to support such averments and to show the force and meaning of the record, where they were made and existed. The court in the latter case stated that if there had been the proper averments and evidence supporting them, and showing that these forms of entry had the effect of judgments where they were made, it might and probably would make a different case, but in such latter case there was nothing explaining the transcript and showing their effect at home.

Where the plaintiff read from a printed book, purporting from its title page to contain the civil code of the state of Louisiana, and to have been published by authority, the court held such book was competent testimony of the laws of Louisiana, and overruled the defendant's objection to the evidence. *Thomas v. Davis*, 7 B. Mon. 227.

The Ohio laws were allowed to be proved by the testimony of witnesses learned in the law, who incorporated sworn copies of such printed laws as their depositions. *Biesensthal v. Williams*, 1 Duv. 329, 85 Am. Dec. 629.

Where the defendant objected, upon the ground of irrelevancy, to the plaintiff's reading in evidence the revised statutes of Illinois, and the first volume of *Brees's Illinois Reports*, the court sustained the objections; the law of Illinois not being an averment sufficient to support proof of what the law was, the proper statute fixing the liability not being mentioned or referred to, there was nothing from which the court could infer the law, the averment not indicating whether such law was statutory or established by precedent of the court, the law of another state being nothing but a fact which must be pleaded as any other fact, in order that the court may judge of the effect of the law. *Roots v. Merriweather*, 8 Bush, 401.

Where the statutes of a sister state purported to be printed by the state authority, and as such were found in book form, they were held competent evidence. *Taylor v. Bank of Illinois*, 7 T. B. Mon. 576.

In *Lapice v. Smith*, 12 La. 91, 38 Am. Dec. 555, a-

ever conflicts may have arisen between the courts of the various states in determining whether a witness should show some special training or opportunity to become instructed in such laws (Id. § 97), we are relieved from doubt and difficulty by the plain expression by the legislature of the purpose to allow all who claim to know the provisions of foreign laws the privilege of explaining them

to courts and juries. It was intended that juries should judge of the skill and intelligence of witnesses testifying upon this subject, as they do when nonexpert witnesses are allowed to give their opinions as to questions of sanity. Our statute, however, is but affirmative of the principle which has been laid down as the law at an early day by some of the courts of this country. Id.

copy of the statutes of Mississippi under the great seal of the state and the certificate of secretary of state were admitted as evidence of the laws.

Where it was sought to prove by a member of the Pennsylvania bar, the statute law of that state in regard to the jurisdiction of justice of the peace, the evidence was rejected. *Zimmerman v. Helser*, 22 Md. 274.

A volume of the laws of the state of Vermont, upon the title page of which were printed the words "by authority," was held admissible in evidence under section 59 of chapter 94 of the Revised Statutes of Massachusetts. *Merrifield v. Robbins*, 3 Gray, 150.

In *Ashley v. Root*, 4 Allen, 504, the defendant was allowed to read in evidence a pamphlet, purporting to be the "acts, resolutions, and memorials passed at the regular session of the fourth general assembly of the state of Iowa" having upon it "the certificate of the secretary of state of Iowa" for the purpose of showing that the money was lent upon an usurious rate of interest. The court affirmed the general principle and admitted the evidence, the proof being in conformity with section 63, chap. 121, of the General Statutes.

Where a volume produced in evidence by an attorney appeared to be a volume of the New York statutes, published by authority of the state and possessing the character of identity and authenticity, provided for under the Michigan compiled laws, it proved itself as an item which was admissible, it not being shown that any change had taken place in the law since the enactment of the statute. *People v. Calder*, 30 Mich. 85.

But where, for the purpose of proving the marriage laws of New Jersey, a policeman and constable in New Jersey did not swear to any general knowledge of the laws of that state, but testified that he had, on account of a difficulty with his wife, looked into those laws, the court held such evidence was wrongly admitted, either as proof of or as explaining the law of New Jersey. *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49.

In *Kopke v. People*, 43 Mich. 41, a first marriage in Ohio was proved by the evidence of an Ohio lawyer as to the statutory law in the state. The court, although no exception was based upon the admission thereof, and it did not affect the record as presented upon appeal, nevertheless suggested that statutes should be proved in a more direct way, and that the laws of Michigan, as well as the act of congress, made distinct provision on the subject. *People v. Lambert*, *supra*, approved of.

A printed copy of a document purporting to be printed by order of the governor of the state, and published by the authority of one of the co-ordinate departments of the government, was held sufficient, the intention of the Michigan statute being only to prevent mere private or unauthorized publications of another state from being admitted in evidence. *Wilt v. Cutler*, 38 Mich. 189.

In the above case the title page read "Revised Statutes of the state of New Jersey, passed in 1874. Trenton, printed by order of the Governor, 1874," and the volume was admitted as evidence, even though it did not purport to be published under the authority of the government of the state, as required by § 5935 of 2 Compiled Laws of Michigan.

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Printed journals of the state in the house of representatives in the state of Missouri, and all public documents and reports therein contained, and all reports or documents printed by order of the state, or of either house of the general assembly, or purporting to be printed by authority thereof, are prima facie evidence to the same extent that duly authenticated copies of the original would be. *Bradley v. West*, 60 Mo. 34.

In *Lord v. Staples*, 23 N. H. 449, the court admitted a volume of the laws of another state, proved by the counselor of that state to be received in the courts thereof, and to be published by authority as evidence.

But the court did not decide in the above case that the laws of any country, merely foreign, might be so proved. *Lord v. Staples*, *supra*.

A copy of the state statute authenticated under the seal of the state, was received in evidence in *State v. Carr*, 5 N. H. 387, without further proof.

Where objection was made to the admission of a bound printed volume of the laws of the state of New York, by an attorney of that state, as universally received in the state of New York as the statutes of that state, it was held it was properly admitted. *Hale v. Ross*, 8 N. J. L. 373.

The decision in the above case was dissented from by the court in *Van Buskirk v. Mulock*, 18 N. J. L. 184, the court holding that such statutes, whether public or private, could only be given in evidence, and exemplified as directed by the act of congress. In the above case the court refused to receive evidence of an attorney, to the effect that a printed volume of the statutes of New York was universally received and read in that state as evidence.

An official printed copy of the Wisconsin statutes of 1854, and of the Revised Statutes of 1858, offered and read without objection, and received by the court, cannot afterwards be objected to. *Condit v. Blackwell*, 19 N. J. Eq. 193.

In the above case the testimony of the defendant with respect to the Wisconsin laws, although it would not have been sufficient if given by a counselor of the state, yet being given by him as defendant, and on his own behalf, the court held must be received as against him, being admitted without objection.

But in that case it was stated that the laws of Wisconsin were not in fact, or by theory of law, known to the courts of the state, and must be proved either by experts, counselors learned in the law of that state, or copies of its statutes with the decisions thereon. *Condit v. Blackwell*, *supra*.

A book purchased in a book store, purporting to contain the laws of a state, unless published by authority, would not be admitted anywhere as evidence of the written laws of any government. *Packard v. Hill*, 2 Wend. 411.

In *Markoe v. Aldrich*, 1 Abb. Pr. 55, the certificate of the recorder of the county of the recording of a mortgage was produced with that of the clerk of the court, with the seal of the court annexed attesting that he was recorder and that his signature was genuine together with the certificate of the presiding judge of that court, attesting the clerk's certificate; it was held not sufficient to prove the validity of a mortgage made in the state of Indiana.



§ 96; *American L. Ins. & T. Co. v. Rose-agle*, 77 Pa. 514; *Pickard v. Bailey*, 26 N. H. 171.

We find no difficulty in arriving at the conclusion that the prosecuting witness was competent to prove that she was married according to the laws of Russia, with which she said she was acquainted. It is equally clear that the writing which she testified was

signed by the defendant and herself at the time of her marriage with him is admissible, not simply as corroborative, but as substantive, testimony, since, if genuine, it is a declaration of the defendant tending to establish the fact that the marriage was then celebrated. 1 Russell, Crimes, 216; *Hill v. Hill*, 83 Pa. 518. This paper is like the English register of marriage,—not a clergy-

Where in order to prove the appellate jurisdiction of the supreme court of California, a member of the California bar testified that a book, containing the statutes of California published by the state printer was one of the official copies, as published by the state printer, and that it was the received official publication recognized by the bar, and that the court had no other and there was no other edition published, the court overruled the defendant's objection, which was that the book did not purport to be published by the authority of the state, and was not commonly admitted as evidence. *Pacific Pneumatic Gas Co. v. Wheelock*, 80 N. Y. 278, affirming 12 Jones & S. 568.

In the case where the statutes of another state were received upon insufficient proof, but upon examination it was made to appear to the supreme court, by reason of facilities furnished by the secretary of state, that the copy so produced at the trial was correct, the court refused the writ. *McDugald v. Smith*, 88 N. C. 576.

Where a paper, purporting to be a copy of the laws of Maryland, was given in evidence but it was not certified as required, either by the laws of the United States or of North Carolina, it was held error for which a *venire de novo* would issue. *Ibid*.

The certificate of the secretary of state, accompanied by that of the governor under the seal of the state, is a sufficient compliance with the Act of North Carolina, of 1823, Rev. Stat., chap. 1198, directing the mode of proof of sister states as to the secretary's official character. *State v. Jackson*, 13 N. C. 563.

In *State v. Twitty*, 9 N. C. 441, 11 Am. Dec. 779, a printed book entitled "Revised Code of the Laws of Virginia" was put in evidence to prove the existence of a certain corporation, and held not admissible, the court stating that such laws must be proved by duly authenticated copies with the seal of the state attached, the Act of Congress of 1790, under which every law of another state must be authenticated by having the seal of the state affixed, superseding the common law of the subject and being the highest evidence of authenticity.

A copy of a private act of assembly, printed under the authority of the commonwealth, was held evidence in *Biddis v. James*, 6 Binn. 321, 6 Am. Dec. 456.

Printed copies, authorized by the legislature, of state laws, whether public or private, were held to be admissible in evidence. *Ibid*.

In *Kean v. Rice*, 12 Serg. & R. 203, a printed copy of an act of assembly, published by the legislative authority of another state, was received in evidence.

A certified copy of the general statutes of Massachusetts, proved by the governor and certified by the secretary of state, under the seal of the commonwealth, was held admissible in evidence. *Grant v. Henry Clay Coal Co.* 80 Pa. 208.

Where the laws are public or private, yet being printed by the public printer by order of the legislature, agreeably to a general act of assembly for that purpose, it must be considered as sufficiently authenticated. *Biddis v. James*, *supra*.

Where the plaintiff offered and gave in evidence a printed book styled "The Revised Laws of New York," and offered to read therefrom, it was held 26 L. R. A.

that printed volumes purporting on their face to be the laws of a sister state were admissible as prima facie evidence to prove the statute law of that state. *Mullen v. Morris*, 2 Pa. 88.

The record of a judgment of a court of a sister state attested by the deputy, and certified by the judge of the supreme court of the state, it appearing from the record that he was a member of the court but not the chief justice, was held not certified as directed by the act of congress and improperly admitted in evidence, the Act of Congress of 1790 declaring that the records and judicial proceedings of any state shall be proved or admitted in any other court of the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate as the case may be, that the said attestation is in due form. *Lothrop v. Blake*, 3 Pa. 483.

Prince's Digest of the laws of Georgia, compiled under the authority of the legislature of that state, examined and approved under authority by the governor containing a certificate of his approbation and carrying other marks of authenticity, was held admissible in evidence of the laws of Georgia. *Allen v. Watson*, 2 Hill, L. 819.

The admissibility of the book, however, was put upon the ground that it was commonly known by the bar and the bench, that in Georgia, which was only separated from South Carolina by the Savannah River, it was received as evidence for the statute law of that state, a copy of the same being in the legislative library of the state of Tennessee, presented as containing the statute laws of Georgia. *Ibid*.

The laws of Missouri, before they became a part of the Union, were held to be provable as facts from the best sources, such as eminent jurists, and other legal characters who had opportunities to become experienced in them, as well as by the public documents of the country. *Wilson v. Smith*, 5 Yerg. 399.

In *Foster v. Taylor*, 3 Overt. 191, it was held that the court could either recur to its own knowledge of the judiciary system of a sister state, or look into the printed statutes of such state, to ascertain facts within such statutes. *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158.

While, under the common law, the law of another state must be averred and proved as any other fact, in Tennessee the averment in such case would only be necessary and would be sustained in the courts of that state by copies of the statute, purporting or proven to have been published by the authority of the state from whence it comes, under section 8900 of the Tennessee Code. So held in *Hobbs v. Memphis & C. R. Co.* 9 Heisk, 873, as to inferior courts.

In *Tryon v. Rankin*, 9 Tex. 585, where the question was as to the plaintiff's right to recover interest on a promissory note, the court held such right did not exist at common law, it was generally the creature of statute and therefore could not be proved by parol; and further that if the rate of interest depended upon usage having the force of law, it was susceptible of proof by parol, but it must be proven as a usage.

The case of *Burton v. Anderson*, 1 Tex. 93, which

man's certificate, but a paper signed by the parties. "Proof of the register there [says Campbell, J., in *People v. Lambert*, 5 Mich. 849, 72 Am. Dec. 49] is proof of the act of the party, as much as proof of his signature to a deed would be."

After the witness testified that the words on the back of a picture of the defendant were in his handwriting, and that the writ-

ing was sent to her together with the picture, the writing was competent as an acknowledgment by him of the relations subsisting between them, just as was the written statement signed by him at the time of the marriage. 21 Am. & Eng. Encyclop. Law, p. 121.

A much graver question was raised, however, by admitting, in the face of objection,

decided that the act of congress did not exclude other modes of authentication of state laws, and admitted the statute books purporting to be published by state authority as evidence, was held to be superceded by the provisions of the statute. *Martin v. Payne*, 11 Tex. 232.

The act of congress does not preclude the establishment of other means of authentication, or proof by the states themselves. *Ibid*.

Where the evidence rejected was a compilation of the statutes of Tennessee, which did not purport to have been published by the authority of the state, or to be official in its character, it was held that they were not receivable in evidence, as, under the act of congress, only books purporting to have been printed by state authority were admissible, the statute not extending to private and unofficial publications. *Ibid*.

The testimony usually produced is a sworn copy of one who has compared it with the original proceedings, or an exemplified copy certified by the clerk, and the presiding judge, and the seal of the court with the broad seal of the province or kingdom to the appointment of the judge, with the proper certificate from the office of appointment. *Spaulding v. Vincent*, 24 Vt. 501.

A village charter was held to be a public law of which the court should take judicial notice. *Winooski v. Gokey*, 49 Vt. 232.

A copy of a manifest taken from the books of a custom house is a copy of a record, and may be given in evidence when properly proved. *United States v. Johns*, 4 U. S. 4 Dall. 412, 1 L. ed. 863.

An exemplification of a law of a state under the great seal thereof is admissible in evidence without any other attestation. *Thompson v. Musser*, 1 U. S. 1 Dall. 458, 1 L. ed. 222.

The written or statute laws of foreign countries are to be proved by the laws themselves if they can be procured, if not, inferior evidence of them may be received. *Consequa v. Willings*, Pet. C. C. 325.

The laws of the other states, printed under authority, are evidence when proved to be so printed. *State v. Stade*, 1 D. Chip. 303.

In *Ennis v. Smith*, 55 U. S. 14 How. 400, 14 L. ed. 472, the Code Civil of France with its indorsement "Les Garde des Sceaux de France a la Coeur Supreme des Etats Unis" was offered as evidence to prove that the law of France was for the distribution of the funds in question and it was held that such indorsement was sufficient to make the code evidence.

#### b. Of foreign countries.

Foreign law is to be proved as a fact, if written or statutory, by the law itself or exemplified copies. *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287, 33 Am. Dec. 638; *De Sobry v. De Laistre*, 3 Harr. & J. 191, 3 Am. Dec. 535; *Gardner v. Lewis*, 7 Gill. 379.

The written foreign laws may be verified by an oath, or by an exemplification of a copy under the great seal of a state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer properly authorized by law to give the copy, which certificate must be duly proved. *Ennis v. Smith*, 55 U. S. 14 How. 400, 14 L. ed. 472.

The written foreign law may be proved by a copy of the law properly authenticated. *Ibid*. 25 L. R. A.

To prove the written laws of any foreign nation, a copy of such laws should be produced. *Gardner v. Lewis*, *supra*; *Robinson v. Clifford*, 2 Wash. C. C. 1; *Pioton's Case*, 30 How. St. Tr. 492.

Otherwise it cannot be taken as evidence. *Hempbill v. Bank of Alabama*, 6 Smedes & M. 50; *Gardner v. Lewis*, and *Robinson v. Clifford*, *supra*.

The usual mode of proving a statute law of a foreign state is by an exemplification of the statute, certified by the proper officer and in the proper manner. *Allen v. Watson*, 2 Hill. L. 312.

The laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts. *Talbot v. Seeman*, 3 U. S. 1 Cranch, 1, 3 L. ed. 15.

The written law of a foreign country is subject to the same rules as all other written instruments of evidence of a public nature, and as the original cannot be produced, can only be proved by the production of a sworn copy. *Innerarity v. Heire of Mima*, 1 Ala. 600.

The written or statute laws and judicial records of a foreign state must be proved by documents properly authenticated under the seal of the state, or a sworn copy must be produced. *Lincoln v. Battelle*, 6 Wend. 475.

Authenticated copies of written laws, or other public instruments of foreign governments, must be produced and verified upon the sanction of an oath, unless verified by some other high authority which the laws respect not less than the oath of an individual. *Phillips v. Gregg*, 10 Watts, 153, 36 Am. Dec. 153.

A person offered as a witness and expert in foreign law may state a written law without producing it, and he may produce the copy of the statutes or code of the foreign country and refer to the same for the purpose of refreshing his recollection as to the law. *Barrows v. Downs*, 9 R. L. 443, 11 Am. Rep. 233.

The statute laws of nations foreign to the United States could not formerly be proved by parol, but now the court has a discretion on this point. *Line v. Mack*, 14 Ind. 330; *Compere v. Jernegan*, 5 Blackf. 375.

Where a defendant, in an action of ejectment, offered to prove by a witness the function and authority exercised by the Spanish commandant at Mobile, under the Spanish government, that they did exercise the civil, military, executive, and judicial powers, and that their decisions therein were conclusive, unless appealed from, and also that they determined all questions concerning lands, both as to the king and individuals, and that the commandant was empowered and authorized by the Spanish government, by written orders from the king and other superior officers; that these orders as well as the regulations by which they were governed were in writing.—It was held that the court committed no error in refusing the testimony, as a foreign written law can only be proved by an exemplification of the law itself. *Innerarity v. Heire of Mima*, 1 Ala. 600.

In the above case there was no offer to prove the existence of a usage or custom for which there was no warrant by any written order or regulation, the proof being an attempt to prove the legal effect

the attestation of the celebration of the marriage by the rabbi of the city of Riga, which was certified by the signature and seal of the official minister. We cannot satisfactorily dispose of this case without determining what documentary testimony can be admitted on the trial of criminal prosecutions without invading the constitutional right of a defendant to confront his accusers. The right

to cross-examine one's accusers was never held to exclude the dying declarations of one who, by the act of the accused, was no longer able to confront him on the trial, provided the declaration was made in the certain expectation of death. *State v. Mills*, 91 N. C. 581; *State v. Tilghman*, 33 N. C. 513; *State v. Williams*, 67 N. C. 12; *State v. Shelton*, 47 N. C. 360, 64 Am. Dec. 587; *Green v.*

of orders and regulations admitted to be in writing, which were therefore properly rejected. *Ibid.*

The printed volume of the laws of the British province, which was proved by the testimony of subscribing witnesses before the lord mayor of London, and certified by him under his official signature and seal of office, which was sufficient to authorize the deed to be read in evidence of title by the law of the province, was held to be sufficient evidence to pass the title here. *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143.

Where the books admitted purported to contain the laws of the province, printed by the printer to his majesty, and distributed by the government to its officers, and cited and read in the courts there as laws in force, regulating the administration of justice, receiving the sanction of the executive and judicial officers of the province as containing its laws, the latter fact being proved by the oath of witnesses, the court held such evidence equally satisfactory as the exemplification of a roll found in the possession of the *custos rotulorum*, accompanied by the oath of the person making it; and was no departure from the rule requiring the best evidence. *Owen v. Doyle*, *supra*.

The evidence of an attorney from Canada, concerning the Canadian law of interest, was held inadmissible to show the terms of a Canadian statute in *Kermott v. Ayer*, 11 Mich. 181.

In an action upon a bill of exchange, it was held that the commerce code of France, being written law, could not be proved by the production of a printed book, admitted to be conformable to the official edition of the code published by the government. *Chanoine v. Fowler*, 3 Wend. 173.

In the above case the chancellor of the French consulate of New York produced a book in the French language containing the code, but not the official edition of the laws of France, although the witness stated that it was conformable to that edition, and that he regulated his official conduct by the laws as contained in that book, which, he stated, was an exact copy of the laws furnished by the French government to his consul, and the defendant agreed to so consider it, but the court held such book was not evidence of the laws of France. *Ibid.*

The notarial certificate only proves the correctness of the translation. *Lincoln v. Battelle*, 6 Wend. 475.

The laws regulating the Court of Consulado of Havana where held not provable by a printed book purchased in Havana purporting to contain the royal charter establishing that court, the written laws of other states being proved by an exemplification, and not by the printed statute book of such states. *Paekard v. Hill*, 3 Wend. 411.

Where the defendant sought to prove his discharge from a debt, by virtue of a royal grant of the king of Denmark, and of the proceedings under it, the *proclama* which preceded the grant being considered as a law of the kingdom of Denmark or as a judicial proceeding, the evidence of a sworn witness who swore that he knew that such grant was issued, and that all necessary notices were given, and that the copy and notarial translation of the *proclama* annexed to the witness's deposition was duly authenticated, and that full 25 L. R. A.

faith and credit would be given to such authentication in the courts of Denmark, was held inadmissible as evidence. *Lincoln v. Battelle*, *supra*.

Where the original instrument upon which suit was brought could not be produced, as by the laws of the Spanish province in which it was executed the original remained with the notary before whom it was executed, copies certified and signed by the notary being delivered to the parties and receivable in evidence in all the Spanish courts,—upon the question whether the *lex loci* ought to prevail so as to allow such copies as evidence, the court inclined to the opinion that they ought not to be received as sufficient *per se*, but were not entirely to be disregarded and treated as nullities, but ought to be received as forming part of the inferior evidence of execution when the original could not be produced and proved. *Mauri v. Hefferman*, 13 Johns. 58.

In order to ascertain the exact state of the law at a particular date, including its construction and effect, the evidence of a person who testified that he had practiced law in Havana for twenty-four years, had been the consulting lawyer of one of the tribunals, and a judge, and the book to which he referred purported to be the Spanish Code of Commerce of 1823, it was held that the book was admissible as showing the law of Cuba, and to support the evidence and refresh the recollection of the witness. *Barrows v. Downs*, 9 L. L. 445, 11 Am. Rep. 233.

Marine ordinance of foreign countries, promulgated by the executive by order of the legislature of the United States, may be read in the courts of the United States without further authentication or proof. *Talbot v. Seeman*, 5 U. S. 1 Cranch 1, 3 L. ed. 15.

Where the claimant offered in evidence of the French law volumes of the fourth, twenty-fourth, and others of the Bulletin Des Lois, sent to the supreme court by the French government, they were held admissible in evidence without further proof for the purpose of proving the French law. *Dauphin v. United States*, 6 Ct. Cl. 221.

In *Thompson v. Musser*, 1 U. S. 1 Dall. 458, 1 L. ed. 222, a copy of an act of assembly of another state, contained with other acts in a pamphlet printed by the printer of the commonwealth, was held to be good evidence where the court below permitted the declaration to be amended before the writ of the jury had been sworn, and then had the jury sworn again and received their verdict without the consent of the defendant.

The English written law was allowed to be proved by printed statutes, proved to be officially published by that government, a copy of the statutes being shown, to the reasonable satisfaction of the court, to be genuine. *The Pawashiook*, 3 Low. Dec. 142.

Where the defendant's counsel offered to prove by a witness the contents of two decrees of the king of Spain, the court refused the evidence, stating that although the unwritten law of foreign countries might be proved by witnesses, the written law could be proved only by itself. *United States v. Ortega*, 4 Wash. C. C. 581.

Where the proof exists, and the provisions of the bankrupt law of a province, at the time the dis-

*State*, 66 Ala. 40, 41 Am. Rep. 744. Where a witness who was examined on a preliminary hearing or on a former trial of the same indictment has since died or become insane, or is too ill to be present, or has been induced by the prosecutor or defendant to remove from the state, his testimony may be proved on a subsequent trial, when it appears that the accused was present, and had

the opportunity to cross-examine the witness when such testimony was delivered. *State v. King*, 86 N. C. 603; *State v. Grady*, 83 N. C. 646; *State v. Valentine*, 29 N. C. 225; *State v. Taylor*, 61 N. C. 508.

Where facts, from their very nature, can only be proved by a record, or a duly authenticated copy of a record, proof of them does not fall within the constitutional in-

charge was granted, was made without the production of any copy of the statute, it was held irregular, as some copy of the law, which the witness could swear was recognized in the province as authoritative, should have been produced. *Spaulding v. Vincent*, 24 Vt. 601.

#### IV. Modifications of the common law.

Statutory modification of the common law must be proved by the production of authenticated copies of the statutes, and cannot be otherwise judicially noticed. *Newton v. Cooke*, 10 Ark. 169.

#### V. Construction of written laws.

The question of the exposition, interpretation, and adjudication, which might never have been evidenced by books or writings, is properly shown by the testimony or opinions of competent witnesses, instructed in the law of the state, such expositions and interpretations being well understood as the rules of law produced by the court, from the written words of the code upon a particular state of facts. *Walker v. Forbes*, 31 Ala. 9; *Dyer v. Smith*, 12 Conn. 384.

It may be learned by parol what the true meaning or construction of a foreign statute, as settled by the practice of courts of a foreign country, is, and courts will take notice of the construction given to foreign statutes by foreign tribunals, into whose reports they may look for such construction. *Hoes v. Van Alstyne*, 20 Ill. 202.

The statutes of another state, and also any peculiar construction which the courts of such state may have placed upon them, when they come in question in the courts of another state must be proved by evidence as matters of fact, and if such statutes be given in evidence, but no evidence of such peculiar construction be given, the courts of the state will give the statute such construction as may be authorized by the settled construction of similar statutes in that state. *Smith v. Bartram*, 11 Ohio St. 690.

The construction given to a statute relating to justice suits might be as much part of the common law as any part of the common law, and capable of the same kind of proof, and it makes no difference whether the construction of the statute arises from immemorial usage and practice, or in consequence of the decisions of the highest judicial tribunals, in either case if the construction had become a part of the law of the state, it is capable of proof by the courts of another state. *Dyer v. Smith*, 12 Conn. 384.

Such evidence, being credible and true, must control the courts in construing the written law, even though it leads to the adoption of a consideration different from that placed upon them by the former decisions in the case. *Walker v. Forbes*, 31 Ala. 9.

Courts may take uniform notice of the construction given to foreign statutes by the foreign tribunals, and for this purpose will look to the reports of such tribunals. *McDeed v. McDeed*, 37 Ill. 645; *Hoes v. Van Alstyne*, 20 Ill. 202.

Where the witness was a counselor at law, and had for many years exercised the duties of the office of a justice of the peace in the state, and gave evidence to the practical construction of a statute 25 L. R. A.

regarding his courts, the evidence was held admissible. *Dyer v. Smith*, *supra*.

Where it was sought to put in evidence a statute giving the plaintiff's executors a right to proceed to execution in the same way the plaintiff might have done, the *modus operandi* by which the executor was to become a party not being defined, the court held that the mode of procedure rested in the practice of the courts in the same manner as the extent of meaning given to the act, and that such construction, usage, and practice might be shown in the same manner as the unwritten law might be. *Greasons v. Davis*, 9 Iowa, 219.

The same rule is applicable to the construction of foreign statutes. *Holman v. King*, 7 Met. 384.

The connection, intercourse, and constitutional ties which bind together the several states require that this species of evidence should be sufficient until contradicted. *Raynham v. Canton*, 8 Pick. 238.

Where the evidence consists of the parol testimony of experts, as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is. *Kline v. Baker*, 99 Mass. 254.

The question of construction and effect of written documents, statutes or judicial opinion is for the court. *Ibid*.

#### VI. Proof of practice under statutes.

The practice and usage under the written or statute law may be proved by parol. *Greasons v. Davis*, 9 Iowa, 219.

By lawyers skilled in the laws, usages, and practice of such state. *Blackwell v. Glass*, 43 Ark. 209.

In *Mowry v. Chase*, 100 Mass. 79, the evidence of experts from Rhode Island was admitted for the purpose of proving the usage and practice of the court of that state, with respect to the sufficiency of service to support a judgment.

Where, in an action of debt, the plaintiff offered the depositions of a witness, skilled in the laws and familiar with the practice of the state of Louisiana, and also the laws of the state of Louisiana, purporting to be published under the authority of the state, such depositions appearing to be regularly taken, the evidence was held competent to prove the laws and practice of that state. *Barkman v. Hopkins*, 11 Ark. 157.

The principles established in *Greasons v. Davis*, *supra*, were followed by the court in *Crafts v. Clark*, 38 Iowa, 237, where the plaintiff introduced in evidence an exemplified copy of an act of the legislature of the state of Pennsylvania, showing the duty of the prothonotary of the courts of record in that commonwealth, upon the application of the holder of a note, bond, or other written instrument upon which judgment is confessed, or containing a warrant to confess judgment as to the entry of such judgments, and also evidence of an expert showing the practice of the courts of that state upon such judgments.

But a witness cannot prove the powers of a notary under a state statute. *State v. Cross*, 66 Iowa, 180.

#### VII. State statutes.

By section 2790 of the civil code of Alabama, ed. of 1886, vol. 1, transcripts of Acts of Congress, or of the statutes of any other state or territory of the

bibition, since the genuineness of the original was determined by inspection, and of the copies by an examination of the certificates, and the right to confront accusers was intended to be secured to the accused, not under all circumstances, but only where it would bring with it the benefit of testing the truth of testimony by meeting a prosecuting witness face to face, and subjecting him to cross-

examination. 8 Am. & Eng. Encyclop. Law, p. 735, note; *Tucker v. People*, 123 Ill. 592; *State v. Matlock*, 70 Iowa, 229; *People v. Jones*, 24 Mich. 235; *United States v. Ortega*, 4 Wash. C. C. 531, Fed. Cas. No. 15,971; *Hutchins v. Kimmell*, 81 Mich. 130, 18 Am. Rep. 184. Before the passage of the Act of 1823 (Code, § 1338), a printed copy of the acts of the legislature of another state was

United States, certified by the secretary of state of that state as being deposited in his office, and public or private statutes, or the proceedings of any legislative body purporting on the face of the book to be printed by authority of the government or state or territory, are made evidence without further proof.

The Revised Statutes of Arizona, ed. of 1897, title 25, chap. 4, p. 380, provides that the printed statute books of the territory of the District of Columbia, or of any state or territory of the United States, or of any foreign government purporting to be printed under the authority thereof, are receivable in evidence.

By section 2322 of the Digest of Statutes of Arkansas, ed. 1884, chap. 59, p. 620, it is provided that the printed statute books of the several states and territories of the United States, purporting to have been printed under the authority of such states or territories, shall be evidence of the legislative acts of such states or territories.

And by section 2323 of the Arkansas Digest, of Statutes ed. 1884, chap. 59, copies of any act, law, or resolution contained in the printed statute books of any of the states and territories of the United States, purporting to have been printed by authority, and which are now, or which may hereafter be deposited in the office of the secretary of this state, and required by law to be there kept, certified under the seal of the secretary of state, shall be admitted as evidence.

Section 1963 of Deering's Annotated Codes and Statutes, of California, vol. 3, p. 643, provides that all other presumptions are satisfactory if uncontradicted. They are denominated disputable presumptions and may be controverted by other evidence.

And paragraph 35 states that a printed and published book purporting to be printed or published by public authority was so printed or published. Paragraph 39, that a printed and published book purporting to contain reports of cases adjudged in the tribunals of the state or court where the book is published, contains true reports of such cases.

The General Laws of Colorado, chap. 43, section 174 of Mill's Annotated Statutes, ed. of 1891, p. 1121, provides that printed statute books of the United States and of the several states and territories, printed under the authority of such states and territories, the books of reports of decisions of the Supreme Court of the United States and of the several states and territories published by the authority of such court, may be read in evidence in all courts of the state of such acts and decisions. *Re Roberts*, 5 Colo. 530.

The General Statutes of Connecticut, ed. of 1888, title 13, chap. 76, p. 256, § 1087, makes public statutes printed by authority of the state enacting them, the private or special acts of the state legal evidence to be judicially noticed.

Section 1086 of the same provides for the admission of exemplified copies of the statutes of other states as evidence.

Section 1088 of the same makes reports of decisions of other states and countries the subject of judicial notice as evidence of the common law of such state or country, and of the judicial construction of the statute or laws thereof.

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Section 488 of Levissee's Dakota Codes, ed. of 1885, p. 137, makes the printed copies of statutes, codes, or written laws published by authority, or commonly admitted in evidence in such states or government, admissible on all occasions as presumptive evidence.

The unwritten or common law may be proved as facts by parol evidence and the books of reports are presumptive evidence of such laws. *Ibid.*

The Laws of Delaware, Revised Code, ed. of 1893, page 798, section 6, make printed copies of statutes of any other of the United States, purporting to be published under the authority of the respective governments, or commonly admitted and read as evidence in the courts, prima facie evidence of such laws.

Section 7 of the same provides that the common or unwritten law of any other of the United States may be proved by parol evidence as a fact, or by the reports of cases adjudged in those courts published by authority.

And section 8 makes the existence and the tenor or effect of all foreign laws provable as facts by parol evidence, but provides that if it appears that the law in question was contained in a written statute or code, the court may in its discretion reject the evidence which is not supported by a copy of such law.

Under the Revised Statutes of Florida, ed. of 1892, title 1, chapter 15, art. 2, section 1106, printed copies of the state laws of the United States, or of any of the states and territories, purporting to be published under the authority of the respective governments, or commonly admitted and read as evidence in their courts, are admitted in all courts and on all occasions as prima facie evidence of such laws.

By section 1107 of the same, the unwritten or common laws of the United States, or of any of the states or territories thereof, are provable as facts by parol evidence and by the books of reports of cases adjudged in their courts.

And by section 1108 of the same, the existence and tenor or effect of all foreign laws are provable as facts by parol evidence, provided it does not appear that the law in question is contained in a written statute or code, the court having power in such case in its own discretion to reject any evidence of such law not accompanied by a copy of such code or statute.

Under the Georgia Code of 1892, p. 994, § 3324, the laws of the United States and the several states, as published by authority, are entitled to judicial recognition without proof.

And by section 3325, foreign laws and judgments must be authenticated under the great seal of the respective states.

The public laws of a state as published by authority, or a duly certified copy thereof properly authenticated under the great seal of the state, are receivable in evidence as the laws of such state under sections 3771, 3772, of the Code of Georgia. *Simms v. Southern Exp. Co.* 38 Ga. 129.

The Revised Statutes of Idaho, ed. 1887, p. 680, title 1, chap. 3, § 5060, provide that books printed or published under the authority of a state, territory, or foreign country and purporting to contain the statutes, codes, or other written law of such state, territory, or country, or proved to be commonly

not admissible in our courts to prove its statute law, but a properly authenticated copy was competent both in civil and criminal actions. *State v. Twitty*, 9 N. C. 441, 11 Am. Dec. 779; *State v. Patterson*, 24 N. C. 346, 88 Am. Dec. 699. Upon the principle that we have stated, it has been held by this court that a deed duly proved and registered is competent evidence to show the transfer

of land, whenever it may become material to do so either in the trial of civil or criminal actions. *State v. Shepherd*, 30 N. C. 195.

It is conceded that, if the paper offered had been a properly authenticated copy of the record of marriage required to be kept in a sister state, it would have been competent in a criminal prosecution. But it is needless to pass upon the question whether authenti-

admitted in the tribunals of such state, territory, or country as evidence of the written law thereof, are admissible as evidence of such law.

By section 5970 of the same, a copy of the written law or other public writing of any of the states, territories, or countries, attested by the certificate of the officer having charge of the original under the public seal of the state, is admissible as evidence of such law or writing.

And by section 5971, the oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a state, other territory, or foreign country, as are also books of reports of decisions of the court of such, which are commonly admitted as evidence in such courts.

In Illinois, it is provided by section 10 of Starr & Curtis' Annotated Statutes of Illinois, vol. 1, p. 1080, that the printed statute books of the United States and of that state, and of the several states or the territories and late territories of the United States, purporting to be printed under the authority of the said United States and states or territories, are evidence in all courts and places in that state of the acts therein contained.

By section 11, an exemplification by the secretary of the state of the laws of the other state and territory, which have been or shall hereafter be, transmitted by order of the executive or legislation of such other state or territory to the governor of that state, and by him deposited in the office of the said secretary, are admissible as evidence in any court of the state.

And by section 12, books of reports and decisions of the supreme court, and of the courts of the United States and this state, and of the several states and territories thereof, purporting to be published by authority, may be read as evidence of the decisions of such court.

By section 457 of the Indiana Revised Statutes of 1883, printed statute books of the several states and territories of the United States, purporting to be printed under the authority of those states and territories, and any copy of any statute, or any part thereof contained therein having attached thereto the certificate of the secretary of state under seal of the state certificate, the copy to be complete and correct; the statute book from which the copy is taken deposited in the office of the secretary, or in the state library, and believed by him to have been received under the authority of the state or territory purporting to have enacted the same,—is presumptive evidence in all courts of the legislative acts, public or private, of those states or territories respectively.

By section 476 of the same, the unwritten or common law of any other of the United States, or of the territories thereof, may be proved as facts by parol evidence, and the books of reports of cases adjudged in those courts may also be admitted in evidence of such law.

And by section 477, the existence and tenor or effect of the laws of any foreign country may be proved as facts by parol evidence, but if it shall appear that the law in question is contained in a written statute or code, the court shall in its discretion reject any evidence of such law not accompanied by a copy thereof.

By section 4909 of McClain's Code of Iowa, ed. 26 L. R. A.

1883, vol. 2, p. 1465, the printed copies of the statute laws of that or any court of the United States, or of congress, or of any foreign government, purporting or proved to have been published under the authority thereof, or proved to be commonly admitted as evidence of the existing laws in the courts of such state or government, are admitted in the courts of that state as presumptive evidence.

Section 4970 makes the public seal of the state or county, affixed to a copy of the written laws or other public writings also admissible as evidence. The unwritten law of any other state or government may be proved as a fact by parol evidence, and also by the books of reports of cases adjudged in the other courts.

Section 4465 of the Annotated Statutes of Kansas, ed. 1890, vol. 2, p. 1410, makes the printed copies in volumes of statutes and codes, or other written laws enacted by any other state, territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the court or tribunal of such state, territory, or government, admissible by the courts on all occasions as presumptive evidence.

The unwritten or common law of any other state, territory, or foreign government may be proved as facts by parol evidence, and the books of reports of cases adjudged in the courts may also be admitted as presumptive evidence of such laws, by virtue of the same authority.

By the third section of the Kentucky Act of February 11, 1869, 2 Digest Laws, 1115, it is provided, copies of any of the printed laws of any state or territory of the United States, which may have been heretofore, or may hereafter, be received in the secretary's office, and which shall have been printed under the authority of any such state or territory, when duly certified under the hand and seal of the secretary of state, shall be admitted and recorded as evidence of such law, in like manner with such printed copy, in any of the courts, or before any judicial officer, of that commonwealth.

By section 1440 of Voorhees' Revised Laws of Louisiana, ed. 1884, p. 230, the published statutes and digests of other states are receivable in the courts of that state as prima facie evidence of the state laws to which they refer.

Section 5 of the Louisiana Act of March 14, 1855 (Acts 1855, p. 200), declaring that the public statutes and digests of other states shall be received in the courts of that state as prima facie evidence of the statute laws of the state from which they purport to emanate, does not give the court power to take judicial notice of such statutes, its only object being to dispense with the necessity of procuring written exemplifications from the statutes of sister states. *Anderson v. Folger*, 11 La. Ann. 309.

Under the Revised Statutes of Maine, ed. 1883, p. 709, § 103, printed copies of statutes, acts, and resolves of the United States, or of that state, or any other state or territory of the United States, purporting to be published under the authority of the government, are admissible as evidence; those of the state being sufficient and those of other states prima facie evidence.

By section 109 foreign laws may be proved by parol evidence, but when such laws appear to ex-

ated copies of marriage records of foreign countries would be competent evidence in any criminal case, since the paper admitted purports to be the original certificate of the rabbi, verified by the signature and seal of the official minister; and unless this court is bound to know the signature and seal of that official, and that he is the custodian of marriage records, the paper must be considered,

not as a record, but merely as an original certificate offered in connection with the testimony of the witness that she was married to the defendant at the date mentioned in the paper, the appended writing being but the extraofficial statement of a private person. 1 Greenl. Ev. §§ 493, 498. At an early period of our national history, it was held that the record of a foreign court could not be

set in a written statute or code, such evidence may be rejected unless accompanied by a copy of the code or statute. The unwritten law of any other state or territory of the United States may be proved by parol and by the books of reports of cases adjudged in such courts.

The Revised Statutes of Maryland, ed. 1888, vol. 1, p. 704, § 48, the public or private statutes of the United States, or of any state or territory, are receivable in evidence from a printed volume purporting to contain the statutes of the United States; the states, or territories, and such printed volume is receivable in all cases as evidence without further authentication or proof.

By the Massachusetts General Statutes of 1888, p. 938, § 71, printed copies of the statutes of any other state and of the United States, or of the territories thereof, if purporting to be published under the authority of their respective governments, or if commonly admitted and used as evidence in their courts, are to be admitted and read as evidence in the courts of that state as *prima facie* evidence.

By section 73 the unwritten or common law of any of the United States or territories are provable as facts by parol evidence and the books of reports of cases adjudged therein are also admissible as evidence of such laws.

By section 73, the existence, tenor, or effect of all foreign laws may be proved as facts by parol evidence, but if it appears that such law is contained in a written statute or code, the court has a discretion to reject such evidence if not accompanied by a copy of such statute.

By the Laws of Michigan, 2 Howell's Annotated Statutes, p. 1888, as amended by the Act of May 11, 1885, vol. 3, Howell's ed. p. 3724, § 7508, printed copies of the statute laws and resolves of any other state or territory, or of any foreign state, purporting to be published under the authority, or commonly admitted and received as evidence in the courts thereof, are to be admitted in evidence in all proceedings within the state as *prima facie* evidence of such laws and resolves.

By section 7509 of volume 2 of the same statutes, the unwritten or common law of any other of the United States or territories, or any foreign state or country, are provable as facts by parol evidence, and the books of reports of adjudged cases are also admissible as evidence of such laws.

Under the General Statutes of Minnesota, ed. 1878, vol. 1, p. 800, title 7, chap. 73, § 53, the unwritten or common law of any state or territory of the United States is provable as a fact by parol evidence, the books of reports of cases adjudged in their courts being admissible in evidence.

By section 59 of the same statutes, the existence and tenor or effect of all foreign laws must be proved as facts by parol evidence, but if such laws are contained in a written statute or code, the court may in its discretion reject any evidence that is not accompanied by a copy thereof.

By section 2893 of the Mississippi Revised Code, it is provided that transcripts of acts of congress, or of the statutes of any state or territory of the United States, certified by the secretary of this state as being deposited in his office, and public or private statutes, or the proceedings of any legisla-

tive body, purporting on the face of the book to be printed by authority of the government, state, or territory are evidence without further proof.

Under the Revised Statutes of Missouri, ed. 1889, vol. 1, p. 1022, § 4831, the printed statute books of sister states, and the several territories of the United States, purporting to be printed by authority, are evidence of the legislative acts of such state or territory.

By section 4832, printed copies of the same are *prima facie* evidence, if certified by the secretary of state of such state, or of that state, to be a true copy under the hand and seal of such secretary, such certificate being set out in full on the title page.

By section 4832, the printed books of cases adjudged in the courts of sister states are admissible as evidence of the unwritten or common law.

By section 386 of the Code of Civil Procedure of Nebraska, printed copies in volumes of statutes, codes, or other written law enacted by any other territory, state, or foreign government, purporting or proved to have been published by authority, or proved to be commonly admitted as evidence of the existing laws thereof, are to be admitted on all occasions as presumptive evidence of such laws. The unwritten or common law may be proved as facts by parol evidence, and the books of reports may also be admitted as presumptive evidence of such law.

By the New York Act of March 27, 1804, section 1, it is provided that all records and exemplifications of office books, kept in any public office of any state not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestations of the keeper of any such records, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding judge of the court in which such officer is or may be kept, or of the governor that such attestation is in due form, and by the proper officer, and such certificate, if given by the presiding justice, shall be further authenticated by the clerk, who shall certify under hand and seal of office that the presiding justice is duly commissioned and qualified. *Markoe v. Aldrich*, 1 Abb. Pr. 55.

Section 942 of Bliss' New York Annotated Code, vol. 1, art. 3, p. 764, provides "a printed copy of a statute or other written law of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof, is presumptive evidence of the statute law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof may also be admitted as presumptive evidence of the unwritten or common law thereof. The Act of Congress of 1790 provides that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the

authenticated by the signature of even an American consul resident in such country. *Church v. Hubbard*, 6 U. S. 2 Cranch, 187, 2 L. ed. 249. And subsequently a statute was passed which empowered and made it the duty of a consul of this government to keep a record of marriages celebrated in his presence, and send copies to a specified office in this country. U. S. Rev. Stat. § 4082.

attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate as the case may be, that the said attestation is in due form. *Markoe v. Aldrich*, 1 Abb. Fr. 55.

Section 1838 of the Code of North Carolina, provides a printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance, by the executive thereof, contained in a book or publication, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals, shall be evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof. And every party may also exhibit a copy of the law of such state, territory, or foreign country, duly certified by the secretary of state of this state as having been copied from a printed volume of the laws of such state, territory, or country, on file in the state library, or in the office of the governor or secretary of state.

Section 5244 of volume 2 of the Ohio Revised Statutes, ed. 1891, p. 1323, provides that printed copies of written laws enacted by any other state or territory, or by a foreign government, purporting or proved to be published by authority, or proved to be commonly admitted as evidence of the existing law in the courts of such state or territory, or government, are admissible as evidence by the courts and officers of that state as presumptive evidence of such laws. The unwritten or common law of any other state or territory, or foreign government, are provable as facts by parol evidence, and the books of reports of cases adjudged in such courts are also admissible as presumptive evidence.

Section 717 of the Oregon Code provides that the oral testimony of witnesses skilled in the laws of a foreign country is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of decisions of courts of such state or country. *State v. Looke*, 7 Or. 54.

Under the above section of the code, it was held that historical works, books of science or art are not evidence of such laws under section 748 of the code which makes historical works, books of science or art, published maps or charts made by persons indifferent between the parties, prima facie evidence of facts of general notoriety and interest. *Ibid.*

By the Rhode Island Public Statutes, ed. 1882, p. 580, § 44, a copy of the statutes of another state or country purporting to be published by authority, and the published ordinances of any town in that state, and the published reports of decisions of such courts, are admissible in the courts of that state as prima facie evidence of the laws of the state under whose authority they purport to be published.

By section 422 of the Code of Civil Procedure of South Carolina, ed. 1882, p. 120, printed copies in

If the paper offered is not competent, because not properly authenticated as an official record, it was not admissible at all as documentary evidence of the marriage, because, as was said in *People v. Lambert*, *supra*, a certificate merely signed by a minister, while, perhaps, it may avail in civil proceedings, if properly supported, cannot avail in criminal cases, where the defendant

volumes of statutes, codes, or other written laws enacted by any other sovereignty, state, or territory, or foreign government, purporting or proved to have been published by the authority thereof, or to be commonly admitted as evidence in their courts, are admissible as presumptive evidence. The unwritten or common law of any other sovereignty, state or territory, or foreign government, are provable as facts by parol evidence, and the books of reports of cases adjudged in such courts are also admissible as presumptive evidence.

Sections 4550 to 4559 inclusive, of chapter 3, of the Code of Tennessee, ed. of 1884, p. 893, provide for the proof of foreign written laws in the courts of that state.

By article 2250 of the Revised Statutes of Texas, ed. 1890, vol. 1, p. 729, the printed statute books of such state, of the United States, of the District of Columbia, or any state or territory of the United States, or any foreign government purporting to be printed with authority, are admissible as evidence.

Under the Compiled Laws of Utah, § 481, ed. of 1876, p. 520, printed copies in volumes of state statutes, codes or other written laws enacted by any state or territory, or foreign government purporting or proved to have been published by the authority thereof, or to be commonly admitted as evidence of the existing law in the courts of such tribunal, are admissible on all occasions as presumptive evidence.

By the Code of Virginia, ed. 1887, p. 793, § 8390, copies of the statutes of the United States printed by authority, and copies of the statutes of any state or territory so printed, are receivable as prima facie evidence.

By section 1684 of Hill's Annotated Statutes and Codes of Washington, vol. 2, p. 634, ed. 1891, printed copies of the statute laws of any state, territory, or foreign government purporting to be published with authority, are admissible as presumptive evidence.

The Code of West Virginia, ed. 1892, chap. 12, § 4, p. 122, provides that whenever it is material to ascertain what the law, statutory or other, of another state or country, or of the United States, is or was, the court, judge, or magistrate shall take judicial notice thereof, and may consult any printed book purporting to contain, state, or explain the same, and consider any testimony, information, or argument that is offered on the subject.

Under the Statutes of Wisconsin, Sanborn and Berryman's Annotated Statutes, vol. 2, p. 2141, § 4136, printed copies of the statute laws, and all acts and resolves of congress of the United States, or of the legislature of any state or territory purporting to be published under authority, if commonly admitted and read as evidence in the courts thereof, are admissible as presumptive evidence in that state.

By section 4138, the unwritten or common law of any state or territory is provable as a fact by parol evidence, and the books of reported cases are also evidence of such laws.

The Revised Statutes of Wyoming, ed. 1897, chap. 3, § 2592, provide that printed copies of written law enacted by any other state and territory, or a foreign government purporting or proved to have



is entitled to confront his witnesses. *Gaines v. Relf*, 53 U. S. 19 How. 472, 13 L. ed. 1071. The defendant was accused of an infamous crime, and in such cases it was said by Pearson, *Ch. J.*, in *State v. Thomas*, 64 N. O. 76, that the word "confront" was intended, not simply to secure to the defendant "the privilege of examining witnesses in his behalf," but was "in affirmance of the rule of com-

mon law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face." In that case the state offered certain entries made by a station agent in the books of a railroad company, when said agent was in the state of Virginia, to show that the cotton, in reference to which it was charged that a perjury had been committed,

been published by the authority thereof, or to be commonly admitted as evidence of the existing law in the courts thereof, are to be admitted on all occasions as presumptive evidence. The written or common law may be proved as facts by parol evidence, the books of reports of cases being admitted as presumptive evidence thereof.

By the acts of congress, it is provided that the acts of the legislatures of the several states and territories shall be authenticated by having the seal of the respective states affixed thereto; and by the Texas statute it is declared that the printed statute books of the several states and territories of the United States, purporting to have been printed under the authority of such states and territories, and a certified copy under seal of the secretary of this state, and of any act or resolution contained in the printed statute books of any state or territory of the United States, purporting to be printed under the authority of such state or territory, which is deposited in the office of the secretary of state, shall be evidence in like manner. *Martin v. Payne*, 11 Tex. 232.

The English Statute, 24 & 25 Vict., chap. 11, gives power to the court, when they have before them a suit involving the law of a foreign country, to cause a statement of the facts or a special case to be prepared and submitted to one of the courts of that country for the decision and certificate of the foreign law; and so reciprocally of questions arising in other countries involving the law of England.

#### VIII. *The English doctrine.*

It is a rule of English law that no knowledge of foreign law is to be imputed to the judge. *Nelson v. Bridport*, 7 Beav. 527, 10 Jur. 571.

A question of foreign law being one of fact, must be decided in each case on evidence adduced in it, and not by a decision or by evidence adduced in another case, although similarly circumstanced. *McCormick v. Garnett*, 5 De G. M. & G. 272, 13 Jur. 413, 22 L. J. Ch. 777.

Foreign laws and their application must be proved as facts are proved, by appropriate evidence of properly qualified witnesses, or by witnesses who can state from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question. *Nelson v. Bridport*, *supra*.

Foreign laws, not written, are to be proved by the parol examination of witnesses of competent skill. *Buchanan v. Rucker*, 1 Campb. 63, 9 East, 192; *Millar v. Heinrich*, 4 Campb. 155.

By parol evidence of a witness learned in the laws of the country. *De Bode v. Begnam*, 10 Jur. 217, 8 Q. B. 208.

A professional or official witness giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence. The *Sussex Peerage Case*, 11 Clark & F. 58, 114, 8 Jur. 798.

In *Dalrymple v. Dalrymple*, 3 Hagg. Const. Rep. 54, 81, Lord Stowell, in enumerating the au-

thorities to prove the Scotch law of marriage, mentioned the opinions of learned professors, opinions of eminent writers, as delivered in books of great legal credit and weight, and certified adjudications of the tribunals of Scotland upon these subjects.

A question of Scotch law being one of fact, is not to be decided by authority but by the evidence. *McCormick v. Garnett*, *supra*.

Witnesses, in giving their testimony on foreign law, may refer to laws or treaties for the purpose of aiding their memory upon the subject of their examination, but in general it is the testimony of the witness, and not the authority of the law or of the text-writer detached from the testimony of the witness, which is to influence the judge. *Nelson v. Bridport*, 8 Beav. 527, 10 Jur. 571.

In *The Sussex Peerage Case*, *supra*, the lord chancellor stated that the witness came within the description of a person *peritus virtute officii*, and Lord Langdale intimated that his evidence was of the nature of that of a judge.

The written laws of foreign states can only be proved by copies properly authenticated. *Millar v. Heinrich*, 4 Campb. 155; *Ganer v. Lanesborough*, Peake, N. P. 25.

To prove the acts of state of a foreign government, copies should be produced and examined by the public archives abroad. *Richardson v. Anderson*, 1 Campb. 65, note a.

In the above case, a book purporting to be a collection of the treaties concluded by America, declared to be published by authority there as a regular copy of the archives in Washington, which would have been performed by the American minister a resident in England, was refused as evidence, the court holding that it was necessary to have a copy examined with the archives in America. *Ibid*.

A party is not bound to produce a written law or decree referred to by his witness in proving the law. *Nelson v. Bridport*, *supra*.

In *Clegg v. Levy*, 3 Campb. 156, the law of a foreign country requiring a stamp to the validity of an instrument being a written law, was held to be proven by an authenticated copy.

Where a Spanish law book, made out to be the laws of Spain, was produced, it was held there would be no difficulty in having it stated as the law in a special verdict. *Picton's Case*, 30 How. St. Tr. 452.

The general written opinion as to a foreign law given by two jurists, exhibited by them on examination and verified as the law of a foreign country, was held receivable in evidence. *Nelson v. Bridport*, *supra*.

An advocate of France, having stated that the feudal law affecting the matter in question ceased in Alsace in a certain year by a decree of the national assembly, and that he had become acquainted with that decree in the course of his study of the law, may be asked as to the contents of it. *De Bode v. Begnam*, 10 Jur. 217, 8 Q. B. 208.

A hotel keeper, a native of Belgium who stated that he formerly carried on the business of a merchant and commissioner of stocks in Brussels, was allowed to prove the law of Belgium on the subject of the presentment of a promissory note made in that country payable at a particular place. *Vander Donckt v. Thellusson*, 6 C. B. 812.

had been received by the defendant. The books were kept by the company as evidence of the conduct of its business, and were identified; but the statements recorded in them were, when offered on behalf of the prosecution, but the written declarations of the agent. His testimony was the highest evidence of the transaction, but could be heard, without the consent of the accused, only when delivered *in sua voce* in his presence. But, while the paper was not admissible as a record or an independent declaration of the rabbi, we think it was made pertinent and competent evidence, even in a criminal prosecution, by the testimony of the witness that it was given to her at the very time of the marriage. While the certificate thus given may tend, when admitted to support the testimony of the witness to the fact of marriage, it is competent only as a part of the *res gestæ*;

being a declaration made in the presence of the defendant, and accompanying the act of solemnizing the rite, if it did not constitute a part of the ceremony. 1 Bishop, Mar. & Div. § 1006. It is true that the criminal act charged was the second marriage, but evidence of words or acts accompanying and reflecting light on any transaction which becomes material in the progress of a trial is admissible as *res gestæ*. 1 Roscoe, Crim. Ev. \*26; Best, Ev. 663. It would have been competent for the witness to have repeated all that was said by the rabbi in celebrating the rite. It was equally admissible to show his declaration, oral or written, in the presence of both, that they were lawfully married, as an immediate result of what was done. 21 Am. & Eng. Encyclop. Law, pp. 99, 103, note 1. The paper was admitted on the trial as corroborative, not as substantive,

In *The Sussex Peerage Case*, 11 Clark & F. 85, 115, it was stated to be perfectly clear that the particular mode of proving a foreign law, was not by showing to the house the book of the law for the house had not organs to know and to deal with the text of that law, and therefore required the assistance of a lawyer who knew how to interpret it.

The laws of a foreign country on a given subject may be proved by any person who, though not a lawyer, or a person who by reason of his having filled any public office, may be presumed to be acquainted with the law, is or has been in a position to render it probable that he would make himself acquainted with it. *Vander Donckt v. Thellusson*, *supra*.

Where an instrument under the seal of the synagogue in a foreign country was produced for the purpose of proving a divorce, it was held no evidence, as before such document could be received it must be shown what the laws of the country were, and they must be proved by a witness. *Ganer v. Lanesborough*, Peake, N. P. 25.

In *Ganer v. Lanesborough*, *supra*, it was held that a Jewess might be permitted to give parol evidence of her own divorce in a foreign country, according to the custom of the Jews there.

A Roman Catholic bishop, holding the office of coadjutor to a vicar apostolic in this country is by virtue of that office to be considered as a person skilled in the matrimonial law of Rome, and therefore admissible as a witness to prove that law. *The Sussex Peerage Case*, *supra*.

Where the witness was in a position of importance, engaged in the performance of important and responsible public duties and connected with them, and in order to discharge them properly was bound to make himself acquainted with the subject of the law of marriage, his evidence was said to be the nature of that of a judge and competent. *Ibid*.

In *Reg. v. Dent*, 1 Car. & K. 97, it was held that a witness, called to prove the Scotch law of marriage, need not necessarily be at all connected with the legal profession, and the evidence of a person who stated he was born and educated in Scotland and lived there for twenty years, and was acquainted with the Scotch law of marriage, was held sufficient.

The above case was, however, expressly overruled in *The Sussex Peerage Case*, 11 Clark & F. 85, 124.

In *Williams v. Williams*, 3 Beav. 547, the question as to the right of parties under Scotch settlement was referred to a master to inquire as to the construction of the Scotch law, the master founding his report on the opinion of the Scotch advocates, 25 L. R. A.

upon which the court acted and ordered accordingly.

Where an application was made for the payment of funds out of court belonging to a Scotch married woman, the affidavit of a witness describing himself as an advocate practicing in the supreme court of Scotland, stating his acquaintance with the Scotch laws and that he had investigated the matter and that the Scotch law did not affect the fund, was received in evidence in *Re Todd*, Shand v. Kidd, 19 Beav. 532.

A petition supported by an affidavit of a Scotch advocate, as to the law of Scotland in respect to the personal estate of the wife vesting absolutely in the husband without any equity to a settlement attaching, was allowed in *Hitchcock v. Clendinning*, 12 Beav. 534, 19 L. J. Ch. N. S. 233.

In an action for infringement of a copyright in a foreign work, a witness, expert in the law of a foreign country, was called to prove such law, and the court held that the proper course in such a case was to call the witness, who was expert in the law, and ask him on his own responsibility what the law was, and not to read any fragments of a code. *Cocks v. Purday*, 3 Car. & K. 209.

Where on a prosecution for bigamy, a female witness stated that she was present at the marriage ceremony which was performed in a private house in Scotland, by a minister of some religious denomination, that she herself was married in the same way, and that it was usual for people to marry in private houses in Scotland, the court rejected her testimony, holding her not a competent witness to prove the Scotch law. *Reg. v. Povey*, 17 Jur. 120, Deane, C. C. 82, 23 L. J. M. C. 19.

In *Goods of Bonelli*, 1 Prob. Div. 63, 45 L. J. P. 42, 24 L. T. N. S. 32, 24 Week: Rep. 255, evidence of the foreign law, with reference to the position of a curator of the dormant inheritance of the deceased, was required, and a witness who described himself as a certified special pleader and as familiar with the Indian law, made an affidavit used in evidence. The court held that the laws of a foreign country could not be proved even by a *juris consult*, if his knowledge of it be derived solely from his having studied it at a university in another country. In that case there was nothing to show that the witness had any knowledge of the Italian law, but from the study of it in England, and his evidence was therefore rejected.

In *Goods of Dost Aly Khan*, 6 Prob. Div. 4, 49 L. J. P. 73, 29 Week: Rep. 80, in the case of a probate of a will of a Persian subject, the court allowed the affidavit of a person who deposed to the Persian law, who from his position satisfied the court that he was competent to give evidence. R. W.

evidence. There is no principle upon which such testimony, amenable to the constitutional objection which we have discussed, if offered as substantive evidence, can be permitted to go to the jury in corroboration of a direct witness to the main point to which it relates. A declaration excluded by the constitution, as in violation of individual right, will not be allowed to accomplish indirectly what it is not permitted to do directly,—lead a jury to believe that a marriage was celebrated, when the guilt of the accused hinges upon the question of its solemnization.

We have been led into this discussion because it is important to understand clearly how this declaration is admissible, under the peculiar circumstances, while it would ordinarily be excluded on the trial of criminal prosecutions, as hearsay, or for the reason that it falls within the constitutional inhibition imposed for the protection of persons accused of crime. The defendant has no just ground for complaint, if the jury were allowed to consider a paper which was admissible as a part of the transaction only for the purpose of corroborating the witness to the fact of the marriage.

*Judgment affirmed.*

**Clark, J., concurring:**

There was objection to Albun testifying, but no exception was taken, nor is any ground assigned for the objection. If the objection was that he was not sufficiently qualified as an expert, the finding of the judge below is conclusive. *State v. Davis*, 68 N. C. 578; *Smith v. Kron*, 96 N. C. 392; *State v. Hinson*, 108 N. C. 374; *State v. Brady*, 107 N. C. 822. He is presumed to have so found, if the witness was admitted as an expert. If the objection was that the witness was not an expert, that ground is not assigned, and the court is not to presume that there was error. In truth, however, the Code (sec. 1838, providing that the common law of another state or country may be proved as a fact by oral evidence) would seem to indicate that expert evidence would not be requisite. If so, when the witness testified that he knew the law as to marriage among the Jews in Russia, he was competent to testify what it was; leaving his credibility to be tested by a cross-examination as to his means of information, whether he had lived in Russia, etc. It does not appear that he had not lived there, and his testimony would indicate that he had. But, if he had not, it would have remained for the jury to say what credit should be given to his evidence. He may have acquired such knowledge by reading or otherwise, just as the same witness was admitted as a competent interpreter of German and Chaldaic without showing that he had lived either in Germany or Chaldea.

**Shepherd, Ch. J., dissenting:**

I cannot assent to the broad proposition that any person who simply professes to have knowledge of the unwritten laws of a foreign country, and who merely states that he has had an opportunity of learning them, is a competent witness in respect to their require-

ments as to the celebration of marriages, or the entering into other contracts. Our statute, providing that such laws "may be proved as a fact by oral evidence," is but in affirmation of a general principle laid down in the works on Evidence (1 Greenl. Ev. 436; 1 Whart. Ev. 303), and very clearly does not change in the slightest degree the existing rules as to the competency of witnesses by which such laws are to be established. This is plainly manifest by the declaration of this court in *Moore v. Gwynn*, 27 N. C. 187 (a case decided long after the statute was enacted), that "the existence of such a law could be proved only by the opinions of persons learned in that law." It would, it seems to me, be a novel thing, in our jurisprudence, to allow a plaintiff suing in the courts of North Carolina upon a contract made in another state or country to testify not only to the terms of the contract, but also to the *lex loci contractus*, upon his bare statement that he is familiar with such law. In the decisions of this court it will be seen that only professional witnesses have been examined; but the rule in this respect has been relaxed to some extent in other jurisdictions, and it has been laid down, as stated in *American L. Ins. & T. Co. v. Rosenagle*, 77 Pa. 514 (cited in the opinion of the court), that "the law of a foreign country on a given subject may be proved by any person who, though not a lawyer, or not having filled a public office, is or has been in a position to render it probable that he would make himself acquainted with it."

This view seems to have been adopted by many of the courts, but it is surely no authority in support of the rule as stated in the opinion in this case. In the case above mentioned there was much more than the statement of the witness that he was familiar with the laws of a foreign country. He was a resident of that country, and he testified that he was the Catholic dean and parson at Odenheim, and that, as such, he was the proper custodian of the records of births, baptisms, marriages, and deaths of the parish. He was permitted to testify that the records had been kept according to the laws of the country. The court said: "It was his duty to know, and he testified that he did know, the law relating to the records in his charge. His knowledge was just that which the responsible head of a public office would be assumed to have of the law which had controlled the past operations of his department." Equally inapplicable, I think, is the point of decision in *Pickard v. Bailey*, 26 N. H. 171, the other case cited in the opinion. In that case the witness had acted as a magistrate in Canada, and had also been extensively engaged in mercantile business there, and, in such employment, had become acquainted with the law in relation to notarial instruments. He was held competent to testify that it was the sworn duty of every notary not to suffer any original paper executed before him to be taken out of his custody, and that notarial instruments are received in all the courts in Canada without further proof of the execution of the original. These cases are similar in principle to those cited in

Rogers on Expert Testimony. That author states that, "in order to prove the law of a foreign country, it is necessary that the witnesses produced to testify in respect to it should be more than ordinarily capable of speaking upon the subject." Section 96. And the cases cited by him also establish the proposition that the knowledge must be acquired in the foreign country. Section 100. See also, 1 Bishop, Mar. & Div. 1123.

Applying these principles to the present case, I am very certain that the testimony of the witness Album should not have been received. All that the witness stated as to his competency was "that he was familiar with the law of marriages among the Jews in Russia." He does not state how he acquired such knowledge, nor does it appear that he was ever in Russia in his life. For aught that appears in the record, he may have been born and raised in the county of Edgecombe, and it is not pretended that he witnessed the marriage. His testimony, therefore, is opinion evidence, only; and I am unable to see why any other resident of said county is not as competent to testify to the law of Russia, provided he simply states that he is familiar with its laws. Had this witness testified to the fact of the marriage, and that it was solemnized in the manner usual and customary in Russia, by a person duly authorized to celebrate the rites of matrimony, and the parties afterwards lived together as man and wife, his testimony would have been com-

petent; and it would have been unnecessary to offer any further evidence of the law, in order to establish the marriage. 1 Bishop, Mar. & Div. 1123. And there is almost authority, remarks Mr. Bishop (Mar. & Div. 1124), "for saying that any inhabitant of a foreign country may be a witness to its marriage laws, because, as judicially observed *Wottrich v. Freeman*, 71 N. Y. 601, 'all residents of a country, of marriageable age and ordinary understanding, are familiar with the usual and customary forms of marriage.' The contrary was held in England, but the rule would seem to be in the line of public convenience and policy." However this may be, it is not applicable to this case, as we have seen that, notwithstanding the defendant's objection, the witness was not qualified in any way to testify as to the laws of Russia, nor was it shown that he was a Russian, or that he was ever in that country. Without discussing the subject further, I conclude that, under the most liberal rules to be found in the text-books or decided cases, the witness Album was incompetent, and that his testimony should have been excluded. I am also of the opinion that the general proposition that not only the law of marriage, but all other unwritten laws, can be proved in such a loose and unsatisfactory manner, is dangerous in its consequences, and contrary to our own decisions, as well as the consensus of judicial authority.

## UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

CANADIAN PACIFIC R. CO., *Plff. in Err.*,

William JOHNSTON.

(61 Fed. Rep. 732.)

1. A conductor of a freight train having exclusive control thereof in relation to other employes acting under him, on the train directing its movements, occupies the position of a vice-principal toward a brakeman injured by such conductor's suddenly ordering the train to start while the brakeman was in a position of danger.
2. A statute of a foreign country providing that a cause of action for personal injuries shall be absolutely extinguished in one year, will not operate as a defense to a suit in the United States, where the injured person left such country before such statute became operative by the expiration of the year.

(May 20, 1894.)

**ERROR** to the Circuit Court of the United States for the District of Vermont to review a judgment in favor of plaintiff in an action brought to recover damages for per-

sonal injuries alleged to have resulted from negligence for which defendant was responsible. *Affirmed.*

The facts are stated in the opinion.

Argued before Wallace, Lacombe, and Shipman, *Circuit Judges*.

*Messrs. Joel C. Baker and Frank E. Alfred*, for plaintiff in error:

Where, upon the trial, there is no sufficient evidence of negligence on the part of the railroad company to sustain a verdict for the plaintiff, the court should direct a verdict for defendant.

*Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1008; *Cincinnati, N. O. & T. P. R. Co. v. Mealer*, 6 U. S. App. 86, 50 Fed. Rep. 725; *Latremouille v. Bennington & R. R. Co.* 68 Vt. 336; *Chandler v. Von Roeder*, 65 U. S. 24 How. 224, 16 L. ed. 638.

In order that an action for negligence may be maintained, it must appear that there existed some duty on the part of the defendant toward the plaintiff, which was unfulfilled.

*Morris v. Brown*, 111 N. Y. 818; *Kennedy v. Morgan*, 87 Vt. 46; *Kelly v. Michigan Cent. R. Co.* 65 Mich. 186; *Hays v. Gainesville Street R. Co.* 70 Tex. 602; *Aerkfets v. Humphreys*, 145 U. S. 418, 36 L. ed. 758.

The employe assumes the known and obvious dangers attendant upon his entering upon and continuing in said employment; this includes the known and obvious dangers which are likely to arise from the imperfection of the place or machinery, or the known want of

**NOTE.**—Upon the subject of who are fellow servants, see note to *Dixon v. Chicago & A. R. Co.* (Mo.) 18 L. R. A. 792.  
25 L. R. A.

care, or unskillfulness and carelessness of fellow servants.

*Carbins v. Bennington & R. R. Co.* 61 Vt. 348; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1008; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 80 L. ed. 1114; *Lothrop v. Fitchburg R. Co.* 150 Mass. 423; *Cincinnati, N. O. & T. P. R. Co. v. Mealer*, 6 U. S. App. 86, 50 Fed. Rep. 725; *Wood v. Locke*, 147 Mass. 604; *Ladd v. New Bedford R. Co.* 119 Mass. 412, 20 Am. Rep. 331.

The servant assumes all the risks naturally and reasonably incident to his employment, and this includes all such dangers as would be known to him or ascertainable by the exercise of ordinary observation, and reasonable skill and diligence in his department of service to ascertain and avoid the dangers attendant upon his discharge of his duties.

*Latremouille v. Bennington & R. R. Co.* 63 Vt. 336; *Wagner v. Jayne Chemical Co.* 147 Pa. 475; *Wormell v. Maine Cent. R. Co.* 79 Me. 397; *Kean v. Detroit Copper & Brass Roll. Mills*, 66 Mich. 277; *Gibson v. Erie R. Co.* 68 N. Y. 449; *Kohn v. McNulla*, 147 U. S. 283, 37 L. ed. 150.

Such risks as were obvious, or which by using observation, skill, and care he ought to have provided against.

*Davis v. Baltimore & O. R. Co.* 152 Pa. 314; *Fisk v. Central Pac. R. Co.* 73 Cal. 88.

The entire crew of the train are fellow servants, and the plaintiff in error is not liable in damages to either for negligence by the other in carrying on the business of the common employment.

*Priestly v. Fowler*, 8 Mees. & W. 1; *Murray v. South Carolina R. Co.* 1 McMull. L. 885, 36 Am. Dec. 268; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003.

For fault or negligence in the discharge of personal duties of the master resulting in injury to his servant, the master is liable whether he acts in person or by other servants who represent him in respect thereof.

*Davis v. Central Vermont R. Co.* 55 Vt. 84, 45 Am. Rep. 590; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 612; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755.

A vice-principal is regarded as such only so long as he represents the master in performing the duties which the master owes to the servant.

*Ross v. Walker*, 139 Pa. 42; *McKinnon v. Norcross*, 8 L. R. A. 320, 148 Mass. 538.

Liability will arise where the negligent employé has been put in the place the master would otherwise occupy, but it will not arise where the negligent employé is a mere boss or foreman in the prosecution of the master's work.

*O'Brien v. American Dredging Co.* 53 N. J. L. 291.

Some confusion has arisen from confounding a vice-principal, or servant having a legal identity with the master, in the performance of duties he owed his employés, with a foreman who merely had charge and direction of the work done by other employés.

*Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 737.

When the *Ross Case* was decided it was 35 L. R. A.

considered to be directly in the face of the general current of authority upon the subject.

*Lehigh Valley Coal Co. v. Jones*, 86 Pa. 483; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *McCooker v. Long Island R. Co.* 84 N. Y. 77; *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573; *Brown v. Winona & St. P. R. Co.* 27 Minn. 162, 38 Am. Rep. 235; *Brown v. Minneapolis & St. L. R. Co.* 81 Minn. 553; *Fraker v. St. Paul, M. & M. R. Co.* 32 Minn. 54; *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336, 5 Am. Rep. 48; *Lawler v. Androscoog R. Co.* 62 Me. 463, 16 Am. Rep. 492; *Doughty v. Penobscot Log Dripping Co.* 76 Me. 143; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661; *Murphy v. Boston & A. R. Co.* 88 N. Y. 148, 42 Am. Rep. 240; *Peterson v. Whitebreast Coal & Min. Co.* 50 Iowa, 673, 32 Am. Rep. 143; *Keystons Bridge Co. v. Newberry*, 96 Pa. 243, 42 Am. Rep. 543; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Robertson v. Terre Haute & I. R. Co.* 73 Ind. 77, 41 Am. Rep. 552; *Cassidy v. Maine Cent. R. Co.* 76 Me. 488; *Blake v. Maine Cent. R. Co.* 70 Me. 60, 35 Am. Rep. 297; *Fiske v. Boston & A. R. Co.* 58 N. Y. 549, 18 Am. Rep. 545; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Holden v. Fitchburg R. Co.* 129 Mass. 268, 37 Am. Rep. 843; *Brick v. Rochester, N. Y. & P. R. Co.* 98 N. Y. 211; *State v. Maister*, 57 Md. 287; *Davis v. Central Vermont R. Co.* 55 Vt. 84, 45 Am. Rep. 590; *Capper v. Louisville, E. & St. L. R. Co.* 103 Ind. 805; *Pease v. Chicago & N. W. R. Co.* 61 Wis. 163; *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 337, 24 Am. L. Rev. 175.

If work belonging to the duties of a servant be done carelessly, there is no conceivable difference whether the negligence proceeds from a commander or a subaltern.

*Ell v. Northern Pac. R. Co.* 12 L. R. A. 97, 1 N. Dak. 336.

The master is only liable for injuries from negligence of a foreman or superintendent when such foreman or superintendent is performing duties which the law imposes upon the master personally.

*Stockmeyer v. Reed*, 55 Fed. Rep. 259.

The general trend of decisions after the *Ross Case* as before, are, that it is only when a servant is performing a personal duty of the master that the master is liable to another servant for a neglect of such duty.

*Ell v. Northern Pac. R. Co. supra*; *Clarke v. Pennsylvania Co.* 17 L. R. A. 311, 132 Ind. 199; *Sullivan v. New York, N. H. & H. R. Co.* 62 Conn. 209; *Reese v. Biddle*, 112 Pa. 73; *New York, L. E. & W. R. Co. v. Bell*, Id. 400; *Waddell v. Simoon*, Id. 567; *Lewis v. Seifert*, 116 Pa. 623; *Hussey v. Cogger*, 112 N. Y. 614; *Gonsior v. Minneapolis & St. L. R. Co.* 36 Minn. 335; *Pittsburg, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 197; *Loughlin v. State*, 105 N. Y. 159; *Brodour v. Valley Falls Co.* 16 R. I. 448; *Galveston, H. & S. A. R. Co. v. Smith*, 76 Tex. 611; *Howard v. Denver & R. G. R. Co. supra*; *McKaig v. Northern Pac. R. Co.* 43 Fed. Rep. 288; *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 190, 6 U. S. App. 75, 50 Fed. Rep. 723; *Newport News & M. V. R. Co. v. Howe*, 6 U. S. App. 172, 52 Fed. Rep. 362.

The inquiry must always be directed to the real powers and duties of the officer and not simply to the name given to the office.

*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772.

Lurton, J., in the circuit court for the district of Tennessee discusses the subject here under consideration, and treats the *Ross Case* as overruled by the *Baugh Case*.

*Harley v. Louisville & N. R. Co.* 57 Fed. Rep. 144. See also *Quinn v. New Jersey Lighterage Co.* 23 Fed. Rep. 363; *Mass v. Northern Pac. R. Co.* 57 Fed. Rep. 283.

It is the duty of a railroad company to furnish for its trainmen a reasonably safe place to work; that place is a reasonably safe train of cars on a reasonably safe railroad.

The conductor does not perform the company's duty of keeping the road-bed and track in repair, or furnishing a safe train. He takes such as are furnished, and if they are reasonably safe, his carelessness in doing his work creates no breach of duty on the part of his employer.

*Hogan v. Smith*, 125 N. Y. 774; *Geoghegan v. Atlas S. S. Co.* 3 Misc. 224.

Whether the servant is performing duties of the master to an injured servant of the same master, or is a fellow servant, is a question of law and not of fact.

*Johnson v. Boston Tow Boat Co.* 185 Mass. 209, 46 Am. Rep. 458.

The plea set up a general law of the said Province of Quebec in full force and effect, under and by virtue of which it was and is provided that all actions for bodily injuries are prescribed and fully barred by one year, and the debt is absolutely extinguished, and no action can be maintained thereon after the delay for prescription has expired.

The replication is the traverse *de injuria sua propria absque tali causa*, and properly concludes to the country.

*Spencer v. Bemis*, 46 Vt. 29.

This traverse denies every material allegation in the plea. Such a traverse cannot be immaterial, and consequently must be accepted by the opposite party.

Gould, Pl. chnp. 7, § 17; 1 Chitty, Pl. 16th Am. ed. 633; *Ersine v. Hohnbach*, 81 U. S. 14 Wall. 613, 20 L. ed. 725; *Crogate's Case*, 8 Coke, 67; 1 Smith, Lead. Cas. Hare & W. notes, pp. 247 *et seq.*

If the existence of such a law amounts to no defense, the plaintiff below might have demurred; but having taken issue on the fact, the court are not called upon to decide whether the facts so put in issue amount to a defense. The judge on a jury trial is never to decide on the pleadings.

*Barney v. Bliss*, 2 Aik. 60; *French v. Thompson's Estate*, 6 Vt. 54; *Mayer v. McLean*, 1 Johns. 509.

If the defendant below had prevailed on its special plea, it would have been entitled to a verdict.

*Wilson v. Benney*, 38 Vt. 221.

When a matter of defense is controverted, it is error to direct the jury that the evidence produced is insufficient to bar the action, and that the jury ought to find for the plaintiff. If there is any substantial evidence in support of an issue it should be submitted to the jury.

*Otis v. Watkins*, 13 U. S. 9 Cranch. 389, 3 L. ed. 752; *United States v. Tillotson*, 25 U. S. 25 L. R. A.

12 How. 180, 6 L. ed. 594; *Ranney v. Barlow*, 112 U. S. 207, 28 L. ed. 662.

When an issue is formed upon the traverse of a special plea in bar, and there is a conflict of evidence, or any evidence to sustain the issue, the court cannot refuse to submit the issue to the jury.

*Carpenter v. Welch*, 40 Vt. 251; *Batchelder v. Kinney*, 44 Vt. 150.

Unless there are statutes enabling courts to take judicial notice of foreign laws, or to ascertain their existence from foreign law books, the existence of foreign laws is to be proved as a fact, just as any other fact is proved.

1 Thomp. Trials, § 1054; *Leavenworth v. Brookway*, 2 Hill. 201; *Lockwood v. Crawford*, 18 Conn. 361; *Pierce v. Indeeth*, 106 U. S. 546, 27 L. ed. 254; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 897, 33 L. ed. 788; 1 Whart. Ev. § 808; *Kline v. Baker*, 99 Mass. 258; *Woodbridge v. Austin*, 2 Tyler, 364, 4 Am. Dec. 740.

When the claim or defense of a party depends upon the construction of a statute of a foreign state, the construction given to it in that state is a question of fact to be decided by the jury.

*Haven v. Foster*, 9 Pick. 111, 19 Am. Dec. 358; *Holman v. King*, 7 Met. 884; *Dyer v. Smith*, 12 Conn. 834; *McLeod v. Connecticut & P. R. Co.* 58 Vt. 727.

Statutes which discharge the debt or extinguish the right, in the *lex loci*, discharge and extinguish it everywhere.

*Peck v. Hibbard*, 26 Vt. 693, 63 Am. Dec. 605; *Carver v. Adams*, 38 Vt. 500.

Where the debt is not only barred, but actually extinguished by the law of the place which governs the performance of the contract, then to a suit in another state upon such contract the foreign statute may be successfully interposed.

Rorer, Interstate Law, 175; Story, Conf. L. § 532b; Foot, Private International Law, 420 *et seq.*; Wood, Limitations of Actions, 19, note 1; *McMerty v. Morrison*, 63 Mo. 140; *Brown v. Parker*, 28 Wis. 21; *McLeod v. Connecticut & P. R. Co. supra*; *Flanagan v. Packard*, 41 Vt. 561.

It is when the law regulates the remedy only that it has no effect out of that jurisdiction.

*Cartier v. Page*, 8 Vt. 146; *Suffolk Bank v. Kidder*, 12 Vt. 464, 36 Am. Dec. 354; *Woodbridge v. Austin, supra*.

The qualification that both parties should remain in the state or country whose laws are invoked, until the cause of action is discharged or extinguished only applies when the statute itself makes such an exception.

*Perkins v. Guy*, 55 Miss. 153, 30 Am. Rep. 510; *Baker v. Stonebraker*, 36 Mo. 338; *Fears v. Sykes*, 35 Miss. 633.

If the law says nothing about residence, and does not make absence from the state an interruption of a prescription which extinguishes a right, the party entitled to act cannot interrupt the running of the prescription by simply withdrawing himself. No person is allowed to take advantage of his own wrong or his own laches.

*Steele v. Steele*, 25 Pa. 154; *Hintrager v. Traut*, 69 Iowa, 746; *Baker v. Johnson County*,

38 Iowa, 151; *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 80 L. ed. 569; *Mostyn v. Fabrigas*, 1 Smith, Lead. Cas. 7th Am. ed. 1047.

**Messrs. Henry Ballard, Gilbert A. Davis, and A. K. Brown** for defendant in error.

**Shipman, Circuit Judge**, delivered the opinion of the court:

William Johnston, the defendant in error (hereinafter called the plaintiff), brought an action at law in the circuit court of the United States for the district of Vermont against the Canadian Pacific Railway Company, plaintiff in error (hereinafter called the defendant), to recover damages for injuries which he had received while in its employ, and, as he alleged, through its negligence. He recovered a verdict for \$8,125. The facts in the case, as they appear in the bill of exceptions, are as follows:

The defendant is, and was at the time of the injury to the plaintiff, a corporation duly organized under the laws of the dominion of Canada, and having its place of business in said Canada, and at the time of the injury to the plaintiff was operating a railroad in Canada, which extended to, and ran into, the state of Vermont. The conductor and trainmen, and the plaintiff, who were running the train upon which the plaintiff was employed at the time he received said injury, were in the employ of the defendant. The plaintiff was employed by the defendant at Farnham, in Canada, about January 1, 1890. He worked a short time in the railroad yard in Farnham under said employment, and then went to work as a brakeman on freight trains, and remained in that service, continuously, up to the time of the injury for which the action was brought. At about half past 10 o'clock in the forenoon of September 6, 1890, the train upon which the plaintiff was employed as a brakeman left Newport, Vt., for Montreal. It consisted of an engine, tender, 18 freight cars, and a van, having a platform, with roof projecting over it, and a brake. Four or five of the freight cars were loaded, and the remainder of said cars were empty. Samuel Gillander was the conductor of said train, and Arthur Pinney was the forward brakeman, and the plaintiff the rear brakeman. Said conductor, said two brakemen, an engineer, and a fireman constituted the entire crew or force of employes upon said train, and the conductor had full control of all the men on the train. At Sutton Junction, in Canada, the plaintiff fell or was thrown from the top of the rear end of the rear freight car of the train, between the tracks, and was run over or upon by the van, and was badly injured. The testimony on the part of the plaintiff tended to show that before reaching Sutton Junction, and while the train was about to commence the descent of a grade down to that station, the plaintiff left the van, where he had been riding, to go to his place on the top of cars; the conductor told him that certain cars were to be set out at Sutton Junction, and where to cut them off, or pull the pin; that the cars to be set out

were pretty near together, and would not require much shunting to set them off upon the side track; that the plaintiff forgot where he was to pull the pin to set out the cars, and went to the rear end of the last freight car, and asked the conductor, who stood on the front platform of the van, if a tall car in the train was to be set out; that in reply to that question of the plaintiff the conductor told the plaintiff to go and get the number of the car; that thereupon the plaintiff went forward, and looked down between the cars, and read the number, and immediately went back over the two intervening cars to tell the conductor the number of the car; that when he got within four or five feet of the rear end of the last freight car, which had no brake at that end, the train started up, without any warning to him, and went forward five or six feet, with a quick snap, and the plaintiff could not reach the van, which had been detached, nor otherwise save himself, and was by the jerk of the train thrown off, and fell upon the track in front of the van, which was slowly following the train; that the van struck the plaintiff, and ran partly over him, and he received the injuries for which he claims to recover in this action. The evidence of the plaintiff tended to show that Gillander, the conductor, as the rear of the train approached the station, pulled the pin connecting the van to the rear end of the last freight car, and applied the brake upon the van; that at the time he pulled the pin he signaled to the engineer to go ahead, without notifying the plaintiff, as he had always done before; and that it was the starting of the train in obedience to the signal of the conductor, given without notice to the plaintiff, when going to give the conductor the number of the car, in obedience to the orders of the conductor, that threw the plaintiff from the train. The evidence of the plaintiff further tended to show that at the time the van was detached the plaintiff was on the top of the freight cars, and entirely out of the sight of the conductor, and that he did not know the van was detached, or that the conductor had given any signal to go ahead, until the train started, by which he was thrown off, and that the conductor gave him no notice or warning that he was going to detach the van, or start up the train. The evidence of the plaintiff further tended to show that his place, as rear brakeman, at the time of said accident, was at the front end of the rear car, and that he was away from his position only for the purpose of going back to the rear end of the car, to tell the conductor the number of the car he had directed him to get. The plaintiff also put in evidence several of the rules of the defendant for the running of its trains, one of which read as follows:

"(92) While on the road, the conductor will have charge and control of the train and all persons employed on it, and is responsible for its movements; but when the directions of the conductor conflict with these regulations, and involve any risk or hazard, the engineer, and all who participate, will be held equally responsible."

There was no other evidence tending to

show any facts of negligence of the defendant or its employes which were in any manner connected with the injuries to the plaintiff.

The evidence of the defendant tended to show that before the plaintiff left the van, at the top of the grade, as the train approached Sutton Junction, the conductor, Gillander, gave the plaintiff a written list of the number of the cars to be set from the train upon the side track, and that there was no further communication between Gillander and the plaintiff until after the injury, except what Gillander said to him when he detached the van; that Gillander supposed that the plaintiff went directly to his place on the train when he left the van; that after the van was detached it was the duty of the plaintiff, as rear brakeman, to detach the cars to be set out; that, as the rear of the train approached the station, Gillander pulled the pin which detached the van from the rest of the train, and said "All right" to the plaintiff, who he supposed was on the front end of the next car to the van; that the plaintiff was in fact standing near the rear end of said car, facing towards the engine; that as the van was detached the plaintiff signaled the engineer to go ahead, and that the train started forward in obedience to the signal of the plaintiff; and that the plaintiff fell or was thrown off as the train started.

The plaintiff testified that he was twenty-six years of age, and an unmarried man; that his father was dead, and his mother lived at White River Junction, Vt.; that in 1887 he went into the employ of the defendant, in Canada, and worked as a brakeman there for three days; that in 1888 he again went to work for defendant, in Canada, and worked two months, and commenced work again for the defendant in January, 1890, and worked until the accident, September 6, 1890; that, in the intervals of working for the defendant, he had worked upon a farm some, and in a foundry; that after the accident he remained at Sutton Junction until April, A. D. 1891, when he went to his mother's house, at White River Junction, where he had ever since remained; that he called it his home at his mother's house, and had no other.

This suit was commenced by a writ dated November 6, 1891. Upon the issue made by defendant's plea that the plaintiff's cause of action was extinguished by the law of Canada, the evidence of the defendant, given by the testimony of witnesses learned and of experience in that law, tended to show that the law of Canada was as specified in articles 2262 and 2267 of the Code of Canada:

"Art. 2262. The following actions are prescribed in one year: For slander or libel, reckoned from the day it came to the knowledge of the party aggrieved. For bodily injuries, saving the special provisions contained in article 1056, and cases regulated by special laws."

"Art. 2267. In all cases mentioned in articles 2250, 2260, 2261, and 2262, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired."

The testimony of defendant likewise tended to show that, by the law of Canada, article 25 L. R. A.

1056 had no reference to the facts of this case, and that the claim of the plaintiff was not regulated by any special laws, and that, by said law of Canada, claims for bodily injuries are extinguished after the lapse of one year from and after the time when the plaintiff receives the injuries, but that the prescription is interrupted by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs, and a debt or claim may be revived after the prescription has run, by acknowledgment, without any new consideration.

At the close of all the evidence, the defendant moved the court to direct a verdict for the defendant, because there was no evidence of negligence on the part of the defendant; also, because Gillander, the said conductor, and the plaintiff, at the time of the alleged injury to the plaintiff, were engaged in the same service and employment, and were fellow servants, and the defendant was not liable in law for any injury resulting to the plaintiff from the negligence of Gillander; and also that from all the evidence received, relating to the issue made upon the defendant's pleas as to the law of Canada, the defendant was not liable in this action. The court overruled said motion to direct a verdict, and submitted said cause to the jury. The court held that said law of Canada was a statute of limitation, and did not apply to this action here, and was immaterial, and that no question arose thereon for the consideration of the jury. The defendant excepted to the refusal of the court to direct a verdict for the defendant, and to the submission to the jury, and to the holding of the court as to the law of Canada. The defendant seasonably excepted to the rule of liability laid down in the charge, for the several reasons set forth in its motion for a verdict.

There was no suggestion upon the trial of incompetence on the part of the conductor. Although the question of his negligence was in dispute before the jury, it was substantially conceded upon the argument before this court that, as between the brakeman and himself, he was negligent, in too hastily detaching the van from the residue of the train, and signaling to the engineer to go ahead, before he was aware that the brakeman had returned, and was in his usual place of safety. There was no negligence in the order to obtain the number of the tall car. That was given to remedy the brakeman's forgetfulness of the details of a previous order. The conductor was not, therefore, responsible for the fact that the brakeman happened to be in a place of danger. If the engineer had suddenly, and without authority, started the train, the conductor would not have been blameworthy. His negligence consisted in causing the train to be put in motion before he was aware that the brakeman had regained a place of safety. His hasty action caused the accident.

The jury having found in the affirmative upon the question of negligence, two questions of law arise upon the record: First, Is the defendant liable for the consequences resulting to the plaintiff, a brakeman upon the



freight train, from the negligence of the competent conductor upon the same train, in a matter in which he was acting as conductor? Second. Was the cause of action extinguished before suit was brought, by the operation of the Canadian statute?

The decision of the first question depends, in this court, entirely upon the fact that the circumstances of this case correspond with, and do not differ from, those which controlled the decision of the Supreme Court in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 877, 28 L. ed. 787, and are within the narrow scope to which the majority of the court confined that decision,—a decision which, notwithstanding what was said and decided in the subsequent case of *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, still, admittedly, remains the law of the court, as applicable to the same state of facts. In the *Ross Case*, a conductor of a freight train, while he was running the train, possessed the powers specified in the regulations of the company, of which the following is a part: "The conductor will have charge and control of the train, and of all persons employed in it, and is responsible for its movements, while on the road, except when his directions conflict with these regulations, or involve any risk or hazard, in which case the engineer will also be held responsible."

It was the conductor's express duty to show to the engineer of his train all orders which he received in regard to its movement, before leaving the station where they were received. On the night of the accident, the conductor forgot to tell the engineer of an order which had been received, to stop the train at a certain station, and wait for a gravel train; and in consequence a collision occurred, by which the engineer was severely injured. The action was brought against the railroad company to recover damages for this injury. The majority of the court, speaking by *Mr. Justice Field*, after an examination of the English decisions, and of the course of conflicting decisions in the states of this country, and of the reasoning which led to the respective results, came to a conclusion as follows: "We agree with them [the Ohio and Kentucky courts] in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and, therefore, that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner."

The controlling reasons which led the minds of the majority to this result were stated, as follows: "There is, in our judgment, a clear distinction to be made, in their relation to their common principal, between servants of a corporation, exercising no supervision over others, engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is

entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles, at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know, from the manner in which railways are operated, that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow servant with the firemen, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction. As to them and the train, he stands in the place of, and represents, the corporation."

When the question came again before the supreme court, in the *Baugh Case*, cited *supra*, which presented a different state of facts, the majority of the court, who spoke through *Mr. Justice Brewer*, took occasion to say that in the *Ross Case* it was not declared to be universally true that, by reason of the mere fact that one servant has control over another, they cease to be fellow servants, but that the general language in the charge to the jury in regard to the importance to be given to this circumstance was not erroneous "when applied to the case of a conductor having exclusive control of a train, in relation to other employes of the company, acting under him, on the same train." In the *Baugh Case* the engineer, who directed the movement of the engine when it was not being used in connection with a train of cars, and the injured fireman, were, in the opinion of the majority, engaged in a common employment. The engineer, notwithstanding the fact of his temporary control, was not the representative of the company. The decision also rested upon the fact that the known peril was voluntarily assumed by the fireman, who thus assumed the risk. When the two cases are analyzed, it will be seen that the facts which controlled the *Ross* decision did not exist, in their fullness and exactness, in the *Baugh Case*. In the case at bar the rule of the defendant was almost in the language of the rule in the *Ross Case*, and declared that the conductor, when upon the road, had the charge and con-

trol of the train, and of all persons employed on it, and was responsible for its movements. There is also no question as to the actual representative character of the conductor. He had control in fact as well as in name. He directed the movements of the train,—when it should go forward, and when it should stand still. In the exercise of this authority, he moved the train too soon, without observing whether those under his control were in an ordinary place of safety, and thereby an accident happened. The significant facts in the two cases correspond, except that the negligence of the conductor, in the case at bar, was not as marked and gross as in the *Ross Case*. His negligence was in one of the details of the business, wherein he had authority, while the negligence in the *Ross Case* was in a particular which might be vital to all the lives, and to the existence of all the property, on board the train. The negligence of the two conductors differed materially in degree. It did not differ materially in its nature. The essence of the negligence of each was forgetfulness.

The second subject is the effect of the Canadian statute. There are two classes of statutes of limitations: One extinguishes the debt or claim; the other merely bars or prevents the remedy. And, as remedies are regulated only by the law of the place where they are pursued, this class of statutes created by one state does not prevent a remedy which is sought in a foreign state, but in such case the *lex fori* controls. *Bulger v. Roche*, 11 Pick. 36, 13 Am. Dec. 359. The difference between the two classes was stated by Judge Story in his learned discussion upon the general subject in *Le Roy v. Crowninshield*, 2 Mason, 151, Fed. Cas. No. 8,269, as follows: "Statutes of limitation may be so framed as merely to apply to the jurisdiction of a court. They may prohibit such court from taking cognizance of an action unless brought within a limited period after the right has accrued. Such statutes properly and emphatically belong to the regulation of judicial proceedings. Statutes of limitations may, on the other hand, declare, in terms, that contracts not sued for within a limited period shall be held to be utterly extinguished. Such contracts are a complete extinguishment or discharge of a contract, and constitute a universal bar, as much as a discharge under a bankrupt law."

No testimony was given in regard to the construction of the statute by the Canadian courts, and we have not found a controlling authority in the decisions of other courts, as to the construction of statutes, which use similar language. The statute purports to be one of extinguishment, but the prescription may be interrupted by acknowledgment on the part of the possessor or debtor, or the debt or claim may be revived after the prescription has run. The argument, therefore, is that, if the debt may be revived, after the full time of prescription has elapsed, the statute is not one of extinguishment. This suggestion does not meet the question, which, it is true, does not arise in this case, but which often may arise, and which is, What is the effect of the statute when pleaded and shown, in an ac-

tion in a foreign country, upon a debt due from a citizen of Canada to a citizen of Canada, when the time of prescription has run before suit, without interruption, while both parties resided in Canada, and the debt has never been revived? In the case of *Bulger v. Roche*, *supra*, the debt was contracted between subjects of Nova Scotia, who remained there until the debt was extinguished by virtue of its statute of limitations; but, in the opinion of Chief Justice Shaw, the statute created no legal defense to an action by the creditor in the state of Massachusetts. The court treated the question as one arising under an ordinary statute of limitations, which merely affected the remedy. But, without attempting to pass upon what may be the effect of the statute under all circumstances, it is sufficient to say that, assuming that it possesses its largest character, and is a statute of extinguishment, it constituted no defense to the suit of this plaintiff in the state of Vermont, because, during the plaintiff's residence in Canada, it had not become operative, and had not extinguished the debt, so far as courts in states foreign to Canada are concerned. The injury happened on September 6, 1890. The plaintiff was at that time a citizen of Vermont, but after the injury he remained in Canada, until April, 1891, when he returned to his mother's and his own home, in Vermont, and remained there continuously thereafter. When, before a statute of limitations has become operative, by way of extinguishment of the debt, as between two citizens or residents of a state, one of the parties has permanently changed his national domicile, and become a citizen of a foreign state, the statute will not become an absolute bar, as an extinguishment in the courts of such foreign state. It cannot become, in the country to which he has removed, an absolute extinguishment, unless the parties resided in the country of the statute during the whole period of limitation. Wood, Limitations of Actions, 23. The reasoning which leads to this result is stated by Judge Story, in his Conflict of Laws (sec. 582), as follows: "Every nation has a complete and exclusive sovereignty to enact laws which shall limit all right of action to certain prescribed periods within its own tribunals, and to declare that after that period all rights of action shall be extinguished; and, if the parties remain domiciled within the territorial jurisdiction during that whole period, the law, *ipso facto*, operates in the case, and the rights of action are completely extinguished there. But the same doctrine is not true, or rather may not be true, when, before the prescribed period has arrived, one or both of the parties have changed their national domicile, for by such change they have ceased to be under the exclusive dominion of the nation whose statute of limitation has begun to operate upon their rights of action, but has not yet extinguished them. The law thereof can no longer operate on those rights; at least, not operate except within the territorial rights of the nation. Elsewhere, they can be deemed to have only an inchoate and imperfect effect, and the change of domicile suspends their power to extinguish

the rights of action in the future, since they can have no binding extraterritorial force. It is no answer to say that, when once the statute begins to run, no subsequent impediment stops it from continuing to run. That is true in the nation whose laws contain such provisions, or inculcate such a doctrine. But no other nation is bound to give effect to such provisions, or to such a doctrine."

This view of statutes of extinguishment was regarded as a reasonable one by *Chief Justice Tindal in Huber v. Steiner*, 2 Bing. (N. C.) 202.

A subordinate question, which arises upon the pleadings, was made by the plaintiff in error. The railroad company averred, in an amended plea, that by virtue of the Canadian statute the plaintiff's cause of action was extinguished and discharged to the same extent as if it had never existed. The plaintiff traversed the plea by its replication *de injuria*, upon which issue was joined to the country. There was no conflicting evidence in regard to the statute. At the close of the

trial the defendant moved for a direction for a verdict in its favor; one ground of the motion being that, from the evidence received relating to the issue made upon the defendant's pleas as to the law of Canada, the defendant was not liable in this action. The court overruled the motion, and, upon the Canadian statute, held that it was not applicable to the action, and that consequently no question arose thereon for the consideration of the jury, to which decision the defendant excepted. The question which arose upon the undisputed evidence was merely as to its legal effect, and the court was properly not asked by the defendant to submit a question of fact upon the statute to the jury. The exception was to the ruling of the court upon the motion to direct a verdict that the statute of Canada was not applicable, and constituted no defense. The action of the court upon the motion to direct a verdict was proper.

We perceive no error in the record, and the judgment is affirmed.

### PENNSYLVANIA SUPREME COURT.

Re ESTATE OF Samuel PICKENS, Deceased.

Joseph OBENSTEIN, App't.

(183 Pa. 14.)

1. Common reputation in a family as to who are members of the family is admissible, when no superior evidence is attainable or in a connection with superior evidence to prove pedigree, legitimacy, and marriage.
2. The presumption in favor of marriage and the legitimacy of offspring is strengthened by lapse of time, and after ninety years from the birth of issue cannot be overcome except by strong, direct, and satisfactory proof.
3. In the absence of evidence the mere denial of marriage will not defeat the presumption of the legitimacy of issue, or throw upon such issue the burden of proof of the marriage of the parents.

(July 11, 1894.)

**A** PPEAL by Joseph Obenstein from a decree of the Orphan's Court for Lancaster County affirming the report of an auditor disallowing his claim to share in the estate of Samuel Pickens, deceased. *Reversed.*

Samuel Pickens died intestate leaving as his next of kin the issue of an uncle and three aunts, and also persons claiming to be the children of his deceased half brother. The evidence in respect to the claim of the descendants of the half brother is stated by the auditor as follows:

Benjamin Obenstein, deceased, "it is alleged, was a step-brother of the decedent, Samuel Pickens, . . . The allegation that he was

a step-brother of the decedent is denied by the Pickens heirs by whom it is alleged that the said Benjamin Obenstein was an illegitimate son of Susan Brockey by one John Obenstein, and that they were never married. The said Susan Brockey afterwards became the wife of Henry Pickens, by whom she had four children, one of whom was the decedent and all of whom are now deceased. Henry Pickens died on February 24, 1861, and his wife Susan died on May 29, 1857.

"That the said claimants would be entitled to receive that portion of the fund for distribution which is personality, if they can establish by competent evidence the relationship alleged, cannot admit of doubt. What, then, are the facts upon which claimants rely to establish their relationship to the decedent and their right to the fund in question?

"That the said Benjamin Obenstein was the son of Susan Brockey, prior to her becoming the wife of Henry Pickens, the father of decedent, is virtually admitted by all concerned, and it is a conceded fact that John Obenstein was his father.

"Whether Susan Brockey was the lawful wife of John Obenstein at the time of the birth of Benjamin Obenstein, or not, is the question raised and to be decided. The evidence discloses nothing to show that John Obenstein and Susan Brockey were ever married by a minister or magistrate, nor was their marriage proved by satisfactory evidence of reputation and cohabitation. Not a single witness was called who knew anything of the life of either of them before Susan became the wife of Henry Pickens. The most that was proved to establish the fact of marriage was the declarations of the decedent to the witness, Isaac Zern, when he remarked to him some

**NOTE.**—For a collection of authorities upon the question of the admissibility of hearsay evidence to prove pedigree, see *Kiesenlord v. Clum* (N. Y.) 12 L. R. A. 884, and *note*.  
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As to presumption of legitimacy, see *notes to Woodward v. Blue* (N. C.) 10 L. R. A. 662, and *Goss v. Froman* (Ky.) 8 L. R. A. 102.

twenty years ago that Benjamin Obenstein was his half-brother; that when Benjamin died he said his half-brother had died; that when decedent's sister Betsy died, he directed the witness to go for the preacher to conduct the funeral services and to send a postal card to each of his half-brother's (Benjamin's) children. He told the same witness on another occasion that his father, Henry Pickens, had to pay too much when old Obenstein came back, so that he would go away again, that old Obenstein was a German and that when he landed in this country he was indebted for his passage across the ocean; that Benjamin came to his mother's home and married her, and her father finding that Obenstein was not free, he went and paid the fare for Obenstein and then wanted Obenstein to work two years for him. Then, he continues, Obenstein went off, and upon returning later, found that Susan was living with Henry Pickens, father of decedent, who had to pay him twenty dollars to go away again. In this the witness is corroborated by his wife, Leah Zern. In addition to the above, claimants called as a witness Susanna Obenstein, widow of the said Benjamin Obenstein, who is now about eighty-eight years of age, by whom were proven certain declarations made by Susan Brockey (then Pickens), and among other things witness asked her, how is it that Benjamin is called Obenstein and he was raised by Pickens? She replied, my first husband's name was Obenstein; we lived together not a year and had a little boy, but that he did not live long; then we lived together a couple of years longer and got another little boy and we raised that one and you have him for a husband; that Benjamin often spoke of Samuel, the decedent, and his sisters as his half-brother and half-sisters, and they spoke of him as their half brother, and that she often spoke of her having been married to Obenstein before she was married to Pickens; that decedent spoke to witness of the relationship and of Benjamin as his half-brother, and by Rev. A. J. Bachman it was proved that decedent spoke of Benjamin as his half-brother and of his children as those of his half-brother.

"This is substantially and in fact all that was proved by the claimants to make out their case.

"Are the facts as above stated sufficient in law to establish the fact of the marriage of Susan Brockey and John Obenstein, and thereby establish the relationship alleged by claimants?"

The auditor decided that the facts were not sufficient to establish the claim and he dismissed the same, which action was sustained by the orphan's court.

Further facts appear in the opinion.

**Messrs. W. T. Brown and Howard C. Shirk**, for appellant:

The rules of evidence governing cases of this kind are:

1. That the statements must be made *ante litem motam*.

2. The declarant must be dead; and,

3. A prior condition to both these is, that it should be proved by some source of evidence independent of the statement itself that the person making the statement is related to the family about which he speaks.

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1 Whart. Ev. p. 209; Greenl. Ev. 15th ed. § 108; *Sittler v. Gehr*, 105 Pa. 592, 51 Am. Rep. 207; 18 Am. & Eng. Encyclop. Law, pp. 257, 259, 260, 261, 263 and notes.

Declarations as to a family, in order to be received in evidence, must emanate from deceased persons connected with such family by blood or marriage.

1 Whart. Ev. § 216.

Can it be contended that the knowledge of the intestate Samuel Pickens goes for nothing, when he said Benjamin Obenstein was his half-brother?

*Sittler v. Gehr*, 105 Pa. 599, 51 Am. Rep. 207.

The term "pedigree" includes not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened. These facts may be established by general repute in the family, proved by a surviving member of it, in all cases where they occur incidentally and in relation to pedigree.

Greenl. Ev. 15th ed. § 104; 18 Am. & Eng. Encyclop. Law, p. 257; *American L. Ins. & T. Co. v. Rosenagle*, 77 Pa. 507.

Declarations made by a decedent whose estate is being distributed are competent to prove claimant's relationship.

18 Am. & Eng. Encyclop. Law, p. 261, and note; *Adams v. Edwards*, 115 Pa. 216.

Even if the marriage had not been proven by the declarations of members of the family the fact having been shown and the same being found as a fact by the auditor that Benjamin Obenstein was the son of John Obenstein, the presumption of law in favor of legitimacy attaches and is conclusive until rebutted by competent proof to the contrary.

*Senser v. Bower*, 1 Penn. & W. 452; *Simpson's Estate*, 4 Del. Co. Rep. 129; *Vincent's App.* 60 Pa. 246.

**Messrs. A. J. Eberly, William D. Weaver, and Thomas J. Davis**, for appellees:

Assuming only for the sake of argument that the appellant has proven, as he claims he has, the marriage of Susan Brockey to John Obenstein before Henry Pickens married her, then, as there is no evidence whatever that a divorce had been obtained by her from John Obenstein before she married Henry Pickens, and it being in evidence that John Obenstein was living after Susan married Henry Pickens, then the issue of Henry Pickens and Susan, one of whom is this decedent, Samuel Pickens, would be illegitimate and the appellant would have no standing to inherit from him, his mother, Susan Pickens, having died before him.

Act of Assembly, April 27, 1855, § 8, Pamphlet Laws, p. 868; Act of Assembly, June 5, 1883, § 1, Pamphlet Laws, p. 88; *Steeckel's App.* 64 Pa. 493; *Grubb's App.* 58 Pa. 55; *Wollemat's App.* 86 Pa. 219.

**Fell, J.**, delivered the opinion of the court:

The contest in this case, before the auditor, was between those claiming the personal estate of Samuel Pickens, as descendants of first cousins, and those claiming as children of Benjamin Obenstein, who, it is alleged, was a half-brother of the decedent. It

was admitted that Benjamin Obenstein and Samuel Pickens were children of the same mother; that the father of the former was John Obenstein, and of the latter, Henry Pickens. The marriage of their mother to Henry Pickens was amply established by proof of cohabitation and reputation, and the question was whether she had previously married John Obenstein. Benjamin Obenstein was born in 1806, and Samuel Pickens in 1812. Eighty-seven years had elapsed between the birth of the former and the time when the marriage of his parents was questioned, and there was no living witness or documentary evidence of either marriage. It was therefore a case in which pedigree could be proved only by hearsay, and it was clearly competent to prove it in that way. "Common reputation in a family connection as to who are members of the family is admissible, when no superior evidence is attainable, or in connection with superior evidence, to prove pedigree, legitimacy, and marriage." 1 Whart. Ev. § 205. The relationship of the persons who made the statements, their death, and the fact that the statements were made *ante litem motam*, were established by competent testimony; and there was for consideration by the learned auditor only the sufficiency of the proof. It was testified by witnesses not connected with the family—Isaac Zern and Leah Zern—that Samuel Pickens, some twenty years before his death, had introduced Benjamin Obenstein to them as his half-brother, and had afterwards spoken of him as his half-brother, and of his children as the children of his half-brother, and that he had said to them that his mother was first married to John Obenstein. Susanna Obenstein, the widow of Benjamin Obenstein, and mother of the appellant, testified that at the time of her marriage she was told by her mother-in-law, Susan Pickens, that her first husband was John Obenstein; that they had two children, one of whom died, and the other of whom was Benjamin Obenstein; that she and John Obenstein lived together three years; and that he died when Benjamin was quite young. She also testified that the previous marriage to Obenstein was frequently spoken of in the family, and the relationship of Benjamin Obenstein and Samuel Pickens fully recognized by both, and by all the members of the family. There is not one word in contradiction of this testimony, the effort of the appellees being directed to show the marriage of Henry Pickens and Susan Pickens. There is nothing in the testimony which suggests a doubt as to the legitimacy of Benjamin, except the statement, said to have been made by Samuel Pickens, that John Obenstein, after the birth of Benjamin, had gone away, and afterwards returned, when his wife was living with Henry Pickens, who had paid him to go away again. This statement must be taken in connection with the declaration made at the same time that Susan Pickens had been married to John Obenstein before her marriage to Henry Pickens; and, if illegitimacy is to be inferred from it, the taint is not in the Obenstein line of descent. In such an inquiry as this there is always a presumption in favor of marriage,

which is strengthened by lapse of time; and after ninety years it cannot be overcome except by strong, direct, and satisfactory proof. Benjamin Obenstein was admittedly the second child of a man and woman who had lived together for some time previous to his birth, in 1806. There was testimony that his mother had said that she was married to his father, who died, and that she afterwards married a second time. He was brought up in the house of her second husband, and treated as were the children of her second marriage, and retained the name of his father. He was recognized in the family as a half-brother and this relationship was acknowledged and spoken of by the decedent, and he was treated as such until his death in 1880.

The learned auditor held that, the marriage being denied, the presumption of the legitimacy of the issue did not prevail, and that the burden of proof was upon the appellant, and that the proof offered was insufficient to support his claim. To sustain this finding he cited *Com. v. Stump*, 53 Pa. 184, 91 Am. Dec. 198. In that case there was no proof of an actual marriage, and all the facts established at the trial rebutted the presumption of marriage until after the birth of the children. There was cohabitation, but the reputation was that there had been no marriage. Upon the facts of that case this court held that proof of cohabitation alone, without reputation, was not sufficient to establish a marriage. In this case the burden of proof to establish his relationship to the decedent was upon the appellant, but he was not confronted with the presumption of the illegitimacy of his ancestors, and not required to disprove it. In the absence of all evidence, the presumption was the other way, and, after this lapse of time, could not have been removed except by clear proof. There was nothing in the admitted facts upon which his right *prima facie* rested to suggest the illegitimacy of any one in either line of descent. Their common ancestor, Susan Pickens, had at different times lived with John Obenstein and Henry Pickens, and had borne children to each. The cohabitation with one commenced fully ninety years ago, and that with the other a few years later. The last survivor of these persons died over thirty years ago. There was no distinct evidence of a marriage to either, but presumably she was the lawful wife of each. Such a presumption is entirely consistent with the facts as established by the testimony; but, if conflicting presumptions arose, that in favor of innocence and legitimacy would prevail. It was error to hold that the simple denial of marriage before the auditor, without a word of testimony upon the subject, imposed upon the appellant the burden of the proof of the legitimacy of his ancestors. This burden, however, he accepted, and offered the only proof of which the subject was susceptible, which, although hearsay, was competent and conclusive. This was by evidence of statements made long before any litigation arose, by persons related to the family, and now dead. These statements establish the first marriage, the cohabitation, the birth of issue, the death of the first husband, the second

marriage, the birth of children by that, and the recognition during the lives of all these parties of the relationship between the decedent and the father of the appellant. This testimony throughout was clear, distinct, and consistent, and no attempt was made to contradict it. The only doubt suggested was by the statement of Samuel Pickens that John Obenstein returned after the marriage of Henry Pickens to his mother, and was paid to go away. It must be remembered that in the same connection he said that his mother had been married to John Obenstein, and that he was speaking of a matter of which he had no personal knowledge. There is nothing in this to give rise to the presumption of the illegitimacy of Benjamin

Obenstein, and there is nothing else in the case upon which such a conclusion can be based.

We are of opinion that the fair conclusion from the whole testimony is that Benjamin Obenstein and Samuel Pickens were half-brothers,—the legitimate children of Susan Pickens.

*The assignments of error are sustained, and the decree of the Orphans' Court of March 29, 1894, dismissing the exceptions to the report of the auditor, is reversed and set aside, at the cost of the appellee, and the matter is referred back to the auditor, that distribution may be awarded in accordance with this opinion.*

## NEW JERSEY SUPREME COURT.

STATE of New Jersey, *ex rel.* William O. ALLISON,

*v.*

Clinton H. BLAKE

(.....N. J. ....)

\*1. All persons who are within the class designated by the constitution are en-

\*Headnotes by BEASLEY, *Ch. J.*

titled to vote, for all officers elective by the people, whether the offices to be filled be created by the constitution or by legislation.

2. Such class of voters cannot be diminished or enlarged by the legislature.

3. Consequently, a statute cannot confine the right to vote for road commissioners to the freeholders of the district, nor extend it to females, or to nonresidents of the district.

(June 11, 1894.)

NOTE.—How far the right to vote is absolute.

### *Constitutional right of suffrage.*

In the case of *ALLISON v. BLAKE* the constitution prescribed the qualifications of an elector in elections for all officers, that were or would thereafter be elected by the people, and it was held that the legislature could not change them. This is sustained fully by all the cases on the power of the legislature to prescribe qualifications.

As to the power of the legislature to prescribe qualifications for electors where they are not defined in the constitution, or where the officers to be elected are not provided for in the constitution, it has been generally held that the legislature has that power. See *note* to *Coffin v. Thompson* (Mich.), 21 L. R. A. 662, as to right of women to vote; see also *note* to *Wolcott v. Holcomb* (Mich.), 23 L. R. A. 215, acquiring residence as a voter while attending school or public institution. This is also fully sustained by the cases throughout this note.

### *a. As affected by acts of congress.*

Congress has the power to legislate in regard to presidential or congressional elections. *Ex parte* Yarbrough, 110 U. S. 651, 28 L. ed. 274; *United States v. Quinn*, 8 Blatchf. 48; *Ex parte* Clarke, 100 U. S. 399, 26 L. ed. 715; *United States v. Munford*, 16 Fed. Rep. 222.

And in such matters if the regulations of a state should conflict with those of congress, the latter must prevail, and the former would be void. *Ex parte* Siebold, 100 U. S. 371, 25 L. ed. 717.

But congress has not the power to legislate in regard to other elections, except to prevent discrimination against voters, on account of race, color, or previous condition of servitude. *McKay v. Campbell*, 8 Abb. U. S. 120; *Ex parte* McIlwee, 3 Am. L. T. 251, Bright, Elect. Cas. 65; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 280; *United States v.* 25 L. R. A.

*Crosby*, 1 Hughes, C. C. 443; *United States v. Petersburg Judges of Election*, 1 Hughes, C. C. 432.

The Fifteenth Amendment to the Federal Constitution annuls the state constitution as to the classification by color. *Wood v. Fitzgerald*, 3 Or. 568.

But the Fifteenth Amendment to the Federal Constitution did not give blacks the right to vote, who had not the qualifications required of whites as to residence. *Antony v. Halderman*, 7 Kan. 50.

### *b. Registration.*

It has been generally held that states have the power to pass reasonable registration law, in cases where the constitution provides for registration or is silent on the subject. *Re* Polling Lists, 13 R. I. 729; *State v. Scarborough*, 110 N. C. 232; *Detroit v. Rush*, 10 L. R. A. 171, 83 Mich. 582; *State v. Bond*, 88 Mo. 426; *People v. Kopplekom*, 16 Mich. 242; *Cowan v. Prowse*, 14 Ky. L. Rep. 273; *People v. Hoffman*, 116 Ill. 537, 56 Am. Rep. 798; *State v. Dillon*, 23 L. R. A. 124, 32 Fla. 545; *Capen v. Foster*, 12 Mich. 455, 23 Am. Dec. 632; *State v. Board of Examiners*, 9 L. R. A. 385, 21 Nev. 67.

But in *White v. Multnomah County Comrs.*, 13 Or. 317, 54 Am. Rep. 882, *note*, 57 Am. Rep. 20, this power was squarely denied, where the constitution was silent, as the requirement of registration placed an unauthorized restriction on the voter. From the dissenting opinion it seems that the act was objected to as imposing restrictions as to time, and for many details that were not commendable in all particulars, but the court puts the decision alone on the question of power.

A clause in a registration act requiring other qualification than that of the constitution, is not valid as to such clause, but a registration law is not invalid giving reasonable time to register although some may be barred of right to vote on election day, and the law may be local. *Com. v. McClelland*, 83 Ky. 636.

As to what is a reasonable time to register, the

See also 25 L. R. A. 486; 28 L. R. A. 523, 683; 29 L. R. A. 668, 670; 31 L. R. A. 837; 40 L. R. A. 752.

**I**NFORMATION in the nature of a quo warranto to test the title of defendant to the office of road commissioner. *Judgment for relator.*

The facts are stated in the opinion.

**Mr. George R. Dutton** for relator.

**Mr. W. M. Johnson**, for defendant:

The only officers whose election is provided for in the constitution of New Jersey are governor, senator, members of assembly, county clerk, surrogate, sheriff, coroners and justices of the peace.

In the election of all these officers except justices of the peace (whose elections are specially provided for in art. 8, § 2, par. 8), every male citizen of the United States who shall have been a resident of this state for one year and of the county in which he claims his right to vote for five months next before the election shall be entitled to vote.

If this constitutional provision applies in full force to all other elections, then every elector possessing the qualifications of residence may

vote for any officer to be elected within the county in which he claims his vote.

He could, therefore, vote in every school district in that county; he could vote at every municipal election within the county because the right is guaranteed to him by the constitution of voting in the county where he has the requisite residence.

As to all the constitutional officers he can vote for them all in the county.

*State v. Wrightson* (N. J.) 22 L. R. A. 548.

If, therefore, the constitutional qualification of an elector must prevail in all elections, every law providing for municipal officers or township officers prescribing a residence within the township or within the municipality is unconstitutional.

The universal practice in our state since the adoption of the Constitution of 1844, indicates that the elections of municipal and township officers have never been regarded as subject to this constitutional clause.

Under the present school laws of New Jer-

cases do not agree, but it was held in *People v. Hoffman*, *supra*, that closing the books on the third Tuesday prior to the election was reasonable.

In *State v. Scarborough*, *supra*, and *State v. Bond*, 38 Mo. 425, the time for closing the books was not stated.

And in *Capen v. Foster*, *supra*, the books were kept open to the day of election, and in *Re Polling Lists*, 18 R. L. 723, they were closed ten days prior to election.

And in *People v. Kopplekom*, *supra*, the board did not meet at all and gave no opportunity for some to vote.

In *Cowan v. Prowse*, *supra*, the court referred to *Com. v. McClelland*, *supra*, where three days were allowed.

In *State v. Dillon*, *supra*, the lists were to be published two weeks prior to the election, and notice was to be given for two days of time and place to revise the lists in regard to a municipal election.

In *State v. Board of Examiners*, 9 L. R. A. 355, 21 Nev. 67, the board adopted a general registration list, for a special election held three months after a general election.

In *Patterson v. Barlow*, *infra*, the voter could have his name placed on the list, on the day of election, except in Philadelphia where the time closed ten days prior thereto.

In *State v. Butts*, *infra*, the books closed ten days prior to the election.

In *Brewer v. McClelland*, *infra*, fifty-nine days were required which exceeded the residence qualification given in the constitution.

That a registration law does not provide for registration or voting of those who become competent to vote after registration is closed ten days prior to the election, will not render the law invalid. *Well v. Calhoun*, 25 Fed. Rep. 865.

But if the voter is not allowed a reasonable time to register, the statute will not be sustained. *Stephens v. Albany*, 84 Ga. 630; *Atty-Gen. v. Detroit*, 7 L. R. A. 90, 78 Mich. 545.

It was said in *Gooding v. Brown*, 23 Fla. 437, that the legislature could not provide a registration law that did not give the voter a reasonable time in which to register, but that was not the question involved.

So the law was held invalid where the voter had only three days within which to register. *Owensboro v. Hickman*, 10 L. R. A. 224, 90 Ky. 620.

So where only four days were given. *State v. Corner*, 22 Neb. 255.

25 L. R. A.

So where only seven days were given. *Daggett v. Hudson*, 43 Ohio St. 543, 54 Am. Rep. 832.

And in *Page v. Allen*, 58 Pa. 333, 36 Am. Dec. 272, it was held that a registration act, not providing for a voter, whose qualification to vote may be complete after the time for registration has closed, is unconstitutional and void. This act provided for closing the registration books ten days prior to election, and is contrary to Pa. Const., art. 2, sec. 1, providing for ten days' residence in district, as the effect would be to require twenty days' residence.

See further as to residence, subhead "*Other statutory conditions, etc.*"

A registration statute not applying alike to all persons, or requiring different residence from that in the constitution, or requiring him to prove in advance that he will be a voter at the coming election, not provided for in the constitution, is void although the constitution may provide for registration of qualified voter. *Morris v. Powell*, 9 L. R. A. 323, 125 Ind. 281.

An act providing that a majority of votes cast at an election for subscription shall prevail is invalid where qualified voters may not have registered for that election, and the constitution requires a majority vote of all the qualified voters of the county, for such an election. *Chester & L. N. G. R. Co. v. Caldwell County Comrs.* 72 N. C. 436.

*Massachusetts Stat. 1885, chap. 345, § 7*, forbidding registration of naturalized persons within thirty days from naturalization, is void as adding qualifications not defined or authorized by the constitution of the state. *Kinneen v. Wells*, 144 Mass. 497, 50 Am. Rep. 105.

And a registration law unreasonable as to proof required of naturalization or which excludes male inhabitants of Michigan living in the state on June 24, 1835, and authorized to vote under the constitution, without regard to birth or naturalization, is void. *Atty-Gen. v. Detroit*, 7 L. R. A. 90, 78 Mich. 545.

*Mississippi Code, § 3612*, forbidding registration or a delinquent taxpayer, is contrary to the state Constitution, § 241, providing for registration of voters, and authorizing the voter to satisfy the election officer at time of election, that he has paid the tax. *Bew v. State* (Miss.) Oct. 16, 1893.

In *People v. Onondaga County Canvassers*, 14 L. R. A. 624, 129 N. Y. 395, it was said that no statute regulating the conduct of elections should be so construed as to place arbitrary or unreasonable

sey women have a right to vote at the district meetings and are eligible to the office of trustee.

In Michigan the general school laws provide that persons may vote at school meetings who are not electors under the constitution and who have taxable property in the district. This, it is held, includes women.

*Belles v. Burr*, 76 Mich. 1.

In *Wheeler v. Brady*, 15 Kan. 26, held that a law permitting women to vote at the school meetings was valid notwithstanding women are not constitutional voters.

In *Buckner v. Gordon*, 81 Ky. 665, held that an act providing that voters at a municipal election shall be taxpayers, is not in violation of the constitutional provision conferring the right of suffrage on every male citizen over the age of twenty-one, etc., the office voted for not being one named in the constitution.

See also *State v. Cones*, 15 Neb. 444; *Dubuque v. Dubuque*, 7 Iowa, 286; *Bernier v.*

destructions in the way of citizens in the exercise of the right to vote, if it did, it would conflict with the constitution, but this was not the question involved.

A registration law providing for reasonable proof of the right of the elector to vote, will be upheld. *Byler v. Asher*, 47 Ill. 101; *Re Election of McDonough*, 105 Pa. 488; *State v. Baker*, 88 Wis. 71; *Edmonds v. Banbury*, 28 Iowa, 267; 4 Am. Rep. 177.

While the constitution of Pennsylvania provides that a voter shall not lose his right because unregistered and has fixed the qualifications of voters, it is not in the power of the legislature to enlarge or abridge them, but a statute requiring those who are unregistered to take an affidavit giving the particulars as to birth, residence, naturalization, and payment of tax is valid, as not unreasonable. *Re Cusick's App.* 10 L. R. A. 228, 136 Pa. 459.

A registration law should be uniform in its effects or it will be void. *Re Supervisors Appointment*, 53 Fed. Rep. 254; *Brewer v. McClelland (Ind.)* 17 L. R. A. 845.

Under the Missouri constitution providing for registration, an act requiring supplemental registration is not invalid as inconsistent with uniformity, as the constitution providing for registration every two years does not prohibit intermediate registration. *Ensworth v. Albin*, 46 Mo. 450.

A registry law to identify and distinguish the true electors is constitutional, and uniform regulations are not enjoined by the Pennsylvania constitution; the only clause of injunction is that elections shall be free and equal. *Patterson v. Barlow*, 60 Pa. 54.

The provisions of the charter of Newport, withholding the right to vote for alderman and councilmen, from registry voters, and conferring the right to vote exclusively on electors, who are qualified to vote for the imposition of a tax or the expenditure of money, is unconstitutional and void. *Re Charter of Newport*, 14 R. I. 655.

Under Mo. Const. 1875, art. 8, § 12, defining voters, and section 5, providing for statute of registration in cities and counties of certain size, and by art. 2, § 7, showing that special charters of cities were not affected without supplemental legislation, a previous city charter providing for registration was not affected by the provisions above, nor repealed by the clause defining voters. *State v. Frazier*, 96 Mo. 426.

Under Kan. Const., art. 5, § 4, requiring that the legislature shall pass such laws as may be necessary for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage, a registry law is not void as not of uniform operation al-

*Russell*, 89 Ill. 61; *People v. English*, 15 L. R. A. 131, 139 Ill. 622; *Paine, Law of Elections*, chap. 4; *Reg. v. Crosthwaite*, 17 Jr. Law Rep. N. S. 157.

*Mr. Joseph D. Bedle* also for defendant.

*Beasley, Ch. J.*, delivered the opinion of the court:

This is a procedure to test the title of the defendant to the office of road commissioner in the first district of Englewood township. The title thus challenged is claimed to exist by virtue of an election held under the act entitled "An act concerning public roads and parks, and creating boards for the control and management of the same," approved March 1, 1893 (Pamph. Laws 1893, p. 69). The main object of this statute is to supersede, by the introduction of new methods, the system theretofore prevailing for the formation and reparation of the public highways by the well-known township officials. The fash-

though it applies only to cities of first and second class; nor invalid as imposing an additional qualification. *State v. Butts*, 81 Kan. 587.

#### c. Tax or property qualification.

If the constitution of a state provides for a tax or property qualification as a condition precedent for voting, statutes to that effect will be valid. *Friesleben v. Shallcross (Del.)* 8 L. R. A. 387; *State v. Dillon*, 23 L. R. A. 124, 32 Fla. 545; *McMahon v. Savannah*, 66 Ga. 217, 43 Am. Rep. 65.

And some states sustain such a statute providing tax-paying qualification as a condition precedent to voting for the office for which the constitution does not prescribe the qualifications of an elector. *Buckner v. Gordon*, 81 Ky. 665; *Valverde v. Shattuck (Colo.)* Oct. 30, 1893.

And in such a case it was held that the voting privilege could be extended to aliens, and restricted to property owners. *Belles v. Burr*, 76 Mich. 1.

But in *St. Joseph & D. O. R. Co. v. Buchanan County Ct.*, 39 Mo. 485, it was held that under the Missouri constitution, providing for submitting questions of subscription to qualified voters, an act which restricts voting to property qualification is invalid.

And in *Morris v. Powell*, 9 L. R. A. 326, 125 Ind. 281, it was held that a statute requiring property qualification as a prerequisite to voting is void, if the constitution fixes the qualification but does not require property.

And a tax-paying qualification clause in a territorial statute, not authorized by the Act of Congress, and providing conditions on one class and not on others, is void. *Lyman v. Martin*, 2 Utah, 136.

#### d. Soldiers voting.

Where the constitution does not define the place of voting, an act to enable electors in military service to vote is not void, although conducted at a place outside the county and state. *State v. Main*, 16 Wis. 338; *Lehman v. McBride*, 15 Ohio St. 572; *Morrison v. Springer*, 15 Iowa, 304.

And the same was held in *Opinion of the Judges*, 37 Vt. 665, in regard to voting for federal office.

But where the constitution intends or provides that votes shall be cast in the county of residence, a statute authorizing voting for state officers elsewhere than in the county of voter's residence is invalid. *Day v. Jones*, 81 Cal. 261; *Bourland v. Hildreth*, 26 Cal. 161; *Opinion of the Justices*, 44 N. H. 533; *People v. Blodgett*, 13 Mich. 127; *Chase v. Miller*, 41 Pa. 403; *Opinion of the Judges*, *supra*.



tion of this substitute is this: the township committee of the several townships of the state are required to divide "their respective townships into convenient road districts," and thereupon to "call an assembly in each of said districts" "of the freeholders of said district," upon a certain prescribed notice. The section of the act containing these directions then proceeds in these words, *viz.*: "At which assembly, after being organized, the said freeholders so assembled shall elect by ballot a suitable person, who shall be a legal voter in the township and a freeholder and resident in the district for which he is nominated, as a road commissioner for said district for the term of three years." The further provision is that the commissioners thus chosen shall be known as the "Public Road Board;" that they shall each take an oath of office, and a certain compensation shall be paid to them by the township collector; that they shall have the "same duties

and be subject to the same penalties as overseers of the highways in the said township now have or heretofore had," and, in addition, "shall have the same powers, perform the same duties, and be subject to the same obligations and penalties as the township committee now have, had, perform or performed, or are or were subject to, in relation to the public highways, and in addition thereto shall have a general and exclusive supervision, control, and management of the public highways and sidewalks in said township," etc. Besides the powers thus specified, there are others, of a similar character, conferred upon this newly created road board. It appears by the record before the court that, in pursuance of the statute in question, the township of Englewood was divided into five road districts, and that in No. 1 of these the defendant was declared elected a commissioner, and is now in the execution of the functions of such office.

*c. Test oaths and disqualification for crime.*

In *BOYD v. MILLS*, post, 486, the constitution provided that persons engaged in the rebellion (with certain exceptions) could not vote until enfranchised by the legislature, and this was held not contrary to the Federal Constitution. This power of each state to provide by its constitution for the qualifications of the voters in that state is fully sustained in the cases noted *infra*, subject only to the inability to disqualify for race, color, or previous condition of servitude.

The test oath required by some of the territories that the voter is not a Mormon, or maintaining bigamous relations, etc., have been sustained as not contrary to the acts of congress or the Federal Constitution, nor *ex post facto* laws. *Davis v. Beason*, 133 U. S. 333, 33 L. ed. 637; *Innis v. Bolton*, 2 Idaho, 407; *Wooley v. Watkins*, Id. 555; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47.

And a similar oath was sustained where the constitution of Idaho so provided. *Shepherd v. Grimmett*, 2 Idaho, 1123.

But where the constitution defines an elector's qualifications, the legislature cannot impose as an additional qualification the test oath that he does not belong to the Mormon church, not provided for in the constitution, although the constitution provides that the legislature may prescribe other rules or oaths as a test of electoral qualifications. *State v. Findlay*, 20 Nev. 193.

Where the constitution so provides, a statute requiring a test oath of loyalty will be sustained. *Randolph v. Good*, 3 W. Va. 551; *Duke v. Brown*, 36 N. C. 127; *McDowell v. Massachusetts & S. Constr. Co.*, 96 N. C. 514; *Southerland v. Goldsboro*, Id. 49; *Hardesty v. Taft*, 23 Md. 512, 37 Am. Dec. 584; *Anderson v. Baker*, 23 Md. 551; *Burch v. Van Horn*, 2 Cong. Elect. Cas. 205; *Blair v. Ridgely*, 41 Mo. 63, 37 Am. Dec. 248; *State v. Neal*, 42 Mo. 119.

By the amendment to the constitution of Tennessee the qualification of voters was left to be determined by the next general assembly thereafter, and the qualifications then imposed govern notwithstanding an inhabitant may have a pardon from the president of the United States. *Ridley v. Sherbrook*, 3 Coldw. 569.

But a legislature cannot require test oath of loyalty from a voter not provided for as to his qualifications by the constitution, which authorizes the legislature to prescribe other oaths as a test of electoral qualification. *Davis v. McKeely*, 5 Nev. 369; *Clayton v. Harris*, 7 Nev. 64.

And a legislative act cannot make voluntary rebellion involuntary expatriation, and it is not alien-

der to charge that one had falsely taken an oath prescribed by an unconstitutional act. *Burkett v. McCarty*, 10 Bush, 758.

So where the constitution does not so authorize, a statute requiring an oath of loyalty and that he has not borne arms, etc., is unconstitutional as to the latter clause. *Rison v. Farr*, 24 Ark. 161, 37 Am. Dec. 52.

New York Act, March 20, 1897, providing for oath of loyalty as prerequisite of right to vote, was held to violate the Federal Constitution, but the court was divided as to whether it violated the New York constitution, which provided no member of the state shall be disfranchised or deprived of any rights or privileges unless by the law of the land, or the judgment of his peers. *Green v. Shumway*, 89 N. Y. 418.

A constitutional provision forbidding, among other things, a person to vote or to preach without taking oath of loyalty and that he had never been hostile to the state or federal government, was held as to preaching to be in effect a bill of attainder and an *ex post facto* law and therefore void, but the question of voting did not arise in the case. *Cummings v. Missouri*, 71 U. S. 4 Wall. 277, 13 L. ed. 353.

An act of congress March 3, 1865, forfeiting the rights of citizenship of deserters, thereby disqualifying such under New York constitution, which requires that only citizens of the United States can vote at a state election, is valid and is not an *ex post facto* law nor bill of attainder. *Goettehus v. Matthewson*, 58 Barb. 153, reversed on another question, 61 N. Y. 420.

Congress may disqualify deserters from the army from being citizens and thus affect their relation with the states, where the state constitution allows only citizens to vote; but such disqualification will not be recognised without proof of conviction. *Huber v. Reilly*, 53 Pa. 112; *State v. Symonds*, 37 Me. 148; *McCafferty v. Guyer*, 50 Pa. 109.

A constitutional provision disqualifying voters convicted of larceny includes also petty larceny. *State v. Buckman*, 18 Fla. 307; *Anderson v. State*, 72 Ala. 187.

Under Ky. Const., art. 3, § 4, providing that laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other crimes or high misdemeanors, a statute disfranchising any person convicted of robbery, forgery, counterfeiting, or perjury, or other like crime, one who has been guilty of larceny cannot vote, and such statute is valid. *Anderson v. Winfree*, 35 Ky. 569.

The legality of this election is the question to be resolved.

It will be perceived, from the outline of the act, as above given, that the elective franchise, in these particular cases, is conferred exclusively upon "the freeholders in said district." At the election now under consideration, the chairman of the assembly ruled that all persons of full age, whether men or women, who resided in the township of Englewood, and who owned lands in said district, should be permitted to vote, and all other persons should be excluded from voting. The supervenient inquiry arising from an election so conducted is, obviously, whether the legislature has the power to vest in a special class of persons the right to fill the office with which we are now concerned. The act explicitly declares that no vote can be given except by a freeholder of the district. By article 2, section 1, of the Constitution of the state, the right of suffrage is thus defined: "Every male citizen of the United States of the age of twenty-one years, who shall have been a resident of this state one year, and of the county in which he claims his vote five months, next before the election, shall be entitled to vote for all offi-

cers that now are, or hereafter may be, elective by the people." With the exceptions enumerated in the proviso we have, at present, no concern. It cannot be denied that the office now in question falls within the terms of this constitutional definition, for it is plainly an office elective by the people. Notwithstanding the universality of these expressions, it is insisted on the part of the defendant that the provision is applicable only to such offices as are created by the constitution itself, and not to those that come into being through legislation. But such a contention is, it is deemed, plainly untenable. The constitutional language is clear and unambiguous, and there is not a syllable of the instrument that throws it in doubt. In the presence of such fact, there is no room for construction. Under such circumstances, the rule of reason, as well as of law, peremptorily requires that the plain language of the primary law must be taken to express the purpose of its framers. "Possible or even probable meanings," says Prof. Cooley, "when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." Cooley, Const. Lim. 55. In view of this principle, that should

Under La. Const., art. 150, disqualifying duelists from the right of suffrage, a statute requiring a voter to take the oath that he has not given a challenge, etc., is valid as he may abstain from voting if he does not wish to take the oath. Dwight v. Rice, 5 La. Ann. 530.

A party convicted of crime in 1871 may be excluded from voting by the Constitution of 1875, and such a provision is not an *ex post facto* law, and is not a bill of attainder, where it requires conviction by judicial proceedings before disfranchisement. Washington v. State, 75 Ala. 552, 51 Am. Rep. 479.

A conviction under the federal laws of the crime of counterfeiting does not disqualify a voter, under N. Y. Laws 1872, providing that conviction of an infamous crime under the laws of this state shall disqualify him. United States v. Barnabo, 14 Blatchf. 74.

#### f. Ballots and primaries.

Statutes may be made regulating political machinery in regard to nominations for public office. *Re House Bill No. 166*, 9 Colo. 628.

A statute prohibiting fraudulent voting at primaries was sustained as valid under Pa. Const., art. 8, § 2, providing for disqualification for holding office and deprivation of right of suffrage of any one convicted of willful violation of the election laws. *Leonard v. Com.* 112 Pa. 607.

So Pennsylvania Act, June 19, 1881, requiring a party nomination or petition before uniform ballots required will be furnished, was sustained, as names may be inserted on the regular ballot. *Dewalt v. Bartley*, 15 L. R. A. 771, 146 Pa. 529.

And limitations on the manner of voting, as by printed ballot, are not void as adding to the qualifications of the voter. *State v. McElroy*, 16 L. R. A. 278, 44 La. Ann. 736.

Australian ballot law is not unconstitutional, as imposing a secret ballot, or providing only special ballots for the voter. *State v. Black*, 16 L. R. A. 769, 54 N. J. L. 448.

Under Mich. Const., art. 7, § 1, providing who is an elector, and that the legislature may provide the way in which his vote shall be cast, and section 2, that all votes shall be by ballot, and section 6, that laws may be passed to preserve the purity of elections, the legislature may provide for regis-

tration, and time, place, and manner of voting, so long as the law does not destroy the right, and uniformity of ballots may be required, and the voter may be required to prepare his ballot in secret, and deposit it alone; but as to lame and blind persons the spirit of the statute will not be infringed if they are assisted—(but see next case). *Detroit v. Rush*, 10 L. R. A. 171, 53 Mich. 532.

Under a constitutional provision giving the legislature power to provide the manner of election of officers of towns and cities, it may be by ballot, although another provision of the constitution provided for elections by the people to be *vis et voce*. So much, however, of an election law as requires a voter to secretly and unaided mark his own ballot, would deprive illiterate persons of the right of suffrage, and is invalid—but see next case, *supra*. *Rogers v. Jacob*, 88 Ky. 502.

Under Tex. Const., art. 4, § 6, amended 1891, providing for numbering ballots as voted, *Rev. Stat.*, § 1797, providing that unnumbered ballots shall not be counted, is valid as the elector takes his right subject to limitations imposed by the constitution, and statutory limitations not inconsistent therewith. *State v. Connor*, 86 Tex. 133.

But Cal. Code, § 1197, 1205, providing for certain ballots and rejecting all others, is unconstitutional as an attempt to discriminate against classes of voters, disfranchising them, as it prevents them from supplementing a straight ticket by stamping choice for individual candidates. *Eaton v. Brown*, 17 L. R. A. 697, 96 Cal. 371.

#### g. Other statutory conditions, restrictions, and qualifications.

A statute imposing qualifications as to residence or payment of tax, different from those authorized by the constitution of the state, is invalid. *Rishel v. Luther*, 2 Pa. Dist. Rep. 799; *Quinn v. State*, 35 Ind. 495, 9 Am. Rep. 754; *People v. Canaday*, 73 N. C. 193, 21 Am. Rep. 463; *State v. Lean*, 9 Wis. 279; *State v. Williams*, 5 Wis. 303; *State v. Tuttle*, 53 Wis. 45.

But a statute may require a voter to show that he has the constitutional qualification. *State v. Williams*, *supra*.

As to other cases of residence, see also Page v.

never be overlooked, it is impracticable to transmute the general declaration of the constitution, that every citizen possessed of certain qualifications shall be entitled to vote for all officers elective by the people, into a right to vote only for a certain class of officers. To say that the phrase "all officers" means all constitutional officers is conspicuously to interpolate the clause, and not to interpret its language. And, indeed, if we scrutinize more closely the phraseology to the constitutional adjustment in question, we will find that it expressly rejects this narrow construction under criticism. The description, "all officers that now are, or hereafter may be, elective by the people," will not consist with the theory that only constitutional offices are embraced in its terms, for, if an office be made elective by the constitution, it cannot, with any propriety whatever, be referred to as an office that may thereafter be elective. Such an expression is congruous with office to be called into existence legislatively, but it is repugnant to the state of an office created by the constitution itself. Both the general and particular indications, therefore, of the clause are rejective of the theory of the defense.

And again: If the constitutional language touching this subject had been deemed am-

biguous or indistinct, still all reasonable inference to be deduced from the scope and purpose of the instrument would have led to the same result as that above expressed. In view of such considerations, it would appear to be improbable, in the extreme, that while, in the fabrication of the primary law, careful provision should be made in regulation of the suffrage in the election of constitutional officers no method whatever should be established with regard to the elevation into public position of the numerous and important functionaries necessary to local government. In every American system of laws there must be, as it would seem, a recognition, express or implied, of the existence of instructions effectuating in the people the right of local self-government. Such instrumentalities always have been, and probably always will be, necessary parts of the machinery of state government. They are invested with large powers, which are exercised by officials chosen by the community. In such a posture of things, it is scarcely rational to suppose that the framers of the constitution, in regulating the right of suffrage, should make provision for its exercise with respect to the smallest of constitutional officers, such as constables and justices of the peace, and should at the same time leave at large, with-

Allen, 58 Pa. 338, 98 Am. Dec. 372, and cases following.

Under Fla. Act, May 31, 1897, in regard to Jacksonville, providing that only qualified electors who were such at the general state election next preceding the city election could vote at the city election thus disqualifying all others who might have possessed the constitutional qualification for eleven months, it was held that in the absence of constitutional provisions applicable to city elections the statute was valid, as the right to vote is not an inherent right but depends on constitutional grant, or if the constitution is silent on the legislative grant. *State v. Dillon*, 22 L. R. A. 124, 32 Fla. 645.

But a statute is invalid which restricts the right of the elector to vote for only a part of the officers of a class, where a greater number are to be voted for, and the right to vote for all is given by the constitution. *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 836; *State v. Wrightson* (N. J.) 23 L. R. A. 548; *State v. Dillon*, *supra*.

The legislature cannot, under the pretense of subdividing a county or state for election purposes, disfranchise a part of the people, by failing to provide for the constitutional right of voting. *People v. Maynard*, 15 Mich. 471; *State v. Fitzgerald*, 37 Minn. 28; *State v. Van Camp*, 36 Neb. 9; *Atty-Gen. v. St. Clair County* *Supra*, 11 Mich. 63.

And a registration law failing to provide for inspectors in some of the districts as registering officers is void. *Atty-Gen. v. Detroit*, 7 L. R. A. 99, 78 Mich. 345.

And statutes allowing officials to revise registration lists so as to exclude qualified voters will be held inoperative as to such part. *State v. Staten*, 6 Coldw. 238; *State v. Dillon*, 22 L. R. A. 124, 32 Fla. 645.

That the law delays election in case of a vacancy three months, does not deprive the electors of any constitutional right. *Com. v. Maxwell*, 37 Pa. 44.

If the legislature may provide an office to be voted for, it may say that certain qualifications are necessary for the incumbent, although this may prevent a voter from voting his choice. *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 503, affirming 12 Abb. Pr. N. B. 306, reversing 63 Barb. 356. 25 L. R. A.

A statute disqualifying the sheriff from voting except in case of a tie vote, is constitutional as the sheriff may decline the office and retain the right of suffrage. *State v. Adams*, 2 Stew. (Ala.) 231.

The Amendment to Mass. Const., art. 20, and Mass. Stat. 1892, chap. 351, § 23, requiring a voter to be able to read part of the state constitution and write his name, does not violate the Federal Constitution as U. S. Const., art. 14, Amendment, provides that the basis of representation shall be reduced on denial of right to vote by a state thus recognizing the right to restrict, subject only of course to article 15, of the Amendment of the United States Constitution. *Stone v. Smith*, 159 Mass. 413.

In *State v. Deshler*, 25 N. J. L. 123, where the court held that an alien could not vote under a school election law providing that inhabitants could vote, it was said that it must not be understood that it is not in the power of the legislature, by express and explicit provisions, to authorize persons not entitled to vote for trustees to vote on the question of taxing or any matter relating to the schools other than the election of officers.

Under Ill. Const., art. 2, § 27, providing that white male inhabitants of certain age and residence shall be voters, an alien may be a voter. *Spragins v. Houghton*, 3 Ill. 377.

But it was said in *Murray v. McCarty*, 2 Munf. 393, that the rights of electors cannot be imparted to any one but citizens of a state, but that was not the question involved.

Where white blood preponderates over African, the citizen is "white" as provided for in the Ohio constitution, confining voters to "white" persons, but a statute imposing unusual and unreasonable burdens on the voter to prove the preponderance is void. *Monroe v. Collins*, 17 Ohio St. 665.

There are numerous election cases which construe and enforce statutes in regard to the voter and election but, not passing on constitutional questions directly, are not included in this note.

The cases unanimously agree that the right to vote is not an inherent or natural right but is simply a gift of the state, subject to be taken away or withheld by the supreme power of the state. L. T.

out adjustment in this respect, the act of filling the highest municipal positions, such as mayoralties and city judgeships. The external indications of intention accord with the language of the constitutional provision now being considered; so that we think that the right of suffrage, with respect both to constitutional and statutory officers, is conferred by it on that class only that is comprehended within its definition. A male citizen of the United States, of the age of twenty-one years, who has been a resident of this state one year, and of the county in which he claims his vote five months, next before the given election, is entitled to vote for all officers that are elective by the people, whether such offices are created by the constitution or by legislation. Such voter, however, with respect to an election in a district that is not coextensive with the county, must, by necessary implication from the foregoing definition, be a resident of such district, for he could not reasonably be said to claim the right to vote in the county unless he were such resident. Such has been the construction that has always been put upon this clause of the constitution, and it is the corner stone in the foundation of all our municipalities. The view thus stated is in harmony with the expression of opinion in this court in the case of *State v. Deahler*, 25 N. J. L. 182. In that case, *Mr. Justice Elmer* says, referring to the constitutional provision before us, that "this applies not only to officers whose election is provided for by the constitution, but to all who are or may be elected by virtue of an act of the legislature." The class of voters at official elections being thus defined by the constitu-

tion, it is not competent for the legislature either to enlarge or to diminish such class. The authorities, it is believed, are unanimous to this effect. *Cooley*, Const. Lim. 64. The provision, therefore, in the present statute, authorizing the election in controversy by the resident freeholders of the district, is a palpable alteration of the constitutional scheme, and the proceedings under it are consequently invalid. Judgment of ouster must pass against the defendant.

Before closing, it is proper to say that the general purpose that this statute is designed to effect has not been considered with respect to its legal feasibility. The attempt here is to lodge in the class of freeholders the exclusive right to lay out and repair the public highways, and to raise and expend the appropriate revenues. It is founded in a claim that the legislature has an unlimited power to establish in a few persons the administration of a branch of government, to the exclusion of the many. Such a prerogative would seem to have no limits, for, if it can be conferred on citizens owning freeholds, it can, at the will of the lawmaker, be given to nonfreeholders, or to the class who are without property, real or personal. But the subject is referred to only for the purpose of saying that it is one of great importance, and that it has not been discussed by counsel, and has consequently not been considered by the court. The title of the relator has not been, and could not be, put in issue by these proceedings, which are not on the part of the attorney-general.

*The defendant has no title, and judgment must pass against him.*

## KANSAS SUPREME COURT.

O. C. BOYD

v.

O. MILLS.

(.....Kan.....)

\*1. That part of section 2 of article 5 of the Constitution of this state, as amended in 1867, which reads: "No person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government, except all persons who have been honorably discharged from the military service of the United States since the first day of April A. D. 1861, provided, that they have served one year or more therein, shall be qualified to vote or hold office in this state until such disability shall be removed by a law passed by a vote of two thirds of all the members of both branches of the legislature,"—does not conflict with sections 10, article 1, of the Constitution of the United States, and is a valid constitutional provision.

\*Headnotes by ALLEN, J.

NOTE.—As to how far the right of suffrage is absolute, see the note to the case immediately preceding this one.

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2. Where the election officers of a township were furnished by the county clerk with official ballots printed on white paper, and also with sample ballots printed on colored paper, in a separate package, and where by mistake the sample ballots were used by all the voters of that township, and the official ballots on white paper were all returned unused by the judges of election, and the election in such township was conducted regularly in every other respect, and the ballots used by the electors of all political parties were of the same color,—Held, that such ballots were rightly counted.

(June 2, 1894.)

MOTION by defendant to strike out portions of a petition for quo warranto to try the title of defendant to the office of sheriff of Barber County. *Sustained in part.*

The facts are stated in the opinion.

*Messrs. Martin & McNeal* and *Frank Doster*, for defendant, in support of motion: Treason shall consist only in levying war against the state, adhering to its enemies, or giving them aid and comfort.

Bill of Rights, § 13.

Treason against the United States shall consist only in levying war against them or ad-

thering to their enemies, giving them aid and comfort.

U. S. Const. art. 3, § 3, par. 18.

If a man has voluntarily borne arms against the government of the United States, or voluntarily aided or abetted in the attempted overthrow of said government, has he not been guilty of the offence of treason?

*Huber v. Reilly*, 53 Pa. 112.

To deprive a man of the right to vote or hold office by bill of attainder, is punishment.

*Cummings v. Missouri*, 71 U. S. 832, 18 L. ed. 865; *Gotcheus v. Matheson*, 58 Barb. 153.

So, then, if we consider the bill of rights of our own state and the Constitution of the United States, and give to the words used in our constitution, in section 2 of article 5, their usual signification, we must conclude that to disfranchise for voluntarily bearing arms against the government of the United States is a punishment inflicted for the commission of a crime.

The persons disfranchised under this section are not disfranchised on account of any offense committed against the government of the state of Kansas or the people of this state.

Every criminal prosecution must charge the offense to have been committed against the sovereign whose courts sit in judgment upon the offender and whose executive may pardon him.

1 Kent, Com. 18th ed. § 403.

The man who has voluntarily borne arms against the government of the United States is answerable for his offense to the government of the United States.

*Ross v. State*, 55 Ga. 192, 31 Am. Rep. 278; *Privett v. Stevens*, 25 Kan. 276.

Subjecting a man to disfranchisement in a quo warranto proceeding is depriving him of a right without due process of law.

*State v. Whisner*, 35 Kan. 277; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 282; *Walker v. Sauvinet*, 92 U. S. 90, 98, 23 L. ed. 678, 679.

Yet this court in this proceeding, under section 2 of article 5 of the Constitution, passes judgment of disfranchisement and finds these men guilty of the high crime of treason without notice that they are to be tried, without the privilege of being present in court in person or of having the benefit of counsel in their behalf.

It is a bill of attainder. Bills of attainder are laws enacted which for a past offense, stain or taint the persons against whom they are enacted, by a forfeiture of their civil or political rights, without the right of trial by jury in due form of law.

*Cummings v. Missouri*, 71 U. S. 4 Wall. 832, 18 L. ed. 865; *Cooley*, Const. Lim. 315.

The people have no more power to put a bill of attainder into the constitution of their state than the legislature would have to enact one into law.

*Shreveport v. Cole*, 129 U. S. 86, 32 L. ed. 669; *Caldor v. Bull*, 8 U. S. 8 Dall. 886, 1 L. ed. 648; *Eison v. Farr*, 34 Ark. 161, 37 Am. Dec. 52.

The provisions of our statute relating to the preparation of the ballot, from the time it is prepared for the printer by the county clerk until it reaches the voter, are mandatory only

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as to the election officers, and directory merely as to the voter. In other words, the voter cannot be disfranchised by any mere mistake of the election officers.

*Bowers v. Smith*, 16 L. R. A. 754, 111 Mo. 45; *State v. Saxon*, 18 L. R. A. 721, 80 Fla. 668; *State v. Van Camp*, 36 Neb. 9, 91; *People v. Onondaga County Canvassers*, 14 L. R. A. 624, 129 N. Y. 395; *State v. Russell*, 15 L. R. A. 740, 84 Neb. 116; *Lindstrom v. Manistee County Canvassers*, 19 L. R. A. 171, 94 Mich. 467; *McCrary*, Elections, 804; *De Berry v. Nicholson*, 102 N. C. 465; *Allen v. Glynn*, 15 L. R. A. 743, 17 Colo. 388; *State v. Walsh*, 17 L. R. A. 364, 63 Conn. 260; *Parvin v. Wimberg*, 15 L. R. A. 775, 130 Ind. 561; *Bowers v. Smith*, 16 L. R. A. 754, 111 Mo. 45; *Kirk v. Rhoads*, 46 Cal. 398; *Wildman v. Anderson*, 17 Kan. 344.

*Messrs. E. Sample and Chester L. Long*, for plaintiff, contra:

The right of suffrage is not a natural right, nor is it an absolute, unqualified personal right. It is a right derived in this country from constitutions and statutes. It is regulated by the states, and their power to fix the qualifications of voters is limited only by the provisions of the 15th Amendment to the Constitution, which forbids any distinction on account of "race, color, or previous condition of servitude."

*McCrary*, Elections, § 3; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 568; *Ex parte Yarbrough*, 110 U. S. 651, 23 L. ed. 274; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 23 L. ed. 627; *Stone v. Smith*, 159 Mass. 418; *Sproule v. Fredericks*, 69 Miss. 398; *United States v. Anthony*, 11 Blatchf. 200; *Blair v. Ridgely*, 41 Mo. 63, 97 Am. Dec. 248.

In *Burch v. Van Horn*, 2 Cong. Elect. Cas. 205, it was held that the principle of the case, *Cummings v. Missouri*, 71 U. S. 832, 18 L. ed. 865, holding that the provisions of the Missouri constitution forbidding persons from engaging in certain avocations were void, did not apply to suffrage.

It would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote; and in that event the election officers would be authorized to determine for that occasion, in case of question in any instance, upon the fact of marriage as a continuing status.

*Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47.

The words "*ex post facto*," have a definite technical signification, sanctioned by long usage. An *ex post facto* law is defined to be a law whereby an act is declared to be a crime, and made punishable as such when it was not a crime when done, or whereby the act of a crime is aggravated in enormity or punishment.

*Green v. Shumway*, 89 N. Y. 418, citing *Caldor v. Bull*, 8 U. S. 8 Dall. 886, 1 L. ed. 648; *Fletcher v. Peak*, 10 U. S. 6 Cranch, 188, 3 L. ed. 178; 1 Kent, Com. 450; *Watson v. Mercer*, 38 U. S. 8 Pet. 109, 110, 8 L. ed. 884, 885; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 266, 6 L. ed. 624; *Satterlee v. Mathewson*, 27 U. S. 2 Pet. 380, 7 L. ed. 458; *Kring v. Missouri*, 107 U. S. 231, 27 L. ed. 506.

It is not a punishment to deprive a person of the right of suffrage after it has once been granted.

Cooley, Const. Lim. § 589; *Anderson v. Baker*, 28 Md. 581; *Blair v. Ridgely*, 41 Mo. 68, 97 Am. Dec. 248; *Shepherd v. Grinnett*, 2 Idaho, 1128; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 628.

The provisions of section 14, chapter 78, of the Session Laws of 1898, in regard to the official ballot, are mandatory, and if not followed, the ballots cannot be counted.

*Fitzpatrick v. Gebhart*, 7 Kan. 85; *Jones v. State*, 1 Kan. 278; *Shawnee County Comrs. v. Carter*, 2 Kan. 115; 6 Am. & Eng. Encyclop. Law, p. 848; *Talcott v. Philbrick*, 10 L. R. A. 150, 59 Conn. 478; *Parvin v. Wimberg*, 15 L. R. A. 175, 180 Ind. 561; *Kirk v. Rhoads*, 46 Cal. 399; *People v. Onondaga County Canvassers*, 14 L. R. A. 624, 129 N. Y. 395; *West v. Ross*, 58 Mo. 350; *Oglesby v. Sigman*, 58 Miss. 502; *Reynolds v. Snow*, 67 Cal. 497; *State v. McKinnon*, 3 Or. 498; *State v. McElroy*, 16 L. R. A. 278, 44 La. Ann. 796; *Re Vote Marks*, 17 R. I. 812; *Eaton v. Brown*, 17 L. R. A. 697, 96 Cal. 371; *Chamberlin v. Hartley*, 152 Pa. 544; *State v. Van Camp*, 86 Neb. 9, 91; *State v. Scarborough*, 110 N. C. 232; *Doores v. Varnon* (Ky.) June 18, 1898; *Cusick's App.* 10 L. R. A. 238, 188 Pa. 459; *State v. Saxon*, 18 L. R. A. 721, 80 Fla. 660; *State v. Connor*, 86 Tex. 133; *Price v. Lush*, 9 L. R. A. 467, 10 Mont. 61; *Sego v. Stoddard* (Ind.) 22 L. R. A. 468; *Bechtel v. Albin* 184 Ind. 198; *Re Ballot Marks*, 18 R. I. —.

Allen, J., delivered the opinion of the court:

This is an original proceeding instituted in this court by O. C. Boyd, as plaintiff, to try the right to the office of sheriff of Barber county. The petition shows that at the election held on the 7th day of November, 1898, according to the official canvass of the votes cast, the plaintiff received 508 and the defendant 516 votes. The plaintiff alleges that many illegal votes were cast and counted for the defendant, and that the plaintiff received a majority of the legal votes. The questions now presented arise on a motion by the defendant to strike out two portions of the petition, which it is claimed are irrelevant. The first is as follows: "That the following named persons voted at the general election, held on the 7th day of November, 1898, for the defendant, O. Mills, for sheriff, in the townships set opposite their respective names, they not being qualified electors at said election, by reason of section 2, article 5, of the Constitution of the state of Kansas, each and all of them having voluntarily borne arms against the government of the United States, and voluntarily aided and abetted in the attempted overthrow of said government, and their disabilities have not been removed by a law passed by two thirds of all the members of both branches of the legislature of the state of Kansas," with a list of names and residences of persons claimed to be disqualified. Counsel for the defendant challenges the validity of that clause of the state constitution which deprives persons who have voluntarily borne arms against the government

of the United States of the right to vote. The section in which this provision occurs is section 2 of article 5. The section originally read as follows: "Section 2. No person under guardianship, *non compos mentis*, or insane, shall be qualified to vote, nor any person convicted of treason or felony unless restored to civil rights." In 1887 the section was amended, and now reads as follows: "Section 2. No person under guardianship, *non compos mentis*, or insane; no person convicted of felony unless restored to civil rights; no person who has been dishonorably discharged from the service of the United States unless reinstated; no person guilty of defrauding the government of the United States, or any of the states thereof; no person guilty of giving or receiving a bribe, or offering to give or receive a bribe, and no person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government, except all persons who have been honorably discharged from the military service of the United States since the first day of April A. D. 1861, provided that they have served one year or more therein, shall be qualified to vote, or hold office in this state until such disabilities shall be removed by a law passed by a vote of two thirds of all the members of both branches of the legislature." It is contended that this section of the constitution, having been passed after the close of the war, is in the nature of a bill of attainder, imposing the penalty of disfranchisement without a trial, and is *ex post facto* in its operation. The leading cases cited as supporting this contention are *Cummings v. Missouri*, 71 U. S. 4 Wall. 277, 18 L. ed. 356; and *Ex parte Garland*, 71 U. S. 4 Wall. 338, 18 L. ed. 366. The question presented in those cases was not identical with the one in this. The constitution of Missouri, as revised and amended in 1865, provided a test oath by which a person was required to swear that he had never been guilty of any manner of disloyalty to the government of the United States, and that, after the expiration of sixty days after the taking effect of the constitution, no person should be permitted to practice as an attorney or counselor at law, or be competent, as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, to teach or preach, unless such person should have taken and subscribed the prescribed oath. Cummings was a Roman Catholic priest, and was prosecuted for teaching and preaching without having taken the required oath. The Supreme Court of the United States held the provisions of the Missouri constitution invalid. A similar question was presented under an act of congress in the *Garland Case*, which was decided at the same time. The question in the latter case arose under an act of congress prohibiting any person from being admitted to the bar of the courts of the United States without taking a similar oath. The court held in both these cases that the requirements were invalid, and were in the nature of bills of attainder; that they operated to deprive these men of the right to earn a livelihood by pur-

suing the callings for which they had been educated; that the requirement of such oaths in effect required them to condemn themselves, and that the constitution of Missouri and the act of congress, in effect, condemned all persons as guilty, and prohibited them from following their callings until they should establish their innocence by expurgatory oaths. The following cases also are cited: *Green v. Shumway*, 89 N. Y. 418; *Huber v. Reilly*, 53 Pa. 112; *Dent v. West Virginia*, 129 U. S. 115, 82 L. ed. 628; *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52.

It is ably and earnestly argued in this case that to deprive a person of the right to vote is a punishment; that the right to vote and hold those offices which can only be filled by persons having the qualifications of electors is a valuable right, and that any law, whether in the form of legislative enactment or constitutional provision, which is retroactive in its operation, and takes away this right, is in its nature a bill of attainder, inflicting penalties, and that it must be declared void under the Federal Constitution. It is answered, however, that the right to vote and hold office is not a natural right; that suffrage is nowhere universal, but always restricted by age, sex, and other incidents; that of necessity the organic law must prescribe the qualifications of electors, and that in doing so the framers are subject to absolutely no restrictions, but may confer or withhold the right at pleasure. The question appears to the writer not free from difficulty. The privileges of citizenship are certainly esteemed as of great value. To be deprived of them is to suffer the infliction of an injury, yet to say that the people in their organic law may not determine who shall participate in the government is to deny a power universally and necessarily exercised by the framers of every constitution. For the courts to assume the function of sitting in judgment, not merely under the constitution, but upon the constitution itself, and according to their own views declare what provisions are valid and what invalid, is a most serious undertaking; yet, of course, provisions of the constitution of the state, if framed in violation of an expressed prohibition by the Federal Constitution, must be held inoperative. In determining who shall exercise the right of suffrage, may not the people exclude classes who have shown themselves unfaithful to a public trust, or who have engaged in hostilities against either the state or federal government? Counsel argues that the offense which is made the ground of disfranchisement is an offense against the sovereignty of the United States, not against that of the state of Kansas at all, and that only that sovereignty against which the offense has been committed can punish for the crime. This question, however, is immaterial until it be determined that the provision in the constitution is in the nature of a punishment for crime. If it be so, the provision would be invalid, no matter whether the offense be against the state or the United States, for it would be *ex post facto* in its operation. It will be observed that the original section of the constitution disqualified persons for of-

fenses only after conviction, while the amended section disqualifies persons convicted of felony, and also those guilty of defrauding the government or any of the states thereof, of giving or receiving a bribe, as well as those who have voluntarily borne arms against the government. In view of the fact that this provision has remained in the constitution for twenty-six years, and that at nearly every session of the legislature acts have been passed removing the disqualifications of voters; that the validity of the provision has remained unchallenged, and has been accepted as the organic law of the state by the people generally, the court certainly should hesitate to overturn that which has been so long established, and so universally recognized. The weight of authority, if not of reason, also seems to sustain the validity of the constitutional provision. *Anderson v. Baker*, 23 Md. 531; *Shepherd v. Grinnett*, 2 Idaho, 1123; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Ex parte Yarbrough*, 110 U. S. 651, 23 L. ed. 274; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 23 L. ed. 627; *Stone v. Smith*, 159 Mass. 413; *McCrary, Elections*, § 8. The only constitutional question we now have to decide is whether the people of the state of Kansas had the right to incorporate this provision in their organic law, and this question is answered in the affirmative. A conviction for treason under the constitution as it stood before the amendment would carry with it the loss of citizenship. The amendment adds nothing to the punishment for the offense. We have here no requirement of test oaths to consider. The character of evidence required to establish the disqualification of a voter under this provision is not now presented, nor do we express any opinion upon the subject.

2. Defendant also moves to strike out the following portion of the petition: "That on the 8d day of November, 1893, F. A. Lewis, as clerk of Barber county, Kansas, issued and gave to S. Y. Carr, judge of the election of Deerhead precinct, 100 official ballots; that on the 8th day of November, 1893, 100 official ballots, unused, from Deerhead precinct, were returned by John Renfrew; that on the said 8th day of November, 1893, as shown by the records in the office of the county clerk of said Barber county, there were voted in said Deerhead township 20 colored ballots; that a true and correct copy of the record of official ballots issued for the election held on the 7th day of November, 1893, for Deerhead township, as the same appears in the office of the county clerk of Barber county, Kansas, is made a part of this petition, here referred to, hereto attached, and marked 'Exhibit A'; that on the 4th day of November, 1893, the county clerk of Barber county, Kansas, took a receipt from S. Y. Carr, judge of election of Deerhead precinct, for 100 official ballots, a true and correct copy of which is attached to this petition, made a part hereof, and here referred to, and marked 'Exhibit B'; that on the 8th day of November, 1893, the county clerk of Barber county, Kansas, took a receipt from John Renfrew, of Deerhead voting precinct, for 100 ballots, unused, and

for 20 colored ballots, voted, which said receipt, as it appears in the stub-book of the county clerk of Barber county, Kansas, is in the words and figures set forth in Exhibit C, which said exhibit is hereto attached, here referred to, and made a part of this petition. The said plaintiff further says that the returns of the election on file in the office of the county clerk of Barber county, Kansas, on the 10th day of November, 1898, show that no official ballots had been voted in Deerhead precinct, and that ballots other than white had been voted in said Deerhead precinct, and that ballots having distinguishing colors and marks thereon had been voted in said Deerhead precinct; that no legal or official ballots were cast in Deerhead precinct for any candidate for the office of sheriff, or other office, at the general election held on said 7th day of November, 1898; that the five votes cast for O. C. Boyd, and the fourteen votes cast for O. Mills, shown by the returns to have been cast in Deerhead precinct, were illegal and void, and should not be counted, for the reasons above set forth." Section 14, chapter 78, of the Laws of 1898, known as the Australian Ballot Law, contains the provision that "the ballots shall be on plain white paper through which the printing or writing cannot be read." Section 15 provides that "ballots shall be printed and in the possession of the officers charged with their distribution at least five days before the election accompanied by exact copies of said ballots printed on paper of any color, other than white, for the inspection of candidates and their agents." It appears from the petition that in Deerhead township the election officers used the sample ballots, printed on colored paper, and returned all the official ballots, which were printed on white paper. It is conceded that all other ballots used in Deerhead township were of the same color, and the sole question with reference to their legality arises from the color of the paper. It is contended on behalf of the plaintiff that the statute is mandatory, and that no ballot can be counted unless it conforms strictly to the requirements of the law; that the court is not at liberty by construction to do away with any of its requirements. In this contention we think counsel for the plaintiff is in the main correct, and that the wholesome provisions of the law are neither to be disregarded nor construed away. Section 25 contains the following provision: "If a voter marks more names than there are persons to be elected to an office, or fails to mark the ballot as required by other sections of this act, or if for any reason it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office. No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted." That the ballots in fact used were printed and furnished by the county clerk, and were in all respects the same as the official ballot, excepting the color of the paper, is conceded, and it is also con-

ceded that the ballots used in the one township were uniform in color. Does this fact operate to render the election at that voting precinct a nullity? In considering the statute, we are to keep steadily in mind the evident purpose of the legislature in its enactment. It is plain that among the most prominent ends sought to be attained was that of absolute secrecy. Any mark or distinguishing feature on the ballots, which would enable a person other than the voter himself to identify the ballot, and find out how the elector had voted, was intended to be strictly prohibited. The case of *People v. Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624, is relied on. The statute of New York differs materially from our own. The law requires that "on the back of each ballot shall be printed in type known as great primer, Roman condensed capitals, the indorsement, 'Official ballot for,' and after the word 'for' shall follow the designation of the polling place for which the ballot is prepared, the date of the election and a fac simile of the signature of the county clerk; the ballot shall contain no caption, or other indorsement except as in this section provided." In distributing the ballots, those printed for the Republican party were transposed, so that the votes indorsed with the number of the first district in certain towns were sent to the second, and those with the second to the first, and such transpositions occurred in four towns, and at nine election precincts. The 29th section of the New York act provided: "No inspector of election shall deposit in the ballot box on election day any ballot which is not properly indorsed and numbered, except in the cases provided for in section 21 of this Act, nor shall any inspector of election deposit in the ballot box, or permit any other person to deposit therein on election day any ballot that is torn, or that has any other distinguishing mark on the outside thereof." It seems that separate tickets are printed there for each political party, instead of printing all the names on one ballot. In deciding the case, the court lays much stress on the fact that the Republican ballots, being indorsed with the wrong number, had distinguishing marks by which they could be identified, and that the secrecy of the ballot was thereby destroyed, and also on the positive requirements of the law that no ballot should be deposited unless properly indorsed and numbered. In the case of *State v. McKinnon*, 8 Or. 498, a ballot was rejected, written on colored paper, the law requiring it to be on plain white paper. We should have no hesitancy in saying that a single ballot printed on colored paper, where the official ballots printed on white paper were being used by other electors, could not be counted. In that case it would be plain that the object of the law was contravened.

We have examined the numerous cases cited by counsel for the plaintiff, and from them deduce two rules, which seem to be steadily adhered to by the courts: (1) That under laws similar to our own, designed to preserve the secrecy of the ballot, any mark or dis-



tinguishing feature apparent on the ballot renders it void. (2) Where the law is explicit in prohibiting the counting of any ballot which does not conform to the requirements of the statute, that the courts will enforce the law as it is, without interposing their own judgment as to the reasonableness or unreasonableness of the requirements. It will be observed that the law nowhere explicitly provides that a ballot printed on paper of a color other than white shall not be counted. The only clause which could be held to imply such a provision is that "none but ballots provided in accordance with the provisions of this act shall be counted." Among the requirements of the act, which are very minute, is one that the official ballots shall be put up in separate lots, packages of fifty ballots each, with certain marks on the outside. Will it be contended that an error in counting the ballots within any package, or in marking or addressing the package intended for any person, would vitiate the election? The departure from the law in matters which the legislature has not declared of vital importance must be substantial in order to vitiate the ballots. This appears to be the general current of all the authorities. In *Bowers v. Smith*, 111 Mo. 61, 18 L. R. A. 754, it is said: "If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declarations, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence as to prevent a full and free expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise, it is considered immaterial. In *State v. Russell*, 84 Neb. 116, 15 L. R. A. 740, it was held: "The provisions in section 20 of the Code, approved March 4, 1891, known as the Australian ballot law, for the marking of ballots with ink, is directory only, for ballots in other respects regular will, in the absence of fraud, be counted, although marked with a pencil." Under the Indiana Election Law of 1889, the poll clerks were required to write their initials in ink in the lower left-hand corner on the back of each ballot. In one precinct, clerks, by an

honest mistake, put the indorsement in the lower right-hand corner on all the ballots, and it was held in the case of *Purvin v. Wimberg*, 180 Ind. 561, 15 L. R. A. 775, that the ballots were properly counted. We have not overlooked the case of *Tulcott v. Philbrick*, 59 Conn. 472, 10 L. R. A. 150, cited by plaintiff's counsel, with the reasoning in which we are not satisfied. A distinction also was made by the supreme court of Michigan in the case of *Lindstrom v. Manistee County Canvassers*, 94 Mich. 487, 19 L. R. A. 171, between those errors or mistakes of officials which would have the effect to disfranchise a class of voters and a disregard of the provisions of the law by the electors themselves. Without proceeding to review at greater length the authorities cited by counsel on both sides of the question, we conclude that the mere fact that the paper on which all of the ballots used in one election district was of a color other than white, where the ballots were not only printed by the authorities designated by law, and by them furnished to the judges of election, but were furnished by the judges to the voters, and were the only ballots furnished to or used by any voter at that voting place, is not sufficient to prevent the counting of the votes. The secrecy of the ballot has been in no wise impaired; the voters themselves have manifested no disposition to disregard the law and it may be fairly inferred that the use of the colored ballots was an honest mistake on the part of the judges of the election. Had a part of the ballots been white, and a part colored, so as to afford some grounds for identification of the votes cast by the individual electors, a different question would be presented. We reach the conclusion, that the law has not been substantially infringed because we are unable to see how the purpose of the act can have been impaired in any degree by the mistake made in using the colored ballots. By this decision we do not intend to say that any of the provisions of the law may be disregarded, or that any officer may escape liability to punishment for violating any of its provisions.

*The first part of the motion will be overruled, and the last part will be sustained.*

All the Justices concur.

## MAINE SUPREME JUDICIAL COURT

Marcia E. ROGERS

v.

KENNEBEC STEAMBOAT CO.

(.....Me.....)

1. A person injured by the slipping of a gang plank while attempting to cross it in entering a steamer to take passage is to be regarded as a passenger.
2. A person traveling with a friend by

invitation, knowing that they were going on a pass held by the latter, although not seeing the pass or knowing its contents, is bound by a condition thereon that the passengers traveling upon it assumed all risks of injury.

3. A condition in a free pass that the passenger will assume all risks of personal injury is not against public policy.

(February 24, 1894.)

NOTE.—As to notice to passenger of conditions on ticket, see note to *Potter v. The Majestic* (U. S. C. C. N. Y.) 33 L. R. A. 744.  
35 L. R. A.

As to the rights of a person traveling on a pass, see note to *Muldoon v. Seattle City R. Co.* (Wash.) 23 L. R. A. 794.

**EXCEPTIONS** by defendant to ruling of the Supreme Judicial Court for Cumberland County made during the trial of an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence which resulted in a verdict in plaintiff's favor, and motion for new trial on such action. *Exceptions sustained.*

The facts sufficiently appear in the opinion.

**Mr. Weston Thompson**, for plaintiff:

Plaintiff at the time of injury was passenger for hire. Such carrier owes to such passenger "the strictest care consistent with reasonable performance of contract of transportation."

*Knight v. Portland, S. & P. R. Co.* 56 Me. 284, 96 Am. Dec. 449; *Warren v. Fitchburg R. Co.* 8 Allen, 283, 85 Am. Dec. 700.

"Most exact care and diligence."

*McElroy v. Nashua & L. R. Corp.* 4 Cush. 400, 50 Am. Dec. 784; *Peters v. Rylands*, 20 Pa. 497, 59 Am. Dec. 746.

Utmost care consistent with the nature and extent of carrier's business.

*Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 93 Am. Dec. 99; *Moreland v. Boston & P. R. Corp.* 141 Mass. 81.

Extraordinary vigilance aided by highest skill.

*Ingalls v. Bills*, 9 Met. 1, 48 Am. Dec. 355; *The "New World" v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 25 L. ed. 141; *Leslie v. Wabash, St. L. & P. R. Co.* 88 Mo. 50; *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560.

Utmost diligence and care of very cautious persons.

*Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 188; *Gillenwater v. Madison & I. R. Co.* 5 Ind. 339, 61 Am. Dec. 101; *Fariash v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 686; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 828; *Hegeman v. Western R. Corp.* 18 N. Y. 9, 64 Am. Dec. 520, and note; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 812; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Nashville & C. R. Co. v. Elliott*, 1 Coldw. 611, 78 Am. Dec. 506; *State v. Baltimore & O. R. Co.* 24 Md. 84, 87 Am. Dec. 600; *Baltimore & O. R. Co. v. Breinig*, 25 Md. 878, 90 Am. Dec. 49; *Huelsenkamp v. Citizens R. Co.* 87 Mo. 537, 90 Am. Dec. 399; *Taylor v. Grand Trunk R. Co.* 48 N. H. 304, 2 Am. Rep. 229; *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Goddard v. Grand Trunk R. Co. of Canada*, 57 Me. 202, 2 Am. Rep. 39; *Angell, Carr* 534, 526, 539, 610.

Any negligence is "gross."

*Edwards v. Lord*, 49 Me. 281.

And carrier is liable for "any negligence, however slight, if the strictest care and precaution reasonably within the carrier's power would have prevented the injury."

*Knight v. Portland, S. & P. R. Co.* 56 Me. 284, 96 Am. Dec. 449; *Baltimore & O. R. Co. v. Breinig*, supra; *Eaton v. Boston & L. R. Co.* 11 Allen, 504, 87 Am. Dec. 780.

For "the slightest neglect against which human prudence and foresight may guard."

*Laing v. Colder*, 8 Pa. 479, 49 Am. Dec. 538.

For "any defect which might have been discovered by the most careful and thorough examination."

*Ingalls v. Bills*, 9 Met. 1, 48 Am. Dec. 355.

Care which defendant owed to plaintiff included, of course, responsibility for omissions and commissions of its servants.

Cases cited above, and *Goddard v. Grand Trunk R. Co. of Canada*, supra; *Hanson v. European & N. A. R. Co.* 62 Me. 84, 16 Am. Rep. 404; *Gillenwater v. Madison & I. R. Co.* 5 Ind. 339, 61 Am. Dec. 101; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695.

Obligation included construction and management of the gang-plank, which was a necessary "subsidiary arrangement."

*Knight v. Portland, S. & P. R. Co.* supra; *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 415; *McElroy v. Nashua & L. R. Corp.* 4 Cush. 400, 50 Am. Dec. 784; *Dodge v. Boston & B. S. Co.* 2 L. R. A. 83, 148 Mass. 207; *Hegeman v. Western R. Corp.* 13 N. Y. 9, 64 Am. Dec. 521, note; *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *Lobdell v. Bullitt*, 18 La. 348, 33 Am. Dec. 567; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124, 96 Am. Dec. 114; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 25 L. ed. 141; *Moreland v. Boston & P. R. Corp.* 141 Mass. 81; *Pennsylvania Co. v. Marion*, 104 Ind. 239.

Degree of care required is "proportioned to the loss or injury arising or likely to arise, from negligence."

*Edwards v. Lord*, supra; *Baltimore & O. R. Co. v. Breinig*, 25 Md. 878, 90 Am. Dec. 49.

At time of receiving injury, plaintiff intended and was able to comply with all proper rules of the carrier. She intended, if required, when facts should be disclosed to defendant's ticket agent, or if she should find the alleged pass unacceptable, to pay her fare. She had not seen or accepted any pass, but supposed that Miss Niles had one that would carry her.

She had not reached the place provided by defendant for receiving fares, or the carrier's agent who might decide upon the scope or validity of the pass, and was on the way to that place and agent by the means of access provided by the carrier.

Plaintiff was a passenger for hire when injured.

*Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 387.

Presumption, as well as proof, is that plaintiff was rightfully on the plank.

*Pennsylvania R. Co. v. Books*, 57 Pa. 339, 96 Am. Dec. 229.

If she had gone there only "to speed the parting guest" defendant would have been liable.

*Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 817; *Keefe v. Boston & A. R. Co.* 142 Mass. 251; *Barrett v. Black*, 56 Me. 498, 96 Am. Dec. 497; *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 415; *Weisenberg v. Appleton*, 26 Wis. 56, 7 Am. Rep. 39, and note; *Hegeman v. Western R. Corp.* 13 N. Y. 9, 64 Am. Dec. 524.

Defendant was liable, irrespective of its carriership, by virtue of "that pervading principle of social duty, 'sic uters tuo,' etc."

See also *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 812; *State v. Balti-*

*more & O. R. Co.* 24 Md. 84, 87 Am. Dec. 600; *Baltimore & O. R. Co. v. Breinig*, 25 Md. 878, 90 Am. Dec. 49; *Knight v. Portland, S. & P. R. Co.* 56 Me. 244, 96 Am. Dec. 449; *Bennett v. Louisville & N. R. Co.* 103 U. S. 577, 26 L. ed. 285; *Barrett v. Black*, 56 Ma. 505, 96 Am. Dec. 497.

Whether defendant was guilty of negligence, was partly question of fact.

*Baltimore & O. R. Co. v. Breinig*, *supra*; *Soniar v. Boston & A. R. Co.* 141 Mass. 10; *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *Le Barron v. East Boston Ferry Co.* 11 Allen, 812, 87 Am. Dec. 717; *Wheclock v. Boston & A. R. Co.* 105 Mass. 208; *Galen & O. U. R. Co. v. Farwood*, 17 Ill. 509, 65 Am. Dec. 682.

The jury found the defendant guilty. It is not denied that the plank fell and that plaintiff was injured thereby. These facts make prima facie case of negligence against defendant, and cast burden on it to show its due care.

*Fariah v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666, and *note*; *Zemp v. Wilmington & M. R. Co.* 9 Rich. L. 84, 64 Am. Dec. 763; *Galena & O. U. R. Co. v. Farwood*, *supra*; *Bowen v. New York Cent. R. Co.* 18 N. Y. 408, 72 Am. Dec. 629; *Sullivan v. Philadelphia & R. R. Co.* 80 Pa. 234, 72 Am. Dec. 529; *Baltimore & O. R. Co. v. Worthington*, 21 Md. 275, 88 Am. Dec. 578; *New Jersey, R. & Transp. Co. v. Pollard*, 89 U. S. 22 Wall. 241, 22 L. ed. 877; *Stokes v. Saltonstall*, 88 U. S. 18 Pet. 181, 10 L. ed. 115; *Louisville, N. A. & O. R. Co. v. Pedigo*, 108 Ind. 481; *Baltimore & Y. Turnp. Road v. Leonard*, 66 Md. 70; *Lawrence v. Green*, 70 Cal. 417, 59 Am. Rep. 428; *Louisville, N. A. & O. R. Co. v. Jones*, 108 Ind. 551; *Cleveland, O. & I. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312; *Central Railroad v. Freeman*, 75 Ga. 331; *Leaving v. Colder*, 8 Pa. 479, 49 Am. Dec. 588; *Ingalls v. Bills*, 9 Met. 1, 48 Am. Dec. 383; *Feist v. Middlesex R. Co.* 109 Mass. 398, 12 Am. Rep. 720; *Angell, Carr.* 569.

Corbin, defendant's officer in charge, says he directed a man to make the plank lines fast to the rings. If this obviously necessary and customary duty had been performed properly, the plaintiff would not have been injured. Corbin's direction to the other servant cannot excuse the omission.

*Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502.

If wind and tide would be evidently working to swing the boat off, then defendant was bound to exercise diligence "commensurate with the risk or danger."

*Baltimore & O. R. Co. v. Breinig*, 25 Md. 878, 90 Am. Dec. 49.

Corbin says the ice was known to him to exist as a cause for unusual caution before anything was done towards putting the plank in place. Knowledge of Corbin and other servants was defendant's knowledge.

*Nashville & O. R. Co. v. Nashville*, 1 Coldw. 611, 78 Am. Dec. 506.

Contract or notice to limit carrier's "common-law liability" is one thing; such contract or notice to exclude liability for carrier's negligence or that of its servants, is another thing.

Contracts (*a fortiori* notices) for the latter purposes are generally held void and ineffectual 26 L. R. A.

in America, except New York and New Jersey, where with much dissent and some inconsistency, they have been upheld.

Against their validity—

See *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 637; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Grand Trunk R. Co. of Canada v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *The "New World" v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 844, 12 L. ed. 465; *Willis v. Grand Trunk R. Co.* 63 Me. 488; *Little v. Boston & M. R. Co.* 66 Me. 289; *Beckman v. Shouse*, 5 Rawle, 179, 28 Am. Dec. 658, and *note*; *Graham v. Davis*, 4 Ohio St. 362, 63 Am. Dec. 285; *Roberts v. Riley*, 15 La. Ann. 108, 77 Am. Dec. 163; *Southern Exp. Co. v. Purcell*, 87 Ga. 103, 92 Am. Dec. 58; *Squire v. New York Cent. R. Co.* 98 Mass. 239, 98 Am. Dec. 162; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 181; *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481; *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470, and *note*; *Swindler v. Hilliard*, 2 Rich. L. 286, 45 Am. Dec. 732; *Sager v. Portsmouth, S. & P. & E. R. Co.* 81 Me. 228, 50 Am. Dec. 659; *Reno v. Hogan*, 13 B. Mon. 63, 54 Am. Dec. 518; *Ingalls v. Bills*, 9 Met. 1, 48 Am. Dec. 387, and *note*; *Michigan, S. & N. L. R. Co. v. Heaton*, 87 Ind. 448, 10 Am. Rep. 69; *Carroll v. Missouri Pac. R. Co.* 88 Mo. 289, 67 Am. Rep. 382.

If common carrier's obligation arises from social duty and not from contract (*Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502, and is "determined by the policy of the law" (*Hollister v. Novlen*, 19 Wend. 234, 32 Am. Dec. 455),—the foregoing cases seem to show the inevitable conclusion; and unless the law has more regard for chattels than for human life (*Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 365), the result must be as they declare it.

A few cases hold that such contract on a pass is good against any negligence less than gross

*Illinois Cent. R. Co. v. Read*, 87 Ill. 484, 87 Am. Dec. 260; *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46, 57 Am. Rep. 88, 58 Am. Rep. 848; *Philadelphia & R. R. Co. v. Derby*, *supra*.

The Indiana court repeats *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 728: "A common carrier can no more stipulate for a slight degree of negligence than for gross negligence" and also approves the language of the Federal Supreme Court where this distinction is disapproved.

Gross is not necessarily willful or malicious. *The "New World" v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019.

Neither the Federal Supreme Court nor this court has decided whether a contract against carrier's negligence is valid on a free pass.

See *Grand Trunk R. Co. of Canada v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 637; *Willis v. Grand Trunk R. Co.* 63 Me. 488, reaffirmed, *Little v. Boston & M. R. Co.* 66 Me. 289.

Such contract on a pass has been upheld by

some courts outside of New York and New Jersey, and adjudged invalid by others.

See notes in *Perkins v. New York Cent. R. Co.* 83 Am. Dec. 290-293; *Bissell v. New York Cent. R. Co.* 25 N. Y. 442; *Camden & A. E. Co. v. Bausch (Pa.)* 6 Cent. Rep. 121.

Against *Griswold v. New York & N. E. R. Co.* 58 Conn. 371, 55 Am. Rep. 115, we cite *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640, and against *Quimby v. Boston & M. R. Co.* 58 L. R. A. 846, 150 Mass. 305, we cite *Jacobus v. St. Paul & O. R. Co.* 20 Minn. 125, 18 Am. Rep. 360.

Those cases that sustain the contract do not appreciate the principle that the carrier's obligation is not founded on contract (*Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 463, 14 L. ed. 502; *Holliester v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455), or duly consider the question "lying behind" the one which they discuss, referred to in last paragraph in—

*Grand Trunk R. Co. of Canada v. Stevens*, *supra*.

The terms which will exempt the carrier must be clear and unmistakable.

*Blair v. Erie R. Co.* 66 N. Y. 313, 23 Am. Rep. 55.

Terms offered here do not refer to negligence. They may well be taken to mean such liabilities as were found in—

*Pittsburg & C. E. Co. v. Pillow*, 76 Pa. 510, 18 Am. Rep. 424, and *McElroy v. Nashua & L. R. Corp.* 4 Cush. 400, 50 Am. Dec. 794.

We deny that plaintiff was traveling on a pass. The burden is on defendant to show pass and contract; contract extensive enough to include the case. As to construction see—

*Hooper v. Wells, Fargo & Co.* 27 Cal. 11, 85 Am. Dec. 211.

And as to burden—

*Baltimore & O. E. Co. v. Harris*, 79 U. S. 13 Wall. 65, 20 L. ed. 354; *Baker v. Brinson*, 9 Rich. L. 201, 67 Am. Dec. 548; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462, 92 Am. Dec. 462; *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 208; *Levering v. Union Transp. & Ins. Co.* 42 Mo. 88, 97 Am. Dec. 320.

Defense infers too much from plaintiff's consent to go. She did not consent to go on the pass regardless of undisclosed conditions. While having right to reject pass for conditions, she was not bound by the conditions.

*Messrs. A. C. Stilphen and Symonds, Snow & Cook*, for defendant:

In *Quimby v. Boston & M. R. Co.*, 5 L. R. A. 846, 150 Mass. 365, the Massachusetts court holds that a person accepting and traveling upon a free railroad pass with certain conditions upon it must be deemed to have accepted it on those conditions whether he reads and signs them or not, and if a person solicits and accepts purely as a gratuity a free pass from a railroad company to ride upon its trains and agrees to assume all risk of injury therefrom, the agreement is not invalid as against public policy and he cannot recover for injuries caused by the negligence of the company's servants.

The cases cited in *Quimby v. Boston & M. R. Co.* 25 L. R. A.

Co. and in *Griswold v. New York & N. E. R. Co.* 58 Conn. 371, 55 Am. Rep. 115, are sufficient to show that the rule there established prevails generally in England, has been definitely adopted by the courts of New York and Connecticut, as well as of Massachusetts, and prevails generally elsewhere, except that some courts have denied the power of the common carrier to limit its liability for gross negligence, making a difference of degrees in negligence which has not generally been approved.

Plaintiff knew she was receiving a pure gratuity in accepting transportation on the pass.

The knowledge in law is imputable to her that the pass might and probably would relieve the defendant from all liability, and she was bound to take notice of all its conditions and limitations, and if she failed to examine them, she was bound by the limitations and exemptions as fully as though she had read them.

*Drey v. Doyle*, 99 Mo. 459.

Whatever puts a party upon an inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding.

*Lodge v. Simonton*, 2 Penr. & W. 439, 23 Am. Dec. 36; *Bolles v. Chauncey*, 8 Conn. 389; *Booth v. Barnum*, 9 Conn. 236, 23 Am. Dec. 339; *Boswell v. Goodwin*, 81 Conn. 84, 81 Am. Dec. 169; *Hull v. Noble*, 40 Me. 459; *Warren v. Swift*, 81 N. H. 332; *Parker v. Conner*, 93 N. Y. 118, 45 Am. Rep. 178; *Bradley v. Whitney*, 108 Pa. 362; *Woodbury v. Bruce*, 59 Vt. 624; *Oliver v. Piatt*, 44 U. S. 8 How. 333, 11 L. ed. 622; *Hinde v. Vattier*, 1 McLean, 110.

Knowledge of agent is knowledge of principal.

*The Distilled Spirits*, 78 U. S. 11 Wall. 356, 20 L. ed. 187; *Patten v. Merchants & Farmers Mut. F. Ins. Co.* 40 N. H. 875; *Mullin v. Vermont Mut. F. Ins. Co.* 53 Vt. 113; *Van Schoick v. Niagara F. Ins. Co.* 68 N. Y. 434; *Fairfield Sav. Bank v. Chase*, 72 Me. 226, 39 Am. Rep. 319.

Notice to trustee is notice to principal, or person represented.

*Pope v. Pope*, 40 Miss. 516; *Pierce v. Emery*, 32 N. H. 484.

Notice to one partner is notice to all.

*Watson v. Wells*, 5 Conn. 463; *Herbert v. Ollin*, 40 N. H. 287; *New Haven County Bank v. Mitchell*, 15 Conn. 206.

One having a free pass in his possession is presumed to be traveling on it even though it was his intention to pay his fare, if that intention were not communicated to the carrier, and where the conditions of the pass exempt the carrier from liability for damages, he cannot recover.

*Neville v. Cork, B. & P. R. Co.* 9 Ir. L. T. Rep. 69, 2 Cent. L. J. 366.

When concurrently with his delivery of goods to the carrier, a bill of lading containing restrictive conditions is given to the shipper and retained by him, it is held that he is estopped to deny that he assented to its terms, and that evidence to show he never read it is inadmissible.

*Germania F. Ins. Co. v. Memphis & O. R. Co.* 72 N. Y. 90, 23 Am. Rep. 113; *Hill v.*

*Syracuse, B. & N. Y. R. Co.* 78 N. Y. 351, 29 Am. Rep. 168; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Wertheimer v. Pennsylvania R. Co.* 17 Blatchf. 421; *Bailou v. Earle*, 14 L. R. A. 483, 17 R. I. 441.

Neglect is followed by all the consequences of bad faith, and he loses the protection to which his ignorance, had it not proceeded from neglect, would have entitled him.

*Pringle v. Phillips*, 5 Sandf. 157.

In *Hill v. Boston, H. T. & W. R. Co.*, 144 Mass. 286, the plaintiff offered evidence to show a want of actual knowledge on the part of his agent of the terms of a shipping agreement, which the agent had signed, but the court held the plaintiff bound by the terms of the agreement.

See also *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 648; *Burke v. South Eastern R. Co. L. R. 5 C. P. Div. 1*; *Harris v. Great Western R. Co. L. R. 1 Q. B. Div. 515*.

**Whitehouse, J.**, delivered the opinion of the court:

On the evening of November 20, 1890, the defendant's steamer Kennebec arrived at the wharf in Bath about half past 5 o'clock, on her regular passage from Gardiner to Boston. There was a fresh breeze from the northwest, with a flood tide and freezing temperature, and the spray from the wheels caused ice to form on the guards of the steamer. The gang plank was adjusted so as to form a bridge or passageway between the steamer and the wharf. The plaintiff had come down from Brunswick by rail, and was going on board as a passenger to Boston. She was on the gang plank, and with a single step more would have been on the steamer, when suddenly, by reason of the swaying of the boat, the end of the gang plank resting on the steamer slipped from its place, and dropped down over the margin of the guard. The lip of the plank was thereby thrown upward and backward, the edge of it striking the plaintiff's leg, and inflicting the injury of which she complains.

The plaintiff claims that the defendant's servants were guilty of negligence in the management of the gang plank, and in this action to recover damages for the injury thereby sustained a verdict of \$3,950 was rendered in her favor.

The case now comes to this court on exceptions and motion for a new trial. The defendant claims—First, that the evidence fails to show any negligence on the part of the defendant's servants on the occasion in question; and, secondly, that the plaintiff became a passenger by virtue of a free pass which had printed on the back of it an express condition that the person accepting it must assume all risk of personal injury while using it.

The plaintiff admits that she was invited by Miss Niles to go to Boston by boat on a pass in company with Miss Niles and her two sisters, Miss Fannie Niles and Mrs. Remick, but says she never saw any pass, and denies that at the time of the accident she was traveling on a pass. She further says that, in any event, she had no knowledge of any condition on the pass in ques-

tion which exempted the defendant from liability for personal injuries, and was not chargeable with any knowledge of such condition which Miss Niles and her sisters may have had. It is further contended that the terms printed on the back of the pass ought not to be construed as a contract against the defendant's liability for negligence, and finally it is insisted that it was not competent for the defendant, as a common carrier of passengers, to make such a stipulation against liability for negligence.

1. The plaintiff had undoubtedly consented to avail herself of the benefit of a free pass on the defendant's steamer to Boston. Her own testimony is clear and unequivocal on this point. She was informed by Miss Niles that a pass had been obtained "for four ladies," and accepted her invitation to go in place of one first invited, who was obliged to decline. She admits that it was "distinctly understood" that she was to go on the pass, and that "no doubt was expressed by any one" as to her "being allowed to go on it." She "had always wished to go by boat," and accepted with pleasure this proffered courtesy from her friend. She afterwards stated that her employer would not have consented for her to leave at that busy season but for the favorable opportunity presented to her of going on a pass. She went from Brunswick to the wharf at Bath, and stepped upon the gang plank of the steamer, with the full expectation of a gratuitous passage to Boston, and with no intention of paying her fare. That such a pass was actually issued by the defendant, and was in the possession of Miss Niles, on the steamer, as well as at Brunswick, is conclusively shown by the uncontradicted testimony of Miss Niles and Mrs. Remick. It was presented by the latter at the ticket office on the steamer for the purpose of obtaining a stateroom. After obtaining the key the ladies went up stairs to the stateroom assigned them, and the plaintiff there ascertained the extent of her injury. The pass was returned to Mrs. Remick when she received the key, but, in the excitement and confusion following the accident, it appears to have been lost. Its terms are satisfactorily shown, however, by the testimony of the Niles sisters, in connection with a copy of the pass, in blank, introduced in evidence.

It is equally clear that the plaintiff had become a passenger at the time of the accident. She was at that moment within the protection of the defendant's servants, and immediately after the injury was assisted by them to the ladies' cabin. The steamer then left the wharf, and proceeded on her course down the river. It was soon discovered, however, that the plaintiff's wound required the attention of a surgeon, and the steamer put back to the wharf, and the plaintiff returned to Brunswick that night.

It cannot be questioned that a person may become a passenger before the transportation has actually commenced, and before he has entered the carrier's vehicle. In the familiar case of *Brien v. Bennett*, 8 Car. & P. 724, the defendant's omnibus was passing on its journey, and the plaintiff made a signal

for the driver to stop and take him up. The omnibus was accordingly stopped for that purpose, and the door opened; but just as the plaintiff was putting his foot on the step the omnibus was driven along, and the plaintiff thrown upon his face and injured. It was held that the stopping of the omnibus at the plaintiff's request implied a consent to take him as a passenger, and that thereupon, in attempting to enter the carriage, he had the rights of a passenger.

In *Shannon v. Boston & A. R. Co.*, 78 Me. 52, a person waiting in the station for a passage on a train soon to depart was invited by the ticket agent to sit in an empty car standing on the side track while the waiting room was being cleaned; and it was held that she was entitled to the same protection from the company, while in this car, as if in the regular waiting room. In either place the person is a passenger in the care of the company. See also, *Smith v. St. Paul City R. Co.* 33 Minn. 1, 50 Am. Rep. 550; *Warren v. Fitchburg R. Co.* 8 Allen. 227, 85 Am. Dec. 700; *Poucher v. New York Cent. R. Co.* 49 N. Y. 263; *Hannibal & St. J. R. Co. v. Martin*, 111 Ill. 219; *Allender v. Chicago, R. I. & P. R. Co.* 37 Iowa. 264; *Cassell v. Boston, & W. R. Corp.* 98 Mass. 194, 93 Am. Dec. 151; *Hutchinson*, Carr. 2d ed. §§ 556-565.

Upon the facts disclosed in the case at bar, it must be conceded that at the time of the accident the relation of passenger and carrier between the plaintiff and the defendant had been fully established. She clearly would have been a passenger if she had gone upon the gang plank intending to procure a ticket at the office, and pay her fare, and she was not the less so because traveling on a pass. *Hutchinson*, Carr. § 565; *Shannon v. Boston & A. R. Co. supra*.

2. The plaintiff was traveling on a pass with the following conditions printed on the back of it, viz.: "The person who accepts this pass thereby assumes all risks of personal injury, and loss or damage of property, while using it." The terms of this condition are clear and unmistakable. They are in effect the same as those on the "free ticket" in *Quimby v. Boston & M. R. Co.*, 150 Mass. 366, 5 L. R. A. 846, and are sufficiently comprehensive to cover all risks of personal injury, "of every name and nature," including those arising from the negligence of the defendant's servants.

But it does not appear that the plaintiff ever saw this pass, and she claims that she had no knowledge of the condition attached to it, and never assented to it. It is in testimony, however, that Miss Niles, who procured the pass at Brunswick, and Mrs. Remick, who presented it at the ticket office on the steamer, had both examined the terms of it, and knew that it contained a stipulation exonerating the defendant from liability for injuries. Miss Fannie Niles also learned from her sisters that there was such a condition on it. Miss Niles and Mrs. Remick both testify that in a conversation with the plaintiff, in going from Brunswick to Bath, on the evening of the accident, it was remarked, "in a joking way," that they must be very careful, as they were traveling on a pass, at

their own risk, and could not recover any damages if they were injured; and on two or three other occasions, before they reached the wharf, allusion was made, in the plaintiff's hearing, to the fact that they were "on a pass, and at their own risk." The plaintiff says she has no recollection of any such conversation, and never understood, as a matter of fact, that they were traveling at their own risk, by reason of express conditions on the pass, or otherwise. However that may be, the defendant contends that, in procuring the pass, Miss Niles may properly be deemed to have acted as agent for those who accepted its benefits, and that the plaintiff is legally chargeable with the knowledge possessed by her agent.

But, in the view here taken of the law, it is unnecessary to determine whether either of the ladies traveling on the pass ever read the conditions on the back of it, or had actual knowledge of the terms on which it was granted. It was evidently issued to "Miss Niles and three ladies," or contained some equivalent general description of the beneficiaries intended. The plaintiff consented to become one of them. It is immaterial that she was not the actual custodian of the pass. When she availed herself of the privileges secured by it, it became her pass, as fully and effectually as that of Miss Niles. She knew that it was a mere gratuity, and she had an opportunity to ascertain if any conditions were attached to the gift. Her omission to inform herself of its terms could give her no additional rights. The acceptance of a conditional gift necessarily involves a compliance with the conditions. A person accepting and traveling upon a free pass, with conditions clearly expressed upon it, must be deemed to have accepted it on such conditions, whether he reads them or not. This doctrine is elementary in the law of contracts, and is distinctly supported by the authorities respecting agreements for the carriage of passengers, as well as contracts for the transportation of goods and other bailments.

In *Quimby v. Boston & M. R. Co.*, *supra*, the plaintiff was traveling on a free ticket which he had solicited as a pure gratuity from the general manager of the company. On the back of it was printed an agreement that he should assume all risk of accidents, and on the face of it were these words: "Provided he signs the agreement on the back hereof." In fact, however, this agreement was not signed by the plaintiff, but the court said: "The fact that the plaintiff had not signed it, and was not required to sign it, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein whether he actually read them or not." In *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 12 L. R. A. 34, it appeared that the plaintiff's attention was not called to the provisions of his passage ticket limiting the defendant's liability, but the court held that the defendant had a right to assume that he assented to its provisions, and that they were equally binding on him as if he had read them.

With respect to this question, the rules of

law are applicable alike to contracts for the carriage of passengers and for the transportation of goods. In *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284, there was a clause in the shipping agreement limiting the liability of the company to certain valuations. The plaintiff offered evidence that his agent never read the shipping agreement which he signed, although he had full opportunity to do so, and did not in fact know that it contained any valuation of the animals. But it was held that the plaintiff was bound by the agreement made in his behalf by his agent. So, in *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 98 Am. Dec. 162, it was held that the plaintiff was bound by a similar shipping agreement, although his agent signed it without reading it, or informing himself of its contents. See also, *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 181; *Boston & M. Railroad v. Chipman*, 146 Mass. 107; *Hill v. Syracuse, B. & N. Y. R. Co.* 78 N. Y. 351, 29 Am. Rep. 168; *Parker v. South Eastern R. Co.* L. R. 2 C. P. Div. 416; *Harris v. Great Western R. Co.* L. R. 1 Q. B. Div. 515. The same principle is illustrated in contracts other than for transportation. *Reinstein v. Watts*, 84 Me. 139, and authorities cited; *Rice v. Dwight Mfg. Co.* 2 Cush. 80; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 343.

Upon this branch of the case at bar, the following instructions, among others, were requested by the defendant, viz.:

"A person accepting and traveling upon a free pass, with certain conditions upon it, must be deemed to have accepted it on such conditions, whether he reads and signs them or not."

"If the pass was written to 'Miss Niles and three ladies,' or in any other similar general terms, and the plaintiff accepted it, and intended to go upon it, as one of the ladies referred to in it, then the plaintiff would be bound by the terms of the pass, and cannot recover."

These requests were evidently prepared with direct reference to the authorities above cited and the principles above stated, but the presiding judge refused to give the former request, and, with respect to the latter, said to the jury: "I give you that with this addition: that if she accepted it, and knew the conditions that the pass imposed." The judge further instructed the jury upon this point, *inter alia*, as follows: "It is not sufficient that the writing was on the back of the pass which was in the hands of Miss Niles."

In order to relieve the defendant company from liability under that contract, the words written upon the back, placed there by the common carrier, must have been assented to by the person receiving the benefit of the pass. . . . If you should find that she expected to travel on a pass, simply, without knowing that any conditions were attached to it, . . . or if she never assented to the conditions, then the defendant would be liable for the negligence of its servants."

This language of the charge, in connection with the refusal to give the requested instructions, necessarily gave the jury to understand

that something more was required of the plaintiff than the acceptance and use of the pass, to constitute an assent to the conditions imposed. This must be deemed erroneous.

3. The plaintiff finally sets up the more radical contention that the condition on the back of the pass is not a valid and binding one, for the reason that it is not competent for a common carrier of passengers to stipulate against liability for injuries arising from his negligence. It is accordingly insisted that the instruction of the presiding judge that the plaintiff could not recover if she assented to the terms of the pass, imposing nonliability as a condition of granting it, was too favorable to the defendant, and, even if there was error in the ruling above considered, respecting the evidence of such assent, the defendant is not aggrieved, and exceptions ought not to be sustained.

It is an undisputed fact, in evidence in this case, that there was no valuable consideration whatever for the granting of the pass. It was purely a matter of courtesy and gratuity. This court is thus, for the first time, brought face to face with the inquiry whether public policy will tolerate the exemption of a carrier from liability for injuries to free passengers, resulting from the negligence of his servants. The precise question has not often been decided in other jurisdictions, but it is one with respect to which courts of great respectability and high authority have reached opposite conclusions. It cannot be said that there is any established or prevailing American doctrine upon the question, and this court is free to adopt the view which seems to be most in harmony with the principles of justice and sound reason, and such considerations of public welfare as may be involved in the inquiry.

The general doctrine of bailments has always been subject to the watchful care and scrutiny of public policy, and the law of common carriers has undoubtedly been developed and molded under its controlling influence. But the carriage of passengers is not bailment, properly speaking; and, while there are obvious analogies between this service and the transportation of goods, the distinction between them, though practically modified in the progress of society, has never been abrogated by the law. A public carrier may transport both passengers and goods by the same conveyance and at the same time, but the nature of the responsibility incurred with respect to them is legally different. As a common carrier of goods, he is an insurer against everything but the act of God and the public enemies. As a carrier of passengers, he is liable for the utmost care and vigilance consistent with the character and mode of the conveyance, but is not accountable for failure to take every possible precaution against danger and accident. *Libby v. Maine Cent. R. Co.* 85 Me. 84, 20 L. R. A. 812, and authorities cited. It must be kept in mind, however, that a common carrier is one who undertakes, for hire, to transport the goods of all who choose to employ him, and that no person is in law deemed a common carrier who does not carry for hire. *Edwards, Bailm.* 426; *Schouler,*

Bailm. § 405; Hutchinson, Carr. § 57. So when it is declared in *Willis v. Grand Trunk R. Co.*, 62 Me. 489, to be well-settled law that common carriers cannot stipulate for exemption from responsibility for losses occasioned by the negligence of themselves or their servants, reference is had only to contracts to carry goods for hire. But ever since the "well-ordered exposition of the English law of bailments" in the celebrated case of *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith, Lead. Cas. 354, those who undertake the gratuitous carriage of goods are deemed private carriers, and held liable only as mandataries; that is, only for losses resulting from gross negligence. And these may, by contract, protect themselves against liability for all losses except those occasioned by their malfeasance or fraud. Hutchinson, Carr. § 14. It is true that in the absence of any agreement to the contrary, when a carrier has admitted a person to the rights of a passenger, he owes him the same care and protection, when traveling on a free pass, as when he has paid the usual fare. Otherwise than this, there seems to be nothing suggested by the analogies between the settled law of common carriers of goods and that of passenger carriers which militates against the right claimed for the latter to protect themselves by contract against liability for negligence with respect to gratuitous passengers.

It has been the tendency of the English courts, from an early period, to recognize the power of carriers to limit their liability with respect to both goods and passengers; and, under the construction given to the several acts of parliament in later years, a common carrier in England has practically unlimited power to provide by contract against liability for negligence. In *McCawley v. Furness R. Co.* (1872) L. R. 8 Q. B. 57, the plaintiff was traveling on a "drover's pass," which provided that he should travel at his own risk, and it was held that the defendant was not liable even for gross negligence. Cockburn, Ch. J., said: "It was agreed that the plaintiff should be carried at his own risk, which must be taken to exclude all liability on the part of the company for any negligence for which they would otherwise have been liable." Quain, J., said: "Negligence, even gross, is the very thing which the contract stipulates that the defendant shall not be liable for." See also, *Gallin v. London & N. W. R. Co.* L. R. 10 Q. B. 212; *Alexander v. Toronto & N. R. Co.* 38 U. C. Q. B. 474.

The decisions of the New York and New Jersey courts also fully sustain the right of the carrier to contract with free passengers against liability for all degrees of negligence, provided the exemption is in clear and unmistakable terms. *Wells v. New York Cent. R. Co.* 24 N. Y. 181; *Poucher v. New York Cent. R. Co.* 49 N. Y. 263; *Magnin v. Dinmore*, 56 N. Y. 168; *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485, 62 Am. Dec. 135; *Kinney v. Central R. Co. of New Jersey*, 82 N. J. L. 409, 90 Am. Dec. 675. See also, *Western & A. R. Co. v. Bishop*, 50 Ga. 465. Some courts seek to distinguish the different degrees of negligence, and concede the right

to make such exemption as to a free passenger in all cases of ordinary negligence, but decline to extend the doctrine to cases of gross negligence. *Illinois Cent. R. Co. v. Read*, 87 Ill. 484, 87 Am. Dec. 260; *Indiana Cent. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339. And others refuse to give effect to any stipulation absolving the carrier from liability for any degree of negligence. *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Jacobus v. St Paul & C. R. Co.* 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640.

In the great case of *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, the federal court reached the conclusion that a condition on a "drover's pass," requiring the person using it to travel at his own risk, was not a valid and effectual one and could not exonerate the carrier from liability for negligence. It is important to notice, however, that this decision is put on the ground that a drover's pass was issued as a part of the contract for the carriage of the cattle, and could not be deemed a gratuitous one. At the close of the elaborate opinion in the case is a distinct finding "that a drover traveling on a pass such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire." The same doctrine was applied in the later case of *Grand Trunk R. Co. of Canada v. Stevens*, 95 U. S. 655, 24 L. ed. 535. There the servant of an inventor obtained a pass to see an officer of the road in regard to the use of a new coupling. As in the case of the drover, it was held that he was a passenger for hire, and not bound by the condition that he should travel at his own risk. In each of these cases, it is explicitly stated that it was not the purpose of the court to express any opinion as to the result which might have been reached if the plaintiff had been a free passenger, instead of one for hire. These decisions of the federal court, therefore, have no application to the precise question here raised. See an interesting discussion of this question by Mr. Schouler in *American Law Review* for March-April, 1892.

On the other hand, the highest courts of Massachusetts and Connecticut, in able and exhaustive opinions of recent date, have held, confidently and without hesitation, that such special contracts, relieving the carrier from liability to free passengers, are not forbidden by any principle of public policy. *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846. In the former case (decided in 1885) the plaintiff's intestate was a youth employed by the keeper of a railroad restaurant, and had a free pass, conditioned that he should travel at his own risk. He used it especially in running on the train to sell fruit and sandwiches, but at the time of the accident was traveling on his private account, as the pass authorized him to do. The court, finding that the railway had no direct interest in the restaurant, or the traffic on the cars, decided



that the plaintiff was strictly a free passenger; and, although he was killed in a collision resulting from the gross negligence of the defendant's servants, it was held, after a careful examination of the authorities, that he was bound by the terms of his pass, and the defendant was not liable.

But *Quimby v. Boston & M. R. Co., supra*, is an important authority still more directly in point. In this case the plaintiff was unquestionably a free passenger. The pass was given him "at his own solicitation, and as a pure gratuity," with a condition upon it that he should "assume all risk of accident, of every name and nature." In the opinion, by Mr. Justice Devens, the court says: "In such instances, one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. . . . The service which he undertakes to render is outside of his regular duties. The plaintiff was in no way constrained to accept the gratuity of the defendant. It had been yielded to him only on his own solicitation. When he did, there is no rule of public policy we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants."

This result seems to be clearly in harmony with the principles of justice and common right. The term "public policy," or "policy of the law," suggests but a vague and uncertain principle, and sometimes seems to be invoked as authority for a decision when a more definite reason cannot readily be assigned. In what manner the public welfare or the safety of human life is involved, or any of the cherished interests of the law are invaded, by allowing one out of a hundred passengers to travel on a pass at his own risk, does not clearly and satisfactorily appear. In most instances, it is believed, free passes are solicited by the traveler, not proffered by the carrier. The fact that a gratuitous passenger must travel at his own risk will surely operate as an incentive to greater care and caution on his part, and tend to diminish the number of passes issued. The probability that the cases of free transit will be so numerous as to induce any relaxation of the rules of prudence and vigilance on the part of the carrier is too remote to have weight as argument. He is constantly, and, it would seem, sufficiently, reminded of his obligations to the public, in the most forcible and effectual manner, by the numerous claims and large verdicts in favor of those injured who travel for hire. Nor is the number of passes likely to be so great as to involve the public interest by an increase in the rates of fare. In this state, furthermore, the rates of fare on railroads are subject to the control of the legislature or the railroad commissioners. Rev. Stat. chap. 51, §§ 9, 48.

In this case there is no suggestion of defective appliances or incompetent servants. The gang plank was used continuously after the accident as before. It is claimed that there was negligence on the part of the de-

fendant's servants in the adjustment and management of the gang plank, under the peculiar conditions existing at that time. It is not pretended that there was willful misconduct, and it cannot reasonably be claimed that there was gross negligence on the part of the defendant. There is therefore no occasion to draw a distinction between the degrees of negligence, if such a distinction is deemed legal and practicable in any case.

The conclusion is that one who accepts and uses a free pass, as a pure gratuity, on condition that he will assume all risk of personal injury, must be deemed to have accepted it on that condition, whether he reads it or not; and such a contract is not prohibited by any rule of public policy in this state but is effectual to exonerate the carrier from liability for the negligence of his servants.

*Exceptions sustained.*

Haskell, J., concurred in the result only.

Abble E. C. WRIGHT

Hartwell L. WOODCOCK *et al.*

(.....Me.....)

1. Ice formed on water flowing land which has been taken in condemnation proceedings by a water supply company, belongs to the water company and not to the owner of the fee.
2. The right of a water company in lands flowed by it under the exercise of eminent domain is something more than a mere easement, and includes the right of exclusive occupation with all attendant riparian rights for such time as the land is held under the charter.

(December 20, 1893.)

REPORT by the Supreme Judicial Court for the Waldo County for the opinion of the full bench of an action brought to recover damages for the conversion of a quantity of ice. *Non-suit granted.*

The facts sufficiently appear in the opinion.

*Messrs. William H. Fogler and William P. Thompson* for plaintiff.

*Messrs. John C. Coombs, Joseph Williamson, and William M. Payson*, for defendants:

The legislature may authorize the taking of the full title to real estate for public purposes. *Lewis, Em. Dom. § 277; Dingley v. Boston, 100 Mass. 544; Page v. O'Toole, 144 Mass. 303.*

Whether the full title or a less estate be granted, depends, of course, on the charter.

The statute establishes an absolute presumption that the terms "real estate" and "land" in this charter mean the full title thereto unless such presumption is overcome by some plain meaning inconsistent therewith.

NOTE.—As to the right to ice generally when in its natural state upon the water where formed, see note to *Brown v. Cunningham (Iowa) 12 L. R. A. 598.*

The principle that when the act is silent no greater estate should be taken for public purposes, against the consent of the owner, than such purposes require, has no application when the purposes require exclusive and perpetual use of the premises.

Lewis, Em. Dom. § 140.

The term "land" includes all interests therein.

*Hamor v. Bar Harbor Water Co.* 78 Me. 127. Damages are to be assessed for the full value of the property.

*Hayden v. Skillings*, 78 Me. 418; Lewis, Em. Dom. § 502; *Heyward v. New York*, 7 N. Y. 825; Me. Const. art. 1, § 21; *Harback v. Boston*, 10 Cush. 295.

By general law the term "land" carries the full title.

Anderson, Law Dict. 594; 2 Bl. Com. 16; *Johnson v. Richardson*, 33 Miss. 464; *Wright v. Douglass*, 7 N. Y. 564; *State v. Pottmeyer*, 33 Ind. 408, 5 Am. Rep. 224; *Mitchell v. Warner*, 5 Conn. 517; *Isham v. Morgan*, 9 Conn. 377, 23 Am. Dec. 361.

Especially should this be the construction of an instrument in which "land" and "real estate" are used in evident contradistinction to "easement."

Anderson, Law Dict. 391; *Ham v. Salem*, 100 Mass. 350.

If the full title did not pass by the taking or by estoppel, still in any event the water company acquired an interest as extensive as its purposes required.

The company was chartered to furnish "the people of Belfast a supply of pure water for domestic, mechanical, and manufacturing purposes, and to the city of Belfast water for the extinguishment of fires and other public uses, with all the rights, privileges, immunities, duties, and obligations incident to similar corporations" and build and maintain dams and reservoirs.

The grant, being once established, is to be liberally construed.

Lewis, Em. Dom. *supra*; *Parsons Water Co. v. Knapp*, 38 Kan. 752.

The necessity of exclusive possession of the reservoir is much greater than of land by the side of the railroad.

The right of the railroad "differs very essentially from that of the public in the land taken for common highways."

*Chicago & M. R. Co. v. Patchin*, 16 Ill. 198, 61 Am. Dec. 65; *Jackson v. Rutland & B. R. Co.* 25 Vt. 150, 60 Am. Dec. 246.

They have exclusive possession "as much so as that of the owner or occupant of the adjoining land."

*Hurd v. Rutland & B. R. Co.* 25 Vt. 116; *Connecticut & P. R. R. Co. v. Holton*, 32 Vt. 43; *Peirce v. Boston & L. R. Corp.* 141 Mass. 481; *Hayden v. Skillings*, 78 Me. 418; Lewis, Em. Dom. 568.

Whatever estate the water company took in the land, it took all the water.

"The water of Little river" is "the whole water of Little river."

*Ingraham v. Camden & R. Water Co.* 82 Me. 335; *Smith v. Concord*, 143 Mass. 253; *Hamor v. Bar Harbor Water Co.* 78 Me. 127; *Howe v. Weymouth*, 148 Mass. 605.

If the works are at first insufficient to handle

all the water needed for all the purposes, they may be afterwards enlarged.

*Ingraham v. Camden & R. Water Co.*, *Howe v. Weymouth*, and *Smith v. Concord*, *supra*; *Worcester Gas Light Co. v. County Comrs.* 133 Mass. 289.

A taking for a reservoir and such other works as the company may deem necessary, is good.

*Biche v. Bar Harbor Water Co.* 75 Me. 91.

To maintain this action of trover, plaintiff must show an ownership or right of possession in the ice alleged to have been converted.

*Haskell v. Jones*, 24 Me. 223; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Clapp v. Glidden*, 39 Me. 448; *Leake v. Loveday*, 4 Mann. & G. 973.

By the common law the title to all tide waters and lands flowed thereby up to high-water mark is held by the government for the use of the people.

*Com. v. Alger*, 7 Cush. 56; *Com. v. Charlestown*, 1 Pick. 179, 11 Am. Dec. 161; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.

The common law was modified by the Ordinance of 1641-1647.

But this was a qualified right to use the interest granted in such manner as not to interfere with the rights of the public.

*Parker v. Outler Milldam Co.* 20 Me. 357, 37 Am. Dec. 56.

Among the rights of the public thus reserved are of passing over the flats when the tide is out.

*State v. Wilson*, 42 Me. 9; *Com. v. Alger*, *supra*.

Of digging up the soil for clams, etc.

*Packard v. Ryder*, 144 Mass. 440, 59 Am. Rep. 101; *Brastow v. Rockport Ice Co.* 77 Me. 100.

Of navigation for boats and other vessels, of anchoring, fowling, fishing, etc.

*Weston v. Sampson*, 8 Cush. 355, 54 Am. Dec. 764; *West Roxbury v. Stoddard*, 7 Allen, 158.

Of cutting ice, which belongs to the first appropriator.

*Woodman v. Pitman*, 79 Me. 456; *Dyer v. Curtis*, 72 Me. 181.

The property in the fish and also of all tide waters is in the public.

*Coolidge v. Williams*, 4 Mass. 140.

Public rights in great ponds include all reasonable and lawful uses of the water, although not enumerated in the ancient charters, as bathing, washing, watering cattle, for manufacturing, domestic and agricultural purposes, skating, riding, using in the arts, and the cutting and taking of ice.

*West Roxbury v. Stoddard*, *supra*; *Hittinger v. Eames*, 121 Mass. 539; *People's Ice Co. v. Davenport*, 149 Mass. 322; *Barrett v. Rockport Ice Co.* 16 L. R. A. 774, 84 Me. 155; *Brastow v. Rockport Ice Co.* *supra*.

All the water, therefore, on these flats within the ebb and flow of the tide, whether fresh or salt, little or much, belonged to the public for all lawful uses.

All tide waters and tidal rivers are navigable and public by absolute presumption of law.

*Parsons v. Clark*, 76 Me. 476; *Veazie v. Duval*, 50 Me. 479; *Parker v. Outler Milldam Co.* 20 Me. 357, 37 Am. Dec. 56; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep.

196; Angell, Tide Waters, 78; *King v. Smith*, 2 Dougl. 441; *Lapish v. Bangor Bank*, 8 Me. 85; *Peyronz v. Howard*, 32 U. S. 7 Pet. 324, 8 L. ed. 700.

Plaintiff's rights were not increased by the taking of her premises and building of the dam.

Such increase could only arise from a corresponding decrease in the rights of the public.

8 Kent, Com. 427; *Weston v. Sampson*, 8 Cush. 355, 54 Am. Dec. 764; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 86 L. ed. 1018.

The grant to the water company for water works cannot operate to transfer other public rights over unto a third person.

*Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9.

The benefit of an ice privilege caused by a dam on an inland private stream to raise a head of water to operate a mill, accrues to the owner of the stream and not to the owner of the mill; only the ice must not be taken so as to interfere with the operation of the mill.

*Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813.

On the same principle the benefit of an ice privilege caused by a dam on a public tidal stream to raise a head of water to supply a city accrues to the owners of such stream; only the ice must not be taken so as to interfere with the operation of the waterworks.

**Emery, J.**, delivered the opinion of the court:

The Belfast Water Company was incorporated by chapter 94 of Special Acts of 1887, "for the purpose of furnishing to the people of Belfast a supply of pure water for domestic, mechanical, and manufacturing purposes, and to the city of Belfast, water for the extinguishment of fires and other public uses." To effect these purposes, the company was authorized, by its charter, to "take as for public uses any real estate or easement therein, including the water of any ponds, streams, springs, or artesian wells, necessary for obtaining a sufficient supply of water, for the construction of reservoirs, and the laying of pipes," etc. It was also authorized to "erect and maintain all necessary dams, reservoirs, stand-pipes, and hydrants." Under this charter, the company took from various owners, in the manner provided in the charter, and for the purposes therein named, a strip of land on each side of a stream called Little river, in Northport. The land taken extended from near the mouth of the stream up both sides of the stream some 2,000 feet, more or less, and included upland on each side of the stream, and the flats, and the land under the stream. The company also, in the same way, condemned "the water of the stream."

A section of this strip of land was taken from the plaintiff, out of a larger parcel of land belonging to her. The section taken from her was about 100 feet wide, including upland, the flats, and the land under the stream to the middle line of the stream. The tides of the sea flowed at high water up this stream past the plaintiff's land, but ebbed entirely out at low water, leaving only the fresh-water stream. The plaintiff sought for,

and obtained, payment of her damages for this taking of her land.

The company afterwards built a dam across the stream, below the land taken from the plaintiff, by which dam an artificial pond of fresh water was formed, and the inflow of the salt water was prevented. From this pond, the water was pumped into the company's pipes to supply the people and the city. Ice was cut and removed, by persons in the employ of the company, from that part of the artificial pond over the strip of land taken from the plaintiff. For this removal of ice, this action of trover was begun by the plaintiff, and is brought to the law court on report.

The plaintiff, before the condemnation of her land, had no property in the water of the stream, either in its liquid or frozen state. Her rights in either kind of water were simply those of an ordinary riparian owner,—to take of the water, as it flowed past or rested upon her land, such limited quantity as would not appreciably diminish the flow or supply to the riparian owners below. In the absence of modifying deeds or contracts, this riparian right is annexed to the possession of the land, and belongs to, and may be exercised by, the tenant in possession, however small his estate, even if he be tenant at will only. It is evident, therefore, that if the company, after condemnation, became the tenant in possession of this strip, and had the right of exclusive possession, then this action cannot be maintained, as there was no injury to the reversionary interest. We think the company did become at least a tenant in possession, and has the right of exclusive possession so long as it occupies the strip for the purposes for which the land and water were taken.

The plaintiff urges that her remaining rights in the land and water are equal and similar to those of a riparian owner whose land is flowed under the mill act, and she confidently cites *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813. There is, however, a manifest difference between the two cases and the two situations. Under the mill act, the mill owner is not authorized to take land, nor does he assume to take land. He is merely authorized to flow the land, and that is all he assumes to do. The landowner retains his possession, and with it all his riparian rights except the right to have the water flow from his land as freely as it naturally would. The flowing of his land puts no other restraint upon his use of the water.

The plaintiff again likens her right to that of a landowner over whose land a highway has been laid out. She cites many cases illustrative of that right. Here, again, the difference is plainly seen. When a road is located, the land is not "taken," in the technical sense of that term. No authority is given any person or corporation to "take" land for a highway. The highway is located or "laid out" over the land directly by public authority. Such laying out is simply imposing a public easement upon the land. The public acquire only the right of passage, with the incidental right of facilitating that

passage by constructing and keeping in repair a road within the lines of the location. The exercise of this right by the public does not ordinarily require the continual and exclusive occupation of the entire width of the location, hence the landowner retains such rights of possession as the public does not need.

The Belfast Water Company is required by its charter to furnish the city and people of Belfast with an abundant supply of pure water at all seasons. It must care for the quality, as well as the quantity, of water to be supplied. It must, therefore, provide large reservoirs for the storage of water, and must guard the water in them against all danger of contamination. It has made a reservoir of large extent by taking land for a long distance under and on both sides of Little river, and by building a dam near its mouth. This reservoir it must maintain, control, and guard at all times, so as to preserve the quantity and purity of the water. To do this requires, in the company, the right of exclusive possession of all the land under and about the pond, or reservoir,—of all the land taken. It must have the right to keep every person away from the water and the reservoir. *Reading v. Davis*, 158 Pa. 380. The riparian rights which the plaintiff insists that she retains are the very rights the company most needs to effectuate the purposes of its charter. They are the rights which the company sought for in selecting the land taken. It is to be presumed that the value of these attendant riparian rights was considered in the appraisal of the damages, and was included in the award. *Ham v. Salem*, 100 Mass. 350. By its condemnation of this land, the company has paid for and obtained, not the fee, perhaps, but certainly something more than a mere easement in the land. It has acquired the right of exclusive occupation, and, with this, all the attendant riparian rights, for such time as it holds the land under its charter.

The rights of a water company in land taken for the purposes of its charter are analogous to those of a railroad company in land taken for its railroad. The rights of the latter to the exclusive possession of such land are satisfactorily expounded in *Hayden v. Skillings*, 78 Me. 413; *Lander v. Bath*, 85 Me. 141; and in *Peires v. Boston & L. R. Corp.* 141 Mass. 481. These cases will shed light upon the question which has been considered here.

It follows that the plaintiff cannot maintain this action.

*Plaintiff nonsuited.*

Charles F. KINGSLEY, by Guardian,  
v.  
GOULDSBORO LAND IMPROVEMENT  
CO.

(.....Me.....)

#### **A way of access by water to land bordering on the sea is sufficient to prevent a right of way from necessity across land of the grantor which encloses it on the land side.**

NOTE.—For a collection of authorities upon the question of right of way by necessity, see note to *Logan v. Stogdale* (Ind.) 3 L. R. A. 58. 25 L. R. A.

dering on the sea is sufficient to prevent a right of way from necessity across land of the grantor which encloses it on the land side.

(February 26, 1894.)

REPORT by the Supreme Judicial Court for Hancock County for the opinion of the law court of an action brought to recover damages for an alleged trespass by defendant upon plaintiff's property. *Judgment for plaintiff.*

The declaration alleged that defendant, by its agents, with force and arms broke and entered plaintiff's close, cut down and destroyed timber and underbrush, broke down and carried away fences, blasted, dug up and carried away a large quantity of rock and granite, dug up and carried away earth and converted a large portion of the close into a traveled road.

Further facts appear in the opinion.

*Mr. J. A. Peters, Jr.*, for plaintiff:

When a man inconsiderately or accidentally conveys his land in such a way as to leave a portion of it inaccessible without trespass, and therefore useless, the courts relieve the owner of the inaccessible tract by establishing the fiction of an implied grant of a right of way.

*Whitehouse v. Cummings*, 88 Me. 96.

The defendant's obvious, most convenient and most used means of access to its land is by water.

The right of way will not be implied if merely convenient.

*Whitehouse v. Cummings, supra; Stillwell v. Foster*, 80 Me. 844; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 743.

The right to cross the plaintiff's land cannot be called a right of way by necessity when it is shown to be only used as a convenience.

See extended notes to *Pettingill v. Porter*, 85 Am. Dec. 875, and to *Cooper v. Maupin*, 35 Am. Dec. 464.

This special case of access by water has been decided very infrequently.

*Lawton v. Rivers*, 2 McCord, L. 445, 18 Am. Dec. 743; *Turnbull v. Rivers*, 8 McCord, L. 181, 15 Am. Dec. 623; *Screen v. Gregorie*, 8 Rich. L. 158, 64 Am. Dec. 748.

There is not a presumption in all cases that a right of way was intended to be reserved.

*Richards v. Attleborough Branch R. Co.* 153 Mass. 122.

If the defendants intend to establish an easement by necessity over the property of the plaintiff the burden is upon them to show the necessity.

*Stuyvesant v. Woodruff*, 21 N. J. L. 133, 47 Am. Dec. 159; *Dollif v. Boston & M. R. Co.* 68 Me. 178.

*Mr. Bedford E. Tracy* for defendant.

*Foster, J.*, delivered the opinion of the court:

Notwithstanding this is an action of trespass, the real and only question involved is whether the defendant is entitled to a way from necessity over the plaintiff's premises.

The defendant's land embraces what is properly known as "Grindstone Neck," in the town of Gouldsborough, and is surrounded on three sides by the waters of Frenchman's bay and Winter harbor. On the north, and adjoining

the defendant's land, lies the land of the plaintiff, over which the way is claimed.

Admitting that both parcels were originally owned by one William Bingham, through whom, by vndry mesne conveyances, both parties derive their respective titles, we do not think the defendant entitled to the way as one originating from necessity. Such right is founded upon the doctrine of implied grant. And implied grants of this character are looked upon with jealousy, construed with strictness, and are not favored except in cases of strict necessity, and not from mere convenience. The rule is now so well settled in this state that a reference to the decided cases where this question has been fully considered is all that is necessary.

*Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 743; *Dolliff v. Boston & M. R. Co.* 68 Me. 173; *Stevens v. Orr*, 69 Me. 323; *Stillwell v. Foster*, 80 Me. 333; *Whitehouse v. Cummings*, 88 Me. 91.

It has long been the established rule that if one grants a close surrounded by his own land, or to which he has no access except over his own land, he impliedly grants a right of way over his adjoining lands as incident to the occupation and enjoyment of the grant. *Nichols v. Luce*, 24 Pick. 102, 85 Am. Dec. 302. And the same rule applies when there has been a severance of the property, one portion of which has been rendered inaccessible except by passing over the other, or by trespassing on the lands of a stranger.

Whether the same rule shall apply in a case like the present, where the property to which the right of way is claimed is partially surrounded by the sea, presents a question somewhat different from any decided case in this state. It has, however, been before the courts in other jurisdictions, and there it was held that the rule did not apply.

Thus, in *Lawton v. Rivers*, 2 McCord, L. 445, 18 Am. Dec. 741, the court in South Carolina decided that the plaintiff, owner of an island separated by a river from another island, and this island being connected at low tide by a hard marsh with a third island, owned by the defendant, did not have a right of way by necessity from the public way over the defendant's plantation connecting with the road or path leading from the second island to the river opposite to the plaintiff's island. After stating the general rule of law governing rights of way from necessity, the court says: "It is apparent, however, that no such necessity existed in this case. The plaintiff has a navigable watercourse from his door to the public road or highway, by which the distance is not greater than by land; and although there may be some inconvenience in being obliged always to go by water, when he visits this plantation, yet it is not greater than necessarily attends every insular situation, and perhaps not so great to him as it would be to his neighbor to keep up a lane through his plantation for his accommodation."

*Turnbull v. Rivers*, 8 McCord, L. 181, 15 Am. Dec. 622, is another case in the same state, where the plaintiff claimed a way across the defendant's land, called "Stent's Point," to his island, and was decided upon the principles laid down in the preceding case. The court

35 L. R. A.

there held that, if the land could be reached by water, or by a distant or difficult road, no way from necessity could be said to exist. In the course of the opinion Nott, J., makes use of this language: "In analogy with that case, suppose one person should sell to another the extreme point of a neck or tongue of land surrounded by an open sea or navigable stream, except on one side, would it be understood that the seller should allow him a right of way through the whole neck of land because sometimes it would be more convenient for him to go to his farm by land than by water? I should suppose not."

In the present case the defendant's land has navigable waters on three sides of it. Over these waters there is a public right of travel. The defendant has the free use of these waters in going to and from its land. It has erected wharves, and owns a steamboat, which during certain portions of the year runs several times each day between there and Bar Harbor, and, as occasion requires, to Winter Harbor, on the east. To the latter place it is only three quarters of a mile by the way of the road or by water. It might oftentimes be more convenient to pass over a highway, or across the plaintiff's premises, than be subjected to the inconvenience of using the waters of the sea. But this inconvenience is not such as the law requires to constitute a legal necessity for the way claimed.

Nor can the defendant prevail upon the question of license. There was no such license as would entitle the defendant to enter upon the plaintiff's premises, and commit the acts which the evidence shows were done in this case.

According to the stipulation in the report, the entry must be, *judgment for the plaintiff*.

John H. MITCHELL

v.

Job ABBOTT *et al.*

(.....Me.....)

An offer of reward for the detection of a criminal, although unlimited as to time and never withdrawn, is merely a proposal which, if not accepted by performance within a reasonable time is conclusively presumed by law to be revoked.

(March 31, 1894.)

**REPORT** by the Supreme Judicial Court for the Somerset County for the opinion of the whole court of an action brought to recover a reward which had been offered by defendants, officers of the Dexter Savings Bank, for the detection of the persons who had murdered the treasurer of the bank. *Judgment for defendants.*

The facts sufficiently appear in the opinion. *Messrs. Walton & Walton* for plaintiff. *Messrs. Crosby & Crosby*, for defendants:

**NOTE.**—The above decision is in accord with that of *Shaub v. Lancaster*, 21 L. R. A. 691, 156 Pa. 322, but direct authority upon the question seems to be limited.

Trustees of a savings bank are the agents of the bank.

They had authority by virtue of their position to make such an offer on behalf of the corporation.

*Ricord v. Central Pac. R. Co.* 15 Nev. 167; *American Exp. Co. v. Patterson*, 78 Ind. 480; *Kelsey v. National Bank of Crawford County*, 69 Pa. 426; 1 *Morawetz, Priv. Corp.* § 424; *Simpson v. Garland*, 72 Me. 40, 89 Am. Rep. 297; *Purinton v. Security L. Ins. & Annuity Co.* 72 Me. 23; *Nobleboro v. Clark*, 68 Me. 87, 88 Am. Rep. 22; *Winship v. Smith*, 61 Me. 118; *Mann v. Chandler*, 9 Mass. 385.

The offer was not accepted or acted upon within a reasonable time.

*Loring v. Boston*, 7 Met. 409.

Is the question of the detection of the murderers open to the defendants? It is admitted that there is a record of the conviction of Stain and Cromwell, but defendants say that, notwithstanding that conviction, Stain and Cromwell were not the real murderers, in fact that there was no murder at all, but that Barron committed suicide.

These defendants were not parties to the case. *State of Maine v. Stain and Cromwell*. They did not appear and did not have any right to appear in the case more than the most insignificant men in Christendom. They are now summoned into court and simply ask for those rights to which every citizen and every human being is entitled.

*Bigelow, Estoppel*, p. 47, *Trespass; Betts v. New Hartford*, 25 Conn. 180; *Hutchinson v. Merchants & M. Bank of Wheeling*, 41 Pa. 42; 1 *Greenl. Ev.* § 587.

Even a plea of guilty in a criminal case is only evidence of confession and is not conclusive in a civil case against the same party.

1 *Greenl. Ev.* 587, *note*, see § 556, *Inquisitions*.

In an action to recover a reward for the detection and conviction of an offender, the record of conviction is not conclusive evidence of his guilt.

*Mead v. Boston*, 8 Cush. 404.

Even admissions in a deed are only binding upon parties and privies.

1 *Greenl. Ev.* § 211; *Buttrick v. Holden*, 8 Cush. 233.

*Wiswell, J.*, delivered the opinion of the court :

The plaintiff alleges that on the 28d day of February, 1878, the defendants published an offer of a reward; that upon the 31st day of March, 1890, the plaintiff performed the service which entitled him to the reward, in accordance with the terms of the offer.

Various objections to the maintenance of the suit are suggested and argued by the defendants' counsel. It is only necessary to consider one, which, we think, is an insuperable objection to the maintenance of the action, unless there are facts other than those set out in the plaintiffs' declaration, viz., that the offer of reward was a proposal to continue for a reasonable time only, and that it ceased to be a proposal long before the time when the plaintiff alleges he accepted it by a performance of the service for which the reward was to be paid.

The legal principles applicable to an offer of

reward for the detection of an offender or the recovery of property are well understood. Such an offer is a proposal merely; if acted upon before revocation, the offer and acceptance by a performance become a valid contract for a sufficient consideration. It may be revoked at any time before it is acted upon.

The offer in this case was unlimited as to time, and, so far as we know, was never withdrawn by the act of those making it. We think that the proper construction of such a proposal is, as contended by the defendants, that it must be accepted by performance within a reasonable time, and that the law will, in the absence of other facts, conclusively presume a revocation after a reasonable time. Otherwise, it would be a perpetually continuing offer for all time. The statute of limitations would furnish no relief, nor limit the continuance of the offer, provided only that the action be commenced within the statutory period after performance. Such a construction would be most unreasonable, and one that could neither have been intended by the persons making the offer, nor contemplated by one who, twelve years later, was instrumental in bringing about the detection of the offender.

Our view is fully sustained by the Massachusetts court in the case of *Loring v. Boston*, 7 Met. 409. In that case a lapse of three years and eight months was held to be beyond a reasonable time.

In this case it was not necessary to decide what would be a reasonable time during which the offer would continue. A lapse of more than twelve years between the time of making the offer and the time of performance is certainly much more than a reasonable time. We are forced to presume, therefore, a withdrawal or revocation of the offer before the time of acceptance.

The defendants filed a demurrer. The case was then reported to the law court for the determination of certain questions. Counsel upon both sides expressed a desire that the question considered, although not specially raised in the report, should be decided. This question is raised by the general demurrer, and we have considered it alone because, unless the plaintiff can show other facts and circumstances than those alleged, it finally determines the rights of the plaintiff in this or any other action brought to recover this reward.

The plaintiff will have the right to amend the declaration at *nisi prius*, upon terms, if there are any other facts which can avail him.

Declaration adjudged defective. *Demurrer sustained*.

STATE of Maine

v.

Herbert A. EDWARDS *et al.*

(.....Me.....)

# 1. A contract to pay greater toll for

**NOTE.**—The interesting and important question of the right of the state to exercise a supervision and control over property which has been devoted by the owner to public use has been discussed in the cases of *People v. Budd* (N. Y.) 8 L. R. A. 533, and *New York & C. Grain & Stock Exchange v. Chicago Board of Trade* (Ill.) 2 L. R. A. 411.

grinding at a public mill than that fixed by statute is invalid and constitutes no defence for taking excessive tolls.

2. A statute limiting the amount of toll which may be taken by a water mill which does grinding for the public is not unconstitutional.

(December 19, 1893.)

**EXCEPTIONS** by defendants to rulings of the Superior Court of Aroostook County made during the trial of a proceeding against defendants for demanding and receiving excessive tolls for grinding grain, which resulted in a verdict for conviction. *Overruled.*

The facts sufficiently appear in the opinion.

*Mr. Charles F. Daggett, County-Atty., for the State.*

*Mr. Louis C. Stearns for defendants.*

**Haskell, J.**, delivered the opinion of the court:

The defendants were convicted under Rev. Stat., chap. 57, §§ 5, 6, as amended by the Act of 1885, chapter 332, on two several counts—First, of refusing to receive grain at their gristmill, there tendered to be ground; second, of taking excessive toll. The defendants have excepted to the ruling of the court that they were bound to receive the grists of grain offered, and grind the same for the toll specified by the statute, and that an agreement for toll in excess of that fixed by statute would be no defense.

The case does not show what kind of a mill the defendants operated, nor whether it was a public or private mill, nor whether it was a water mill, steam mill, or wind mill. It assumes, however, that it was a gristmill, used for grinding grain for the public.

Exceptions must show sufficient facts to make the ruling erroneous. *Reed v. Reed*, 70 Me. 504. In this case, therefore, if the ruling excepted to be correct, and the statute under which the conviction was had be constitutional when applied to any kind of a gristmill, judgment must be entered on the verdict. And it may be assumed that defendants' mill was a public gristmill, propelled by a head of water obtained under authority of the mill act. Rev. Stat. chap. 92.

Assuming the mill to be a public mill, and the statute under which the conviction was had to be valid, an agreement between the owner of the grain and the defendants, for toll in excess of the statute quantity, can be no defense. The act of the defendants in taking excessive toll was just as much in defiance and violation of the statute, when taken by agreement with the owner of the grist, as if taken without his consent. The defendants' act is prohibited by the statute. They were required to run their public mill, for statute toll, with equal dispatch for all the patrons of their mill. They were required to receive grists and grind them in their turn, without motive for unequal dispatch to those willing to pay an extra price for it. The taking of usury by agreement with the borrower of money is analogous. Freedom from blame on the part of the lender is not a bar to the borrower's right to recover back the usury. *Houghton v. Stowell*, 28 Me. 25 L. R. A.

§15. The statute under which the conviction was had imposes on such condition.

But it is stoutly asserted that the statute is unconstitutional, as an invasion of the private right of enjoyment of property. The mill act of Maine applies to all water mills; and whether its validity results from the exercise of eminent domain as supposed by many cases (*Jordan v. Woodward*, 40 Me. 317; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Olmstead v. Camp*, 38 Conn. 533; and others cited by Gould, Waters, § 253; and by the supreme court in *Head v. Amoskeag Mfg. Co.* 118 U. S. 9, 28 L. ed. 889), or from the proper regulation of the rights of riparian owners, so as to best serve the public welfare, having due regard to the interests of all, as held in *Head v. Amoskeag Mfg. Co.* *supra*, and in *Murdock v. Stickney*, 8 Cush. 113, and remarked by the court in *Lovell v. Boston*, 111 Mass. 466, 15 Am. Rep. 39, it is unnecessary now to consider.

It is conceded by all authorities that the public use of property by the individual is within the scope of legislative control; and it matters not whether the use be authorized by express statute or dedicated by the individual proprietor. If it be a public use, it is within the supervision and control of the legislature. The troublesome question is whether the use be public. *Tyler v. Beach*, 44 Vt. 648, 8 Am. Rep. 398. In most branches of business the public has an interest. That interest varies, according to the surrounding conditions of the particular business in question. If it be a monopoly, the interest of the public to be fairly and conveniently served is much greater than when the monopoly ends by force of wholesome competition. A distinction must be made between a public use and a use in which the public has an interest. In the former case, the public may control, because it is a use within the function of government to establish and maintain. In the latter case, it is a private enterprise that serves the public, and in which it is interested to the extent of its necessities and convenience. The former is clearly within the control of the legislature, while the latter may not be. Many authorities, however, go to that extent. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, and cases cited. The public is interested to be well and reasonably served at the store of the tradesman, the shop of the mechanic, and the office of the professional man, and yet all these vocations are private. The goods on sale in the store, material furnished by the mechanic, and the skill employed by the professional man are the individual property of each one, respectively. Their vocations are exercised for their own gain, and they have a right to the fruits of their own industry, without legislative control. It must not be understood that each one may not be properly subjected to suitable police regulations as to the manner of his business (3 Kent, Com. 340), but the business cannot be thereby controlled, and the profits to be gained therefrom destroyed, taken away, or limited by the establishment of prices; otherwise, we should have a paternal government that might crush out

all individual liberty, and the declaration of our constitution would become as valueless as stubble.

It is conceded by all authorities that common carriers, common ferries, common roads, common wharves, common telegraphs, and common telephones, etc., and common grist-mills, and common lumber mills are of that public nature, to be put under public control, whether operated under the authority of charters from the state, or by individual enterprise. Each of those cases is within the function of government to establish and maintain, and, therefore, to control, by whomsoever exercised. *Blair v. Cumming County*, 111 U. S. 363, 23 L. ed. 457; *Head v. Amoskeag Mfg. Co. supra*; *Stone v. Farmers Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970.

Mills for the grinding of grain and for the sawing of lumber for all comers have been aided or established by the legislature from the earliest colonial times. Those mills were usually water mills; but it is of no moment what the propelling power may be. *Burlington Twp. v. Beasley*, 94 U. S. 310, 24 L. ed. 161. They have always been considered so necessary for the existence of the community that it was proper for government to foster or maintain them. And, in the absence of government aid, the individual proprietor, not pretending to serve the public, might maintain such mills as private mills, free from legislative interference, precisely as he might maintain a store, shop, or other private business; but when such proprietor makes his mill public, assumes to serve the public, then he dedicates his mill to public use, and it becomes a public mill, subject to public regulation and control. He is not compelled to continue such public use, but, so long as he does, he becomes a public servant, and may be regulated by the public.

In the present case, the mill must be considered a public mill, and rightfully within legislative control. No suggestion is made that the statute regulation is unreasonable, and therefore it is unimportant to consider whether the reasonableness of the statute regulation be a legislative or judicial function.

*Exceptions overruled.*

Isaac G. WILLIAMSON

v.

Andrew LACEY.

(.....Me.....)

**A justice is not personally liable for ordering the exclusion of spectators from his court-room and the actual removal of a person by an officer under his direction, where he acts in the mistaken belief that the case is one which he is justified in conducting with closed doors.**

(December 5, 1896.)

NOTE.—As to the personal liability of a justice of the peace for official acts, see note to *Austin v. Vrooman* (N. Y.) 14 L. R. A. 134.  
25 L. R. A.

**REPORT** by the Supreme Judicial Court for Lincoln County for the opinion of the law term of an action against defendant, a trial justice, for excluding plaintiff, a spectator at a trial before the justice, from the court-room. *Judgment of nonsuit.*

As special matter of defense defendant stated that deeming it wise in the interests of justice and the proper and orderly conduct of the trial that all spectators should be excluded from the trial, and the same be conducted in the presence of the parties and witnesses only, he requested plaintiff to depart, which the plaintiff wholly refused to do but continued therein in contempt of defendant as trial justice, and to the disturbance and violation of good order and decency in the administration of justice and to the great hindrance thereof, and therefore defendant requested an officer to remove plaintiff from the room.

Further facts appear in the opinion.

*Mr. W. E. Hogan* for plaintiff.

*Messrs. Baker, Baker & Cornish* for defendant.

*Peters, Ch. J.*, delivered the opinion of the court:

It is an undeniable proposition to start with in this discussion that courts of justice should be open to the public. That is the rule. History brings to us too vivid pictures of the oppressions endured by our English ancestors at the hands of arbitrary court ever to satisfy the people of this country with courts whose doors are closed against them. They instinctively believe that it is their right to witness judicial trials and proceedings in the courts.

It is true that courts have discretionary powers to be exercised in such a matter, but not an unlimited discretion. The almost boundless authority exercised by the court of star chamber in England was the seed of its own destruction, and was its historical infamy. Its lessons are not lost on the courts of to-day. We never knew of any court of general jurisdiction in this state conducting a strictly private criminal trial, nor, before this, of such a trial before a common magistrate. The defendant testifies that he never before held a private court during his eighteen years' experience as a magistrate.

*Mr. Cooley*, in his book on Constitutional Limitations (page 812), remarks on the general subject as follows: "It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials, because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned; and that the presence of interested spectators may



keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly met with it, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would be drawn thither by a prurient curiosity, are excluded altogether."

We cannot doubt that it was an unwise exercise of discretion for the defendant to expel forcibly from his court-room on the occasion in question all persons but the parties and witnesses. The accused persons had no witnesses, and they were left without the presence of friends. There was room enough for all the spectators to be seated without the discomfort of any one. There was no inclination on the part of any one to create a disturbance, nor was any such state of things apprehended. The magistrate testifies that his order was not based on any such ground, and he declined, as a witness, to specify any reason for the order, further than to say that he acted upon his judgment that the demands of justice required it. It appears that one of the prisoners who were to be tried was complained of for adultery, and that he and his wife were complained of for an affray, and the cases were tried separately and privately. The complainant in the two cases, whose daughter was to be a witness, requested private trials, but the magistrate does not admit that her request influenced him at all, although he states that there were to be five female witnesses at the trials. The prisoners were committed to jail for want of bail, where they remained many months, until the grand jury met, which found a bill that was abandoned without a trial.

It is better for the public interest that such trials be conducted in the presence of a responsible portion of the community. Public trials have a tendency to prevent waste of the public money. The persons ejected from the court-room were among the principal citizens of the county, comprising leading members of the bar, county commissioners, clerk of the courts, county treasurer, and others of the highest respectability in that community. It is idle to charge against such a body of men that they crowded the court-room for any unjustifiable purpose. Much more decorous would it be to conceive that they distrusted the propriety of the prosecutions, and were present because they were interested in the orderly and economical administration of justice. Apparently some of them were present because they were acquaintances and friends of the accused. They were gentlemen capable of being good judges of their own conduct.

There is a lack of particular authority on the questions arising in this case, for the reason that so few private trials have anywhere been held. *State v. Copp*, 15 N. H. 212, is cited by the defense. There a person was removed from a court-room because he offensively insisted in keeping a seat so near to the magistrate as to personally embarrass him in the performance of his duties. And the court there remarks: "But

the law does not authorize any court to act arbitrarily, and unreasonably exclude persons, but the right to have the courts open is the right of the people, and not of the individual." It would seem that in the case at bar the public right was well represented by the numerous personages who sought to be present in court. *Garnett v. Ferrand*, 6 Barn. & C. 611,—the other case cited by the defense,—was a case where a person unreasonably and obnoxiously intruded himself before a coroner's inquest held upon the body of a deceased person of no interest personally to the intruder. That case went upon the ground that a coroner's court in England is a court of record, and of high privilege, and that no action is maintainable against any coroner for an act done by him when sitting in a judicial capacity and acting within his jurisdiction.

But the more practical question in the present case is as to the rule of the liability of judges who commit errors in the proceedings in their courts injuriously affecting other persons. It is universally admitted that a judge of a court of record is not liable at common law for any act he does as judge, while acting within his jurisdiction. No action lies against him, whatever his act, or the motive for the act, may be.

The same policy of the law, which affords such absolute protection to the judges of the higher courts for their acts, also affords a very great immunity to those who administer justice in courts that are of a lesser grade than strictly courts of record. The same policy prevails in either case, affording in the one instance a complete protection against a liability to private action, and in the other a reasonable though partial protection.

*Lord Tenterden*, in the case of *Garnett v. Ferrand*, *supra*, hits the subject with these observations: "This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be. And it is not to be supposed beforehand that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature it is better, even, that an individual should occasionally suffer a wrong than that the general courts of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter. So, also, are neglect of duty and misconduct in it. For these, I trust, there is, and will always be, some due course of punishment by public prosecution."

The general rule of liability, therefore, of a judge of a court not of record, as deducible from the authorities, is that a judge of such a court is not liable personally for any injury sustained by any one which is the result

of honest error of judgment, in a matter where the court has jurisdiction, and where the act done is not of a purely ministerial character. See, on this subject, a collection of cases, and the discussion of them, in 15 American Law Review, 427.

If an inferior magistrate, however, acts unreasonably and arbitrarily, or from malicious motives, and thereby inflicts an injury upon a person, he may be liable in an action therefor. But it must be a case of direct injury or indignity to the individual.

We cannot with any certainty decide, from the facts before us, that the defendant did not act from honest motive, and according to his best judgment. He seems to have been in some degree influenced by suggestions from the officer in attendance upon his court, and in all probability he actually believed, however mistakenly, that the delicacy of the situation would justify the proceedings with closed doors.

*Plaintiff nonsuit.*

## MISSOURI SUPREME COURT.

Josephine HICKS *et al.*, *Respts.*,

*v.*

CITIZENS' R. CO., *Appt.*

(.....Mo.....)

1. Whether a cable car was run closer to a buggy on the track than was prudent, and whether there was negligence in failing to stop it to allow the buggy to leave the track, is a question for the jury.
2. Whether a person driving on a street-car track could have left it more expeditiously than he did and by so doing have avoided an injury received from the car is a question for the jury.
3. It is not necessarily negligent for a cable car to follow after a buggy

which is seen upon the track, when running slowly enough so that it can be stopped in time to avoid a collision.

(July 9, 1894.)

**A**PPEAL by defendant from a judgment of the St. Louis Circuit Court in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

Statement by Macfarlane, J.:

This is a suit by plaintiffs, as husband and wife, to recover damages for personal injuries received by the wife, on account of the alleged negligence of defendant's employes in running and managing a train of its cable-cars in the city of St. Louis. The petition

*NOTE.—Injuries by street-car collisions with vehicles or horses.*

*Horses or vehicles, caught in dangerous places.*

Street-car companies are liable for injuries caused to persons, horses, and vehicles caught in narrow or dangerous places, or standing near the track, where such injury was caused by the negligence of the company and such person injured was without negligence and unable to get out of the way, and the question of negligence and contributory negligence is for the jury. This has been held in cases against electric car companies. *Greeley v. Federal Street & P. V. Pass. R. Co.* 153 Pa. 218; *Kestner v. Pittsburgh & B. Traction Co.* 158 Pa. 422; *Gibbons v. Wilkes-Barre & S. Street R. Co.* 155 Pa. 279; *Citizens Street Railway v. Steen*, 42 Ark. 321; *Omaha Street R. Co. v. Duvall* (Neb.) April 3, 1894.

And a horse-car company is also liable in the same manner. *Cook v. Metropolitan R. Co.* 98 Mass. 361; *Laethem v. Ft. Wayne & B. I. R. Co.* (Mich.) May 18, 1894; *Koch v. St. Paul City R. Co.* 45 Minn. 407; *Brooks v. Lincoln Street R. Co.* 22 Neb. 324; *Weyant v. New York & H. R. Co.* 8 Duer, 360; *Berke v. Twenty-Third Street R. Co.* 22 N. Y. S. R. 492; *Mullen v. Central Park & E. R. R. Co.* 1 Misc. 219; *Lawrence v. Pendleton Street R. Co.* 1 Cin. Super. Ct. Rep. 180.

And a recovery was allowed where plaintiff drove his horse to the curb, and hitched him, while he delivered a parcel, believing there was room for the car, and a collision occurred by negligence of car company. *Albert v. Bleeker Street R. Co.* 2 Daly, 339.

But a teamster placing his team directly across the track of an electric car on a dark night without necessity, cannot recover in absence of evi-

dence of negligence on part of company. *Winter v. Federal Street & P. V. R. Co.* 19 L. R. A. 232, 168 Pa. 20.

So driving across the track and leaving the horse standing with feet in the gutter of the street, but with the wagon near enough to collide with horse-car, will bar a recovery on account of contributory negligence, unless the street-car driver knew that it would collide. *Spaulding v. Jarvis*, 33 Hun, 621.

So where a teamster negligently kept his team near a steam motor track and the horse backed or danced on the track, where the company was not negligent, there could be no recovery. *Coughtry v. Willamette Street R. Co.* 21 Or. 245; *Brooklurst v. Manchester, B. R. & O. Steam Tramways Co.* L. R. 17 Q. B. Div. 118, 55 L. T. N. S. 403, 34 Week. Rep. 568, 51 J. P. 55.

In the latter case 33 & 34 Vict. chap. 73, making the company liable for injury caused by act of the company was held to mean "wrongful act."

And there can be no recovery where both the driver of the vehicle and the driver of the horse-car believed that there was sufficient room for safe passage. *Patton v. Philadelphia Traction Co.* 138 Pa. 78; *McKelvey v. Twenty-Third Street R. Co.* 6 Misc. 424.

*Injuries at street crossings.*

It is generally held that street railroads have no superior right of way over vehicles at street crossings, and the company will be liable for negligence of its employes in failing to have the car under control at such place, thereby causing injury to persons with vehicles; and the question of negligence and contributory negligence is for the jury. This has been held in regard to electric cars. *Watson v. Minneapolis Street R. Co.* 53 Minn. 551; *Hickman v. Union Depot R. Co.* 47 Mo. App. 635.

makes the following charge of negligence: "That said injuries were occasioned by the negligence and lack of care on the part of defendant's agents and servants while operating defendant's said cars, in this: that said defendant saw, or by the exercise of reasonable care and foresight might have seen, plaintiffs' buggy on its right of way, and consequently plaintiffs' imminent danger; but notwithstanding the facts aforesaid, and regardless of its duty to operate its cars with skill and care, defendant, without having rung any alarm bell or in any wise having notified plaintiffs of its approach on said right of way, negligently and carelessly allowed the grip-car to which was attached said train of cars to run into and break plaintiffs' buggy, thereby causing the injury above complained of." The manner and cause of the injury are thus stated: "Plaintiffs were driving in a top buggy, in a westerly direction, along Easton avenue. A train of defendant's cars, propelled as aforesaid, and in charge of its servants and agents, struck and collided with the rear of the vehicle in which plaintiffs were seated, at a point on said Easton avenue just west of Thomas street, and that the shock of the collision was such that plaintiffs' vehicle was broken, and they were precipitated to the ground." The character of the injuries is charged to have been a shock to nervous system, causing her eyesight to become impaired, and affecting her mental condition, and causing her to have frequent and serious hemorrhages, so that, ever since the accident, plaintiff has

suffered great and continual physical pain and mental anguish. The answer was a general denial, and a plea of contributory negligence. The judgment was for plaintiff, and defendant appealed.

The evidence shows that Easton avenue is a public street, running in an easterly and westwardly direction, through the city of St. Louis. On this street defendant operates two tracks of its cable railway. A space of only 11 feet is left on the north side of the street between the track of the railway and the curbing. Thomas street runs into Easton avenue from the northwest, at an angle of about 38 degrees. On the 22d day of April, 1891, plaintiffs, in a single top buggy, drove north up Thomas street into the north side of Easton avenue. About 50 feet from the intersection, a horse, attached to a buggy, was standing on the street, thus occupying and obstructing the greater portion of the 11-foot space between the railroad track and the foot-walk. Plaintiffs, in order to pass this buggy, were required to drive upon the railway track. At the time plaintiffs undertook to pass round this standing buggy, a train of cars was approaching from the north, on Easton avenue, and on the north track of the road. The customary warnings of this approach were given by the employes in charge of the cars, but these Mrs. Hicks testified she did not hear. The cars reduced their speed to about the rate at which plaintiffs were moving, and, when the latter got upon the track, the cars were within a few feet of the buggy, and slowly following it, making sig-

*Buhrens v. Dry Dock, E. R. & B. R. Co.* 53 Hun. 371; *Bernhard v. Rochester R. Co.* 63 Hun. 369.

And the same has been held in regard to cable-car companies. *Pope v. Kansas City Cable R. Co.* 90 Mo. 400.

And the same was held with regard to horse-car companies. *O'Neil v. Dry Dock, E. R. & B. R. Co.* 129 N. Y. 126.

The sudden stopping of a street-car contrary to city ordinance, on a street crossing in front of a funeral procession, causing the carriage pole of one of the carriages to crash into a carriage in front of it, is such negligence as will authorize a recovery for damages. *Mueller v. Milwaukee Street R. Co.* 21 L. R. A. 721, 86 Wis. 240.

But in *Smith v. Citizens R. Co.*, 52 Mo. App. 36, it was held that where a driver of a vehicle whipped his horse forward, when ten feet from cable-car track, and the car was only twenty feet distant coming rapidly, and the gripman used all appliances to stop the car, there could be no recovery.

And in *Carson v. Federal Street & P. V. R. Co.*, 15 L. R. A. 257, 147 Pa. 219, it was held that the failure of a driver of a vehicle to look out for the electric car at a street crossing will bar a recovery for injury received, the court saying that if by looking the driver could have avoided the injury he cannot recover.

And in *Boerth v. West Side R. Co.* (Wis.) March 16, 1894, where a driver attempted to drive around in front of an electric car as he reached a corner at a street, and the car bell was rung in time, he could not recover for injuries received.

In *Wheelahan v. Philadelphia Traction Co.*, 150 Pa. 187, it was held that the failure of a driver of a wagon with a hood cover to lean forward and look up and down the track at a street crossing will bar a recovery for injuries received by collision from

an approaching car. Following *Ehrisman v. East Harrisburg City Pass. R. Co.*, *infra*, which was not a street-crossing case and the question of street crossings was not discussed in the *Wheelahan* case.

#### *Crossing the track at places other than streets.*

There is some conflict of authorities on the question of liability of the street-car companies for negligence of its employes, where a party, injured in attempting to cross in front of the car, is guilty of contributory negligence. And so it has been held that attempting to drive across the track of an electric railroad, at places not at street crossings, without looking along the track for the cars, bars a recovery. *Davidson v. Denver Tramway Co.* (Colo. App.) Feb. 12, 1894; *Ward v. Rochester Electric R. Co.* 43 N. Y. S. R. 84; *Ehrisman v. East Harrisburg City Pass. R. Co.* 17 L. R. A. 445, 150 Pa. 180.

In the latter case the question of street crossings was not discussed.

And the same was held in regard to horse-cars. *Thomas v. Citizens Pass. R. Co.* 132 Pa. 504; *Follett v. Toronto R. Co.* 15 Ont. App. Rep. 244.

And the same was held in regard to cable cars. *Hamilton v. Third Ave. R. Co.* 6 Misc. 382.

And a person driving a team on a narrow temporary driveway alongside of an electric-car track cannot recover for injuries to his team, where he was negligent in going on such driveway, and he attempted to cross back in front of a car in sight coming at high speed, although he believed the driveway too narrow for the car to pass him, where the motorman used every effort to stop the car when he saw the danger. *Christensen v. Union Trunk Line, 6 Wash. 75.*

And a person having time to avoid danger is guilty of gross negligence in attempting to cross a track and delay a car, and cannot recover for in-

nals for plaintiffs to leave the track. After plaintiffs had passed round the buggy, they turned to the right, in order to leave the track. After all except the left hind wheel of the buggy had cleared the track, that wheel was struck and broken, and the hind end of the buggy fell, carrying plaintiff with it. The evidence tended to prove that plaintiff, at the time, was in delicate health, and the shock from the fall and fright caused her to lose consciousness, produced hemorrhages of the womb, and seriously affected her nervous system. The evidence will require a more detailed consideration in the opinion. Defendant demurred to the evidence, which was overruled. The case was submitted to the jury, upon instructions of the court. Verdict and judgment were for the plaintiff Mrs. Hicks, and defendant appealed.

**Mr. Smith P. Galt** for appellant.

**Mr. Seneca N. Taylor**, for respondents: The defendant's gripman was negligent in permitting the grip car to collide with the buggy on the occasion in question.

Persons using vehicles have the undoubted right to drive upon street railway tracks, for the purpose of passing other vehicles, and active diligence is due from street railway companies to exercise reasonable care to prevent their cars from colliding with vehicles of persons exercising this right.

*Henry v. Grand Ave. R. Co.* 113 Mo. 585; *Humbird v. Union Street R. Co.* 110 Mo. 81; *Rosenkranz v. Lindell R. Co.* 108 Mo. 9; *Senn v. Southern R. Co.* Id. 142; *Hile v. Missouri*

*Pac. R. Co.* 101 Mo. 55; *Winters v. Kansas City Cable R. Co.* 99 Mo. 517; *Meyers v. People's R. Co.* 43 Mo. 526; *Liddy v. St. Louis R. Co.* 40 Mo. 519; *Frick v. St. Louis, K. C. & N. R. Co.* 75 Mo. 595; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 24; *Dunkman v. Wabash, St. L. & P. R. Co.* 95 Mo. 233; *Scoville v. Hannibal & St. J. R. Co.* 81 Mo. 484; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *Boland v. Missouri R. Co.* 96 Mo. 491; *O'Flaherty v. Union R. Co.* 45 Mo. 70, 100 Am. Dec. 343; *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 484; *Kelly v. Hannibal & St. J. R. Co.* 75 Mo. 188; *Werner v. Citizens Street R. Co.* 81 Mo. 868; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 543, 53 Am. Rep. 594; *Mauerman v. St. Louis, I. M. & S. R. Co.* 41 Mo. App. 348; *Brooks v. Lincoln Street R. Co.* 22 Neb. 824; *Stringer v. Frost*, 3 L. R. A. 614, 116 Ind. 417; *Chicago West Div. R. Co. v. Ingraham*, 131 Ill. 659.

If it was imputed negligence on the part of Mrs. Hicks in being on defendant's track, in a buggy not driven by herself, still it was the duty of the gripman after seeing the buggy in danger, or by the exercise of ordinary diligence being able to have seen it, to have avoided the collision, if it could have been done, by the exercise of ordinary care.

*Morrissey v. Wiggins Ferry Co.* 43 Mo. 384, 97 Am. Dec. 402; *Meyer v. People's R. Co. supra*; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 466, 11 Am. Rep. 420; *Meyers v. Chicago, R. I. & P. R. Co.* 59 Mo. 231; *Matthews v. St. Louis Grain Elevator Co.* 59 Mo. 478; *Harlan v. St. Louis, K. C. & N. R. Co. supra*; *Dunk-*

jury even if the driver of the street-car was negligent, although he claimed the car driver threatened "to smash" him anyhow. *Wood v. Detroit City Street R. Co.* 52 Mich. 402, 50 Am. Rep. 259.

But other cases hold that the questions of negligence and contributory negligence are for the jury, where a person driving has been injured or his horse or vehicle damaged in attempting to cross the track in front of an electric car. *Piper v. Pueblo City R. Co. (Colo.)* March 12, 1894; *Central Pass. R. Co. v. Chatterton*, 14 Ky. L. Rep. 668; *Heffran v. Brooklyn Heights R. Co.* 8 Misc. 41.

And the same was held where the party was injured by a horse-car. *Cohen v. Dry Dock, E. B. & R. Co.* 69 N. Y. 170, affirming 8 Jones & S. 368; *Witzel v. Third Ave. R. Co.* 8 Misc. 561.

And the questions of negligence and contributory negligence are for the jury where a driver of a wagon approached a deep hole negligently left uncovered without a guard, in a turntable by the cable-car company, and was obliged to turn across the track and was injured. *Ryberg v. Portland Cable R. Co.* 22 Or. 234.

And it is not contributory negligence to attempt to cross a cable-car track on a down grade even if the lock chain on the wagon was broken, and failure to look when the car is more than one hundred feet distant will not bar a recovery. *Cross v. California Street Cable R. Co. (Cal.)* April 27, 1894.

#### *Injury received in turning out.*

If the party with a horse or vehicle was not guilty of negligence, and was injured through the negligence of the company as he was turning from the track of the electric street railway company, the street-car company is liable. *Arnesen v. Brooklyn City R. Co.* 9 Misc. 270; *Will v. West Side R. Co.* 84 Wis. 42.

And the same was held where the injury was

caused by a horse-car. *Swain v. Fourteenth Street R. Co.* 83 Cal. 179; *Meyer v. People's R. Co.* 43 Mo. 522; *Fettritch v. Dickenson*, 22 How. Pr. 248; *Fleckenstein v. Dry Dock, E. B. & R. Co.* 106 N. Y. 655; *Lyman v. Union R. Co.* 114 Mass. 68; *Jatho v. Green & C. Street Pass. R. Co.* 4 Phila. 24.

A minor aged sixteen riding with her father injured may recover for injuries caused by collision of wagon with approaching horse-car whose driver is negligent although her father may be negligent also. *St. Clair Street R. Co. v. Radie*, 43 Ohio St. 91.

Where the court instructed that it was not a teamster's positive duty to keep a lookout behind at all times, but a reasonable attention to this was required, a verdict for plaintiff for damages caused by fast driving of horse-car behind as he was turning out was affirmed. *Adolph v. Central Park, N. & E. R. Co.* 76 N. Y. 580. (Former trial, 65 N. Y. 554.)

The questions of negligence and contributory negligence are proper for the jury where the employees of the street-car company might have avoided injuring the driver or his vehicle, and he tried to turn out of the way of the car or was prevented from avoiding the car by reason of the situation of the vehicle, fully sustaining *Hicks v. Carriens R. Co.*; and this was held where the injury was caused by a cable-car. *Haney v. Pittsburgh, A. & M. Traction Co.* 150 Pa. 395; *Spurrier v. Front Street Cable R. Co.* 3 Wash. 659.

Or by a dummy car. *McKeever v. Market Street R. Co.* 59 Cal. 294.

Or by a horse-car. *Quinn v. Atlantic Ave. R. Co.* 84 N. Y. S. R. 801, affirmed, 184 N. Y. 611; *Glasebrook v. West End Street R. Co.* 160 Mass. 236; *Orange & N. Horse R. Co. v. Ward*, 47 N. J. L. 560; *North Hudson County R. Co. v. Isley*, 49 N. J. L. 488; *Gumb v. Twenty-Third Street R. Co.* 26 Jones & S. 1; *Hegan v. Eighth Ave. R. Co.* 15 N. Y. 862.

*man v. Wabash, St. L. & P. R. Co.* 95 Mo. 244; *Werner v. Citizens Street R. Co. supra*; *Bergman v. St. Louis, I. M. & S. R. Co.* 88 Mo. 683; *White v. Wabash Western R. Co.* 34 Mo. App. 74.

Contributory negligence is an affirmative defense, and the burden of proof rests on the defendant to establish it.

*O'Connor v. Missouri Pac. R. Co.* 94 Mo. 150; *Fetty v. Hannibal & St. J. R. Co.* 88 Mo. 306; *Thompson v. North Missouri R. Co.* 51 Mo. 190, 11 Am. Rep. 448; *Beach, Contrib. Neg.* § 157, p. 490, and cases cited.

It was not negligence *per se* on the part of Mrs. Hick's husband, in driving from forty to fifty feet on defendant's track, in order to pass by a vehicle standing between the rail and curb, though half of that distance defendant's train followed behind him within two or three feet.

*Swain v. Fourteenth Street R. Co.* 98 Cal. 179; *Lynam v. Union R. Co.* 114 Mass. 83; *Cook v. Metropolitan R. Co.* 98 Mass. 361; *Fleckenstein v. Dry Dock, E. B. & B. R. Co.* 105 N. Y. 655; *North Hudson County R. Co. v. Isley*, 49 N. J. L. 468; *Adolph v. Central Park, N. & E. R. Co.* 76 N. Y. 530; *Rascher v. East Detroit & G. P. R. Co.* 90 Mich. 418.

Where a wife is riding with her husband in a private vehicle, and is injured by reason of his careless driving, his negligence will not prevent a recovery, by her, against a third person whose concurring negligence was the proximate cause of the injury.

*Louisville, N. A. & C. R. Co. v. Creek*, 14 L. R. A. 733, 130 Ind. 139; *Shaw v. Craft*, 37 Fed. Rep. 317; *Knightsdown v. Musgrove*, 116

Ind. 121; *Hoag v. New York Cent. & H. R. Co.* 111 N. Y. 199; *Miller v. Louisville, N. A. & C. R. Co.* 128 Ind. 97; *Platz v. Cohoes*, 24 Hun, 101; *Platz v. Cohoes*, 89 N. Y. 219, 42 Am. Rep. 280; *Sheffield v. Central U. Teleph. Co.* 36 Fed. Rep. 164; *Street v. Holyoke*, 105 Mass. 82, 7 Am. Rep. 500; *Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35; *Winters v. Kansas City Cable R. Co.* 99 Mo. 510; *Dickson v. Missouri Pac. R. Co.* 104 Mo. 492; *Becke v. Missouri Pac. R. Co.* 9 L. R. A. 157, 102 Mo. 544.

When from the whole case it appears that justice has been done, though errors were committed which did not materially affect the merits, the court will not disturb the verdict.

*Walter v. Cathcart*, 18 Mo. 256; *Smith v. Culigan*, 74 Mo. 388; *Drain v. St. Louis, I. M. & S. R. Co.* 88 Mo. 582; *Nicholson v. Golden*, 27 Mo. App. 159; *Mauerman v. St. Louis, I. M. & S. R. Co.* 41 Mo. App. 358; *Fitzgerald v. Barker*, 96 Mo. 681; *McGowan v. St. Louis Ore. & Steel Co.* 109 Mo. 518; *Henry v. Grand Ave. R. Co.* 113 Mo. 538; *Davis v. Kansas City Belt R. Co.* 46 Mo. App. 180; *Fortune v. Fife*, 105 Mo. 433; *Walsh v. St. Louis Exposition & Music Hall Asso.* 101 Mo. 534; Mo. Rev. Stat. 1889, §§ 2302, 2303.

**Macfarlane, J.**, delivered the opinion of the court:

1. It is first argued that the judgment cannot stand, for the reason that there was no evidence of negligence on the part of defendant's employes. The evidence shows that the cars follow very slowly after the buggy, and within a few feet of it, giving constant signals of its approach. That the cars were

Or by an electric car. *Rascher v. East Detroit & G. P. R. Co.* 90 Mich. 418.

The questions of negligence or contributory negligence are for jury where the evidence is conflicting as to whether the injury to plaintiff was caused by collision with the car or by a quick and sharp turn off the track. The cars have not the exclusive right of way only superior, and the company is liable if the driver is without fault and is injured by the negligence of the company. *Cambels v. Third Ave. R. Co.* 1 Misc. 158.

Some cases hold that there can be no recovery if the driver of the horse-car exercised reasonable care to avoid injury. *Moroney v. Brooklyn City R. Co.* 30 N. Y. S. R. 911.

And a cartman going the same way and turning out from a horse-car in passing, and injured by reason of his load being projected against the car as he turns cannot recover for injuries received as his negligence caused the injury. *Suydam v. Grand Street & N. R. Co.* 41 Barb. 375.

A driver of a wagon, on an electric-car track, struck by a car from the rear, cannot recover where he could have avoided injury and neglected to look back until he heard the bell, and the car was then about 50 yards away, although the motor-man made no effort to stop the car until within five or six yards from the wagon. *Winter v. Crostown Street R. Co.* of Buffalo, 8 Misc. 382.

And a driver of a vehicle should look behind to see if a horse-car is coming, and if through negligence or willfulness on his part, a collision occurs, he cannot recover even if the car driver is also in fault. The driver of a vehicle is bound to keep a better lookout on the track than if he was on another part of the street. *Wilbrand v. Eighth Ave. R. Co.* 3 Bow. 314.

The driver of a vehicle has no right to drive upon 25 L. R. A.

a street railroad track so as to obstruct the horse-cars, and is bound to exercise more diligence than when on a common pavement if a car is approaching in the opposite direction; and it is his duty to turn out, and if a collision occurs through his negligence, he cannot recover unless the company willfully caused the injury, or was guilty of greater negligence than plaintiff. *Chicago West Div. R. Co. v. Bert*, 69 Ill. 388.

An instruction that vehicles must yield the right of way to the street-car was properly modified by instructing that the company is entitled to the track on meeting vehicles, as against one driven thereon with a view to delay the cars, where such company introduced the ordinance to that effect in evidence, and the plaintiff was injured by collision in trying to turn out of the way of the horse-car following. *Chicago West Div. R. Co. v. Ingraham*, 131 Ill. 659.

A driver of a cart having room and time to turn out and seeing a freight car drawn by horses coming towards him cannot recover for injuries, even if the driver of the car does not stop when the cart driver calls to him to do so, as the cartman should yield the right of way. *Barker v. Hudson River R. Co.* 4 Daly, 274.

And a horse-car company has the superior right of way over vehicles on the track, and it is error to instruct the jury that no contributory negligence would bar a recovery, where a driver of a wagon was between his wagon and car and was injured either by his wagon or by the car, in passing. *Pendleton Street R. Co. v. Stallmann*, 22 Ohio St. L.

There can be no recovery where the driver of a wagon pulled his horse out from the sidewalk towards an electric car causing a collision, and there was no evidence that the street-car driver saw or could have seen the danger of collision in

under perfect control is attested by the undisputed fact that they were stopped immediately on striking the wheel of the buggy. So far there can be no complaint as to the conduct of the employés. The gripman in charge of the cars also saw plaintiffs driving along the track in front of the train, and knew that the cars were entitled to the right of way on the track. The signals given were not only intended to notify plaintiffs of the approach of the cars, but to admonish them to get out of the way. They should have expected that, in obedience to the signals the buggy would be driven from the track, and should have been prepared for any necessary checking of speed, or slipping of the wheel of the buggy on the rails, in making the turn. Counsel for defendant states the cause of the injury thus: "Hicks drove the buggy with the front wheels onto the track; just ahead of the car, and continued to drive it that way, ahead, close in front of the car, bell ringing all the time, and did not accelerate his speed, and, without any notice to the gripman that he was going to do so, attempted to turn to the one side, which always involves a moment's lessening of speed, and thereby caused the buggy to be struck by the car." We do not think that those in charge of the car were entitled to notice that plaintiffs were about leaving the track, after they had been notified to leave it. On the contrary, they should have been prepared for such a movement by plaintiffs, and for the moment's lessening of speed necessarily involved therein. There was no evidence that the momentary checking of the buggy was unusual or unexpected. We think the question, then, as to whether the cars were run closer to the buggy than reasonable prudence and care dictated, and whether defendant's employés should, in the exercise of proper care, have checked or stopped the cars, in order to give plaintiffs time to get out of the way, were properly for the determination of the jury. The evidence certainly tended to prove that the cars were following within two or three feet of the buggy, and moving at about the same rate of speed; so a very slight check in the speed of

the buggy would necessarily have resulted in a collision.

2. It is insisted in the next place that, though defendant may have been negligent, plaintiffs were also guilty of negligence, which directly and proximately contributed to the injury, and therefore the judgment should not be sustained. It is said that plaintiffs were negligent in driving on the track in front of the train, and in thereafter driving upon and laterally along the track without heeding the warnings of the defendant. Generally, a distinction is made between the duties required of one going upon or crossing a street-car track and the track of a steam railroad. The weight and momentum of trains propelled by steam renders their control and management much more difficult than light cars, moved by cable or electricity. The measure of prudence which will constitute ordinary care is less with respect to those going upon them than is required of persons crossing tracks of steam railroads. *Beach, Contrib. Neg.* § 290. Persons in wagons and other vehicles have the undoubted right to pass over or upon street-car tracks without hindrance; yet the right of a traveler to drive a vehicle upon or along a street-railroad track does not absolve him from the duty of looking for approaching cars. The cars can only move upon the tracks, and are used for the convenience of the public, and are consequently entitled to the right of way as to all others. It is therefore the duty of a traveler to give way to approaching cars, so as to cause no unnecessary hindrance. *Adolph v. Central Park, N. & E. R. R. Co.* 76 N. Y. 582; *North Hudson County R. Co. v. Isley*, 49 N. J. L. 468; *Wood v. Detroit City Street R. Co.* 52 Mich. 402, 50 Am. Rep. 259.

But we are not able to say that the evidence shows conclusively that plaintiffs violated any of these rules, unless it was in driving upon the track without observing the cars, which must have been very near them. But that negligence was clearly not the proximate cause of the injury, for plaintiffs not only got safely upon the track without injury, but they were seen by the servants of defendant, and, by their timely action, a collision was

time to avert it. *North Side Street R. Co. v. Want* (Tex.) Nov. 12, 1890.

There are no cases holding that a street-car company has the exclusive right of way on its tracks, where the question arose by reason of injury to vehicles or occupants.

#### "Look out."

It is the duty of a driver of a vehicle to "look out" for cars at all places other than street crossings. *Quinn v. Atlantic Ave. R. Co.* 84 N. Y. S. R. 601, affirmed 134 N. Y. 611; *Adolph v. Central Park, N. & E. R. Co.* 76 N. Y. 530. See also *Davidson v. Denver Tramway Co.* (Colo. App.) Feb. 12, 1894, and the cases following: *Winter v. Crosstown Street R. Co.* 8 Misc. 362; *Wilbrand v. Eighth Ave. R. Co.* 3 Bosw. 514. But see *Cross v. California Street Cable R. Co.* (Cal.) April 27, 1894.

For "looking out" see subheads "*Injuries at street crossings.*" "*Crossing at places other than street crossings.*"

#### Right of way.

Street-car companies have not exclusive right to

use of tracks, their right of way on their tracks is only paramount. *Arnesen v. Brooklyn City R. Co.* 9 Misc. 270; *Fleckenstein v. Dry Dock, E. B. & B. R. Co.* 105 N. Y. 655; *Hefran v. Brooklyn Heights R. Co.* 8 Misc. 41; *Omaha Street R. Co. v. Duval* (Neb.) April 3, 1894; *Cambels v. Third Ave. R. Co.* 1 Misc. 156; *Chicago West Div. R. Co. v. Ingraham*, and *Pendleton St. R. Co. v. Stallman*, *supra*.

Turning to the left in meeting street-cars is not negligence. *Hegan v. Eighth Ave. R. Co.* 15 N. Y. 350; *Spurrer v. Front Street Cable R. Co.* 3 Wash. 650.

The street-cars have the paramount right of way on the track at places other than street crossings, and the car employés have the right to assume that a driver of a vehicle will turn out for the cars if the situation and condition of the track permits such turning, and while the courts do not sustain the car companies if the employés willfully injure vehicles on the track, yet they are inclined to favor the companies if the driver of the vehicle is reckless, or obstinately attempts to block the way of the street-car.

L. E.

then avoided. After that, the conduct of plaintiffs could not be declared negligent, as a matter of law. Whether they could have left the track more expeditiously than they did, and whether doing so would have avoided the injury, were questions for the jury. It seems to me there was very little evidence tending to show contributory negligence in the case, but we cannot say there was none. Defendant's gripman saw plaintiffs in their dangerous and exposed situation, and the chief question is whether, after that, he acted with due care towards them. *Hendon v. Missouri Pac. R. Co.* 104 Mo. 389, and cases cited.

3. Objections were made to a number of hypothetical questions asked physicians by plaintiff's counsel, with a view to getting before the jury their opinion as to whether the condition and sufferings of Mrs. Hicks were produced by the accident. These questions were long, and need not be given in full to understand the questions involved. The objections urged to these questions were that they assumed facts not warranted by the testimony. The question asked Dr. Keir assumed that the evidence tended to prove that Mrs. Hicks had "chilly sensations all over her body following immediately after this accident;" "that she still has serious floodings and severe pains on all occasions, and still has cold sensations all over her body." In the questions asked Dr. Fry, the following facts were assumed: That Mrs. Hicks was subjected to a "serious shock;" that the buggy fell "violently to the pavement or to the ground, and that the lady was thereby jarred, shocked, and frightened to such a degree that she lost self-consciousness;" that "immediately after the accident, and for several weeks, she suffered nervous prostration to such a degree that she was often unconscious;" that she "still has frequent flooding spells." The same objections were urged to questions asked Dr. Bond. The rule in regard to the hypothetical questions that may be asked an expert witness is thus clearly given in a recent case by this court: "Counsel, in propounding a hypothetical question to an expert witness, may assume any state of facts the evidence tends to establish, and may vary the questions so as to cover and present the different theories of fact. But there must be evidence in the case tending to establish all the facts stated in the question. If the question assume any fact which the evidence does not tend to prove, it should be excluded." *Russ v. Wabash Western R. Co.* 112 Mo. 48, 18 L. R. A. 23. It is manifest that a very slight change of fact may lead to a very radical difference in the conclusion drawn from it. This is particularly true when the opinion of physicians is used to prove the effect produced upon the health of a person by a certain cause, or the cause of certain physical and mental conditions. If, then, the hypothetical questions to which objections are made assumed any fact which the evidence did not tend to prove, they were improper, and should have been excluded. But we have gone over the evidence very carefully, and are of opinion that it fairly tends to prove every fact assumed by the questions.

The evidence proves that the hind wheel was broken, which caused the buggy to fall to the ground, carrying plaintiff with it. She was a large, fleshy woman, and from these facts it might well be inferred that the fall of the buggy was "violent," and that plaintiff was thereby jarred, shocked, and frightened. The evidence of plaintiffs was that she lost consciousness when the buggy fell, and before she was removed from the place of the accident she suffered severe pains through her back, stomach, bowels, and womb, accompanied with severe hemorrhages; and "creeping sensations" from head to foot, and from that day to the day of trial she had hemorrhages, and these "nervous sensations, drawings, and twitchings." The evidence of Mrs. Myrick was that all of the symptoms described by plaintiff as the immediate result of the fall existed next morning, and also cold, chilly sensations. All other symptoms continuing, we may fairly infer from all the evidence, that the chilly sensations followed immediately after the accident. From all the facts proven, we may also infer that plaintiff received a "serious shock."

4. The first instruction defined the duty of defendant's gripman, in case he saw, or by the exercise of reasonable care might have seen, the buggy on the track in front of the cars, to be that of reasonable care to avoid a collision. There is nothing in this requirement of which defendant can reasonably complain. The second instruction given on behalf of plaintiffs is as follows: "The court further instructs the jury that if they believe from the evidence that the gripman operating defendant's grip-car on the occasion of said collision saw, or by the exercise of reasonable care might have seen, said buggy after it got upon defendant's track, in danger of being struck by the car, in time to have stopped the train, by the exercise of reasonable care and diligence, before it struck the buggy, and so have avoided the collision, then the defense of contributory negligence cannot avail, even if the jury believe that Josephine Hicks, plaintiff, negligently drove the buggy, or allowed said buggy to be driven, upon defendant's track on the occasion in question." We think the duty this instruction required of street railways too broadly stated, under the circumstances of this case. The jury might well have inferred from the instruction that it became the duty of the gripman of the car to stop the train immediately upon seeing the buggy on the track in front of it, and that, if he could have done so, and failed, he was guilty of negligence. The same rule of care is thus imposed upon those managing a train of cable cars in the streets as is required of one running a steam locomotive. The evidence is undisputed that the cars, under perfect control, moving at a rate of speed not exceeding a slow walk, followed the buggy on the track from 30 to 50 feet, and could have been stopped at any moment. As was said in the second paragraph of this opinion, a traveler in a vehicle has the right to use the track of a street railway and travel laterally upon it, provided the running of trains were not thereby unnecessarily hindered, and that it was not negligence in itself for the train

to so follow after the buggy. To require a street-car to stop for a clear track when no danger of a collision is threatened would virtually stop the running of all such trains, or so interfere with them as to greatly impair their usefulness. Beach says: "The danger of accident from a collision with street-cars is very trifling, as compared with that from collision with trains of cars running at a high rate of speed upon a railroad. Street-cars never run very fast, and are easily and almost instantly stopped. What, therefore, might be gross negligence as respects a steam railroad, might be perfectly prudent and perfectly proper to be done in dealing with street-cars. We must not therefore attempt to apply to street railways the rules of law applicable to steam railroads. The cases are essentially different, and, the reason for the rule ceasing, the rule itself must also cease." Beach, Contrib. Neg. § 290; *Lynam v. Union R. Co.* 114 Mass. 83. It is true the instruction predicated the duty of stopping upon the fact that the buggy was in danger of being struck, but it assumed that the danger arose when the buggy got upon the track. There was no danger of a collision in moving the train slowly and cautiously, and not negligently near to the buggy. Both were going in the same direction, and at about the same rate of speed, and danger only arose when plaintiff attempted to leave the track. But the instruction goes further, and plainly informs the jury that if the gripman saw the buggy, after it got upon the track, in time to have stopped the car and avoided the injury, the

defense of contributory negligence cannot avail defendant. It was as well the duty of the plaintiffs to leave the track as it was of defendant to prevent the cars from striking the buggy. Reasonable care and caution should have been observed by each in doing what duty required of them. Plaintiffs were not relieved of this duty by reason of a failure of defendant to do that required of it. There was no question here as to the negligence of plaintiffs in going upon the track. When the buggy got upon the track, the situation was changed altogether. It was for the jury to determine the question of negligence and contributory negligence, in view of what was done by the parties in the situation in which they were placed. The question of contributory negligence should not have been withdrawn from the jury in the circumstances.

5. Counsel discuss the question as to whether the negligence of the husband can be imputed to the wife. We do not think the question appears upon this record in this case. The charge in the petition is that plaintiffs were driving the buggy. The instruction assumed the same fact. There was no attempt by the parties to separate the act of one from the other, and to consider the question of imputed negligence would be a very needless work. Whether Mrs. Hicks would be held responsible for the negligence of her husband or not, she would certainly be held responsible for her own. *Hoag v. New York Cent. & H. R. Co.* 111 N. Y. 199.

*Reversed and remanded.*

All concur.

MISSOURI SUPREME COURT (In Banc).

Augustus O. GIRARD, *Resp't.*,

v.

ST. LOUIS CAR-WHEEL CO., *App't.*

(.....Mo.....)

\*1. In an action for damages for personal injuries, defendant, by answer, set up an alleged agreement in the nature of a release or discharge of the cause of action. To that plea plaintiff replied that the agreement had been obtained by fraud, while he was unable, because of pain and suffering caused by the injuries, to comprehend his act in signing it, and that he never assented to the agreement. Held, that the reply to the plea of a release was sufficient in an action at law, without resorting to equity to cancel that document.

2. Where a reply of fraud is made to a plea of release, and no point is interposed in the trial court of any deficiency in the reply on account of any omission to tender back the benefits received under the agreement for a release, and the record shows that those benefits were accounted for in the judgment, there is no prejudicial error in the omission to allege or prove an offer to return those benefits, even if

such offer were otherwise necessary to avoid the release.

(*Burgess and Sherwood, JJ., and Gantt, P. J., dissent from proposition 1.*)

(June 12, 1904.)

CERTIFICATION from the St. Louis Court of Appeals for the opinion of the Supreme Court of an appeal by the defendant from a judgment of the St. Louis Circuit Court in favor of plaintiff in an action brought to recover damages for personal injuries for which it was alleged defendant was responsible. *Affirmed.*

The facts sufficiently appear in the opinions. *Messrs. Lee & Ellis and W. E. Fiske* for appellant.

*Mr. A. R. Taylor* for respondent.

*Barclay, J.*, delivered the following opinion:

The petition states a case for damages on account of personal injuries suffered by plaintiff while in the employ of the defendant company. It charges as the cause negligence in respect of the operation of certain hoisting machinery, under the direction of defendant's superintendent, in its shops in St. Louis; and alleges that, in consequence of that negligence (the particulars of which are not important at this stage of the proceedings), a

\*Headnotes by *BARCLAY, J.*

NOTE.—For a collection of authorities upon the subject of relieving from a contract obtained by fraud, see note to *Meldrum v. Meldrum* (Colo.) 11 L. R. A. 69.

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heavy timber fell upon plaintiff, disabling him from labor, etc. The answer denies the charge of negligence, and sets up, as a bar to plaintiff's action, a written instrument, signed by plaintiff and by one of defendant's officers, in which, after reciting the fact of plaintiff's injury, the following stipulations appear: "The said Car-Wheel Co., on their part, proposes to furnish and pay for all the medical attendance necessary for his recovery from said injuries sustained by said accident, and to keep his name on its pay roll at the uniform wages per day for all working days which he has been up to this time credited, and in any other way in their power assist in his recovery until he is physically sufficiently recovered from said accident, evidenced by physician's certificate, to resume work. And on his part, beyond the above obligation of the St. Louis Car-Wheel Co., he relinquishes all other claims whatsoever as to them; and that he agrees to this deliberately, and of his own free will, and without any undue influence from any one. The said parties, in evidence of which, and in good faith, sign this, the date first herein written." Defendant alleged compliance on its part with the above agreement, so far as plaintiff had permitted such compliance, and prayed judgment. Plaintiff, by a reply, charged that the said agreement had been obtained from him by gross fraud and misrepresentations of defendant and its agents; that at the time it was made he was in the deepest distress and mental and bodily pain, and was unable, through his bodily and mental condition, to understand or comprehend the contents of said agreement, and did never assent to the terms thereof. These allegations of fraud and incapacity are repeated in several forms with considerable particularity of detail, but the above outline will be sufficient for present purposes. The cause came to trial before Judge Dillon and a jury. It is not necessary to go into the evidence as to the plaintiff's original right of recovery, since no point is made in this court on that branch of the case. The only questions of any difficulty now submitted concern the rules of law to be applied in view of the so-called "release" or "settlement."

The plaintiff's testimony tended to prove that his injury occurred September 13, 1889, and the agreement (which we will for convenience call a release) was signed the next day, about noon. The timber which struck plaintiff was about 18 feet long and 6 by 9 inches thick. It hit him in the back. He was knocked to the ground, senseless. His arm was broken. Blood oozed from his forehead, and his face was scratched. He could not stand. He had to be carried away from the shop. He was put into an ambulance, and taken to the city hospital. The next day he was removed to his boarding house. He testified that he had no recollection of signing the release. That at that time he was unable to read or comprehend anything. If he attempted to read, he could merely "see a gleam" in front of him. "That for four or five weeks he was not in his proper mind, or able to understand things. That during the first week he did not easily recog-

nize people who called on him." He suffered intense pain, which did not begin to abate for two months. His face and jaws were badly swollen; his eyes discolored, and almost closed. He had a lump on the back of his head for some time after the mishap. Six or eight days later he found a copy of the release on the floor of his room. He gave it to his attorney soon afterwards, and then brought this action in October, 1891. Several of his fellow workmen who called to see him on the day the release was signed and on the following day gave various descriptions of his condition. For instance: "He was excited and bewildered;" "his mind was not clear;" he was more jovial than was usual with him;" "he did not seem rational;" "he didn't seem to me to act or talk at the time as I saw him do before." The defendant's testimony contradicted that above quoted, and tended to prove that plaintiff understood the release, assented to its terms, executed it freely, and that no fraud was practiced upon him. Under its terms, defendant employed a physician to treat plaintiff, at a cost of \$50, up to the time plaintiff discharged him, shortly before bringing this suit. The defendant further paid \$10 to another physician who had been called to plaintiff's aid at the shop in the emergency when he was first injured. Defendant also kept plaintiff's name on the pay roll, and was ready and willing to pay him wages according to the terms of the release; but he would not or did not accept such payment. The trial court submitted the issue of release upon instructions, under which the jury found that plaintiff signed that paper at the instance of defendant's agents, without knowing its contents, and never did assent to its terms. They also found that the release was signed when plaintiff was in such a mental condition that he could not comprehend its contents, and that defendant's agents took advantage of that condition to induce him to sign the paper without understanding it, intending thereby to defraud plaintiff of his cause of action set forth in the petition herein. On that issue the court gave the following instructions at the instance of defendant, viz.: "(4) The jury are instructed, even though you should believe from the evidence the release pleaded by defendant to have been unfair to the defendant, and not a sufficient recompense for plaintiff's injuries, still this will not relieve plaintiff from its force and effect as a bar to his recovery in this action. The only way in which plaintiff can effect the conclusiveness of this bar is to satisfy you by a preponderance of evidence that plaintiff, when he signed the release, had not sufficient mental power to know the nature of the instrument he was signing." "(7) The court instructs the jury that the paper read in evidence, signed by the plaintiff, and termed a 'release,' is on its face a release and discharge of the cause of action sued on in this case. It is a presumption of law that the plaintiff understood and agreed to the terms and contents of said paper when he signed it, and the burden is on the plaintiff to show by a preponderance of evidence that he was not acquainted with the contents of the paper,

and that he did not voluntarily agree to release his claim for damages growing out of his injury upon the terms stated in said petition, or that defendant fraudulently procured the execution thereof by him; and, unless the plaintiff has affirmatively so proven these facts to the satisfaction of the jury by a preponderance of proof, they should find for the defendant." "(12) The court instructs the jury that in determining the question whether the paper offered in evidence, and termed a 'release,' was freely and voluntarily signed by the plaintiff, they are not at liberty to consider whether the terms of said release were reasonable, nor whether the undertakings of the defendant therein constituted a full and adequate compensation for his injury." The bill of exceptions also shows that, "the cause being submitted to the jury, they found a verdict in favor of plaintiff, such verdict being an award of damages in favor of plaintiff in the sum of \$1,662, less the sum of \$62, paid by the defendant under the terms of the release given in evidence; leaving the amount of damages \$1,500." The jury also found for the plaintiff on the issues of negligence, under appropriate instructions, which need not be examined, as this appeal does not call in question any rulings on that part of the case. After the usual motions and exceptions, defendant appealed to the St. Louis court of appeals, but, as the judges of that court were divided in opinion (*Girard v. St. Louis Car-Wheel Co.* 46 Mo. App. 81), the case was transferred to the supreme court, under the provisions of the constitution. Amend. Const. 1884, § 6.

1. Defendant's first proposition is that this action for damages is not maintainable, because the release has not been set aside by a decree in equity; in other words, it is claimed that the paper in question is a complete defense at law to the cause of action to which it relates, no matter how the paper may have been obtained. This position has been defended with much ability, but no resources of counsel are sufficient to conceal its inherent weakness. The testimony for plaintiff tends strongly to prove that he was incapable of understanding the release when he signed it, and that he did not comprehend, or intend to assent to, its terms. The jury so found in response to instructions. Those facts, when established, destroyed the substance of the agreement which the release in form expressed. They took from the apparent contract what was essential to its legal force and validity, namely, the element of assent by the plaintiff. That element is a necessary part of every contract. Without it, a mere writing, expressing some formula of words, imposes no obligation. The signature of plaintiff, obtained to such a paper without the assent of his mind to the act, deprived him of no legal right. He might, indeed, affirm such a signature, or make it his lawful act by his subsequent conduct, the effect of which would be to give to the agreement that assent which was necessary to originate an obligation on his part; but, in the absence of such acts as amounted to an approval of it, he might proceed to enforce his rights, irrespective of such a paper.

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*Brewster v. Brewster* (1875) 88 N. J. L. 119. In circumstances such as are here exhibited, a writing in the form of a release, which never acquired original validity as a contract for want of competent assent to its terms, may be disregarded by a court of law in the administration of justice, without the intervention of a court of equity. The paper in question is, in contemplation of law, nothing more than the form of a contract; and, on finding that the substance which should give life to an obligation is wanting, the court may cast aside the form, and proceed to judgment, notwithstanding the fraud which may have brought the verisimilitude of an obligation into existence. *Hartshorn v. Day* (1856) 60 U. S. 19 How. 211, 15 L. ed. 605; *Vanderelden v. Chicago & N. W. R. Co.* (1894) 61 Fed. Rep. 54, opinion by Judge Shiras. A court of law, upon ascertaining such a fraud, may properly pass over it to the conclusion which it considers to be just; thus, in effect, discarding the fraud as an obstacle to the exercise of its jurisdiction. It is not thought necessary, at this day, to further argue the correctness of this proposition. It has been repeatedly asserted in earlier decisions in this state, both before and since the adoption of the reformed code of procedure in 1849. *Burrows v. Alter* (1842) 7 Mo. 424; *Wright v. McPike* (1879) 70 Mo. 175. They conform to a multitude of precedents elsewhere, many of which are cited in the briefs of counsel, to which may be added: *Thompson v. Faussat* (1815) Pet. C. C. 182, Fed. Cas. No. 18,954; *Bliss v. New York Cent. & H. R. R. Co.* (1894) 160 Mass. 447. The case of *Blair v. Chicago & A. R. Co.* (1896) 89 Mo. 888, which is cited as having some tendency to the contrary, goes no further in that direction than to approve the practice of proceeding to first cancel the release for fraud, upon allegations stating a cause of action in equity, before trying the other cause of action at law on the merits of the plaintiff's original claim. While that course may be adopted, it is not essential where the alleged fraud goes to the integrity of the release as a legal agreement, which is the case in the present action. The Blair decision does not declare it necessary to go into equity to get rid of a paper executed in such circumstances as here appear.

2. It is next contended that the release must stand, because plaintiff did not, before action brought, offer to refund the amount paid by defendant for medical services to plaintiff under the terms of that paper. The verdict gave defendant the benefit of that credit upon the plaintiff's claim by reducing his damages to that extent (\$62); but it is urged that that mode of refunding the fruits of the agreement for a release does not satisfy the requirements of law. The substance of defendant's contention is that a tender of the benefits received under the release was essential to plaintiff's case, and that without it the action cannot be maintained. Assuming, as this court is now bound to do in view of the evidence and the findings of the jury, that the release was not the valid act or contract of the plaintiff, then it was, at best, voidable at his option; that is to say,

he was at liberty to ignore it in the assertion of his legal rights. His act in bringing the present suit was a plain and unmistakable repudiation of it, and a distinct notice that he discarded and denied the obligation which it apparently imposed. *Ward v. Day* (1863) 33 L. J. Q. B. 3; *Clough v. London & N. W. R. Co.* (1871) L. R. 7 Exch. 26; *Dawes v. Harness* (1875) L. R. 10 C. P. 166. He had done nothing to ratify it or adopt it as his act. Was he required, in such a case, to seek the defendant's officers, and tender back the value of the medical services rendered to him before beginning his action? He has, before judgment, accounted for everything of value received by him by virtue of the supposed release, and the defendant has had credit therefor, as the verdict of the jury on its face shows. But the attitude of the defendant throughout, as well as before, the litigation, its plea of release, its setting aside in an envelope the wages of plaintiff each week, all indicate that any tender by plaintiff of repayment for the medical services would have been useless. Since the execution of that paper, defendant has asserted and relied upon its validity, and still asserts it. It has been decisively held in other cases that no preliminary tender can be insisted upon as a bar to legal action where the facts show that the tender would have been rejected. *Deichmann v. Deichmann* (1871) 49 Mo. 107; *Westlake v. St. Louis* (1882) 77 Mo. 47. In such a state of the facts a tender would be, as Mr. Bigelow remarks, "an idle ceremony." Bigelow, Fr. (1888) p. 424. No distinction should be made, and, in my opinion, none exists in principle, between actions for personal injuries and other actions at law in respect of the right now under consideration, or in respect of the testimony required to sustain a judgment. A preponderance of evidence is necessary to support an allegation of fraud in a court of law, and it is for the trial judge in the first instance to determine whether or not the testimony offered upon that allegation is reasonably sufficient to justify an inference of the fraud charged. It has been often held in other jurisdictions that a tender of money received by virtue of a release of similar tenor to that in question here need not be made before bringing suit, where the release was obtained by fraud, but that it is sufficient to offer its return, and to account for it by the judgment. *Duval v. Mourey* (1860) 6 R. I. 479; *Smith v. Salomon* (1877) 7 Daly, 216; *Butler v. Richmond & D. R. Co.* (1891) 88 Ga. 594; *Kley v. Healy* (1891) 127 N. Y. 555; *Sheanon v. Pacific Mut. L. Ins. Co.* (1892) 83 Wis. 507; *Kirchner v. New Home Sewing Mach. Co.* (1892) 185 N. Y. 182; *Knoznike, O. G. & L. R. Co. v. Acuff* (1892) 92 Tenn. 26. That certainly is the rule in equity in reference to rescission (*Martin v. Martin* [1860] 35 Ala. 560; *Metropolitan Elev. R. Co. v. Manhattan R. Co.* [1884] 14 Abb. N. C. 224; *Lusted v. Chicago & N. W. R. Co.* [1888] 71 Wis. 391); and in equity, as a general rule, a better showing is required of a plaintiff, conditional to granting relief, than is exacted by the practice in courts of law. It has been also ruled

that, where a release is found to have been obtained by fraud practiced upon one incapable, because of mental weakness, to validly enter into such a contract, no necessity exists for refunding the fruits of the release before action brought. *O'Brien v. Chicago, M. & St. P. R. Co.* (Iowa, 1894) 57 N. W. Rep. 425; *Johnson v. Merry Mount Granite Co.* (1892) 53 Fed. Rep. 569. Whether these rulings correctly declare the law applicable to release of the kind now in question we think it unnecessary to decide, in view of the condition of the record now before the court.

8. If it be conceded for the sake of argument that a tender was necessary to sustain plaintiff's right to recover upon his original cause of action, let us see whether the judgment actually reached in the trial court can be supported upon the pleadings, evidence, and findings of the jury, irrespective of the question of a tender. No objection to the sufficiency of the plaintiff's case for the want of such tender was at any time interposed in the trial court, unless it may be implied in the request for an instruction that, under the pleadings and evidence, plaintiff was not entitled to recover. But at that stage of the case the testimony tending to prove fraud in obtaining from the plaintiff the execution of the release had been admitted under the allegations of the reply. Upon the facts before the court at that time plaintiff would have been entitled to recover at law, upon the footing of the fraud, a measure of damages at least as great as that which the judgment shows was actually meted out to him upon the same facts which the jury found as the basis of their verdict. Plaintiff, at the outset of the proceeding, in his petition might have set up his original cause of action, and the fraud by which he was induced to execute the release for it, and, on showing these facts, have lawfully claimed a recovery of the difference between what he received by reason of the release and the damages justly due him upon his former cause of action. That theory would have involved acquiescence in the release, which he might have conceded without waiving his right to recover for the fraud in obtaining it. His right of action for fraud on such a showing could be maintained without any offer to return the fruits of the release. These positions are sustained by abundant precedents. 1 Whart. Cont. § 262; *Wabash Valley Protective Union of Crawfordsville v. James* (Ind. 1893) 35 N. E. Rep. 919. The only difference between a recovery on that basis and the judgment reached on the trial now under review is one of form. The essential facts to sustain both appear in the plaintiff's pleadings, and were found by the jury. Part of those facts are first stated in the reply, but the only objection made at any time to the reply in the circuit court was on the ground that it admitted the existence of a release uncancelled when the action was brought. That objection we have held to be untenable for the reasons given in the first paragraph of this opinion. No objection was made to any of the plaintiff's pleadings on the ground that a tender of the fruits of the release was essential to plaintiff's right of recovery, nor

was that proposition advanced in the trial court by defendant in any request for instructions. By positive law in this state the trial courts are expressly authorized, where defendant has appeared and answered, as in this record, to "grant any relief consistent with the case made by the plaintiff and embraced within the issues." Rev. Stat. 1889, § 2216. By the Code of Procedure this court is directed in every stage of the action "to disregard any error of defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party" (Rev. Stat. 1889, § 2100); and, further, not to "reverse the judgment of any court, unless it shall believe that error was committed by such court against appellant or plaintiff in error, and materially affecting the merits of the action." Id. § 2308. In addition to these very plain and practical rules of decision, the statute declares, furthermore, that it is the duty of the courts to so construe the provisions of the code of pleading and practice as "to distinguish between form and substance." Id. § 2117. In this state of the record and of the law, would it not be the sheerest technicality, a complete surrender of substance to barren form, to hold that the judgment should be reversed for want of a tender, when the facts alleged, proved, and found show a solid foundation for the result reached, irrespective of the question of a tender? Viewing the case at bar broadly on its merits, the judgment of the trial court seems abundantly supported by the facts and by the law applicable thereto. The court would depart from the precepts contained in the statutes referred to should it reverse the judgment for any of the objections which have been urged to it here. It should not be done. In my opinion, *the judgment ought to be affirmed.*

**Black, O. J., and Brace and Macfarlane, J. J.,** concur in that result, and express their own views in an opinion filed along with this. **Gantt, Sherwood, and Burgess, J. J.,** dissent, and file a separate opinion.

**Macfarlane, J.,** concurring:

I agree to the conclusion reached by the court that the judgment should be affirmed, but desire briefly to give my reasons therefor. The questions insisted upon in this court by defendant are: First, that an action could not be maintained for damages until the release had been canceled by a decree in equity; and, second, that the release could not be attacked for fraud, either in law or equity, until plaintiff had restored to defendant whatever of considerations he had received thereunder.

An examination of this abstract of record fails to show that any objection was at any time, by pleading or otherwise, made to the failure of plaintiff to return or tender to defendant the consideration paid under the release. On the other hand, the record does show that the defendant insisted upon the validity of the release throughout the trial, and gave it prominence as a defense. It may, therefore, be reasonably inferred that

a tender would have been refused, and was waived. In addition, it affirmatively appears upon the record that the amount paid out by defendant on account of the release was restored to it by a reduction of the judgment which was obtained by defendant. Manifestly defendant was not prejudiced by a failure to make the tender.

We have often said that this court will only consider questions to which exceptions have been saved in the circuit court, or which affirmatively appear upon the record proper. We must therefore decline to consider the second proposition.

This leaves simply the question whether the reply properly put in issue the validity of the release; or, in other words, whether a release of the character of this one can be avoided, in an action at law, on the ground of fraud charged in the reply to the answer of defendant setting it up in bar of plaintiff's action. Defendant insists that it is a complete bar until canceled by the decree of a court of equity. It is undoubtedly true that fraud was one of the original heads of equity jurisdiction, "but," says Blackstone, "every kind of fraud is equally cognizable in a court of law, and some frauds are cognizable only there; as fraud in obtaining a devise of lands." 2 Bl. Com. 481. "Courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud." *Lord Mansfield, in Bright v. Eynon*, 1 Burr. 396. This principle has received recognition and approval by this court from the decision of *Montgomery v. Tipton*, 1 Mo. 446, to that of *Clough v. Holden*, 115 Mo. 336.

This doctrine is not disputed when the fraud is pleaded by way of answers to a cause of action stated in the petition; but it is insisted, and argued with much learning and ability, that a different rule applies in case the charge of fraud is made to a release when pleaded as a bar to the action. In such case it is argued that the release must be canceled by the decree of a court of equity before the original action can be prosecuted. The principal ground of objection urged to the right to raise the question of fraud by reply is that such a course of proceeding permits questions of fraud to be tried by a jury, instead of a chancellor, and the rescission of a release to be obtained upon evidence which would have been insufficient in a court of equity. But this objection can be urged with equal plausibility to pleading fraud by answer, which, it is conceded, may be done. When we keep in view the fact that courts of law have jurisdiction to relieve against fraud, it would seem to follow logically that its jurisdiction may be exercised to relieve against a fraudulent contract pleaded as a defense, as well as against a fraudulent contract which is made the subject-matter of the suit. It would seem wholly unnecessary and oppressive to drive a plaintiff to another jurisdiction for relief against a defense of which he may have had no information until the answer was made, when the forum, having all the parties before it, has concurrent jurisdiction of the same subject-matter. This is particularly true in jurisdictions wherein legal and equitable rights are ad-

administered by one court and in one proceeding, as in this state. Chitty says: "To a plea of release he [plaintiff] may reply *non est factum*, or that it was obtained by duress or fraud." 1 Chitty, Pl. 16th Am. ed. 608. It is contended by counsel that Mr. Chitty had reference alone to a release obtained pending the suit. It is true the references made are to cases in which pleas *quis darrein continuance* were interposed, but the author's general accuracy in the statement of his proposition forbids my acceptance of any qualification to the broad and general declarations. Bliss, in his work on Code Pleading, lays down the same rule, sec. 210. The rule given by Mr. Chitty has been generally, if not uniformly, followed by the courts of this country. "The pleading of a release first occurs generally in the answer or plea of the defendant, unless in actions brought to set aside a release; and the controverting of the release is usually made under the plaintiff's reply." 20 Am. & Eng. Encyclop. Law, p. 766. The following cases will be found to follow the rule given by Chitty, *supra*, as applied to a release of claims for damages on account of personal injuries caused by negligence; *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120; *Bussian v. Milwaukee, L. S. & W. R. Co.* 56 Wis. 825; *International & G. N. R. Co. v. Brazil*, 78 Tex. 314; *Sobieski v. St. Paul & D. R. Co.* 41 Minn. 169; *O'Brien v. Chicago, M. & St. P. R. Co.* (Iowa) 57 N. W. Rep. 425; *Mullen v. Old Colony R. Co.* 127 Mass. 87, 34 Am. Rep. 349; *Addyston Pipe & Steel Co. v. Copple* (Ky.) 22 S. W. Rep. 323; *Dixon v. Brooklyn City & N. R. Co.* 100 N. Y. 170; *Bean v. Western N. C. R. Co.* 107 N. C. 731; *O'Neil v. Lake Superior Iron Co.* 68 Mich. 690; *East Tennessee, V. & G. R. Co. v. Hayes*, 88 Ga. 568; *St. Louis, I. M. & S. R. Co. v. Higgins*, 44 Ark. 296. The pleading necessary to assert and attack such release has not been directly considered or decided by this court. In *Vautrain v. St. Louis, I. M. & S. R. Co.*, 8 Mo. App. 538, a release was pleaded in bar, and the reply charged that it was obtained by fraud. No question of the propriety of thus attacking the release was raised or considered, but the sufficiency of the pleading to put in issue the validity of the release was, inferentially at least, conceded. This decision was approved by this court without comment. 78 Mo. 44. In the case of *Blair v. Chicago & A. R. Co.*, 89 Mo. 383, the petition contained two counts,—one in equity to set aside the release, and the other for the damages received. This method of proceeding was approved by this court. There can be no doubt that a plaintiff can elect to have the release set aside by suit in equity before proceeding at law on the original cause of action. The *Blair Case*, then, only settled the question that the two actions may be joined in separate counts in the same petition. This court has recognized the right of a plaintiff to plead fraud in reply to a transaction set up by answer as a bar to the original cause of action. *Wright v. McPike*, 70 Mo. 177; *Williams v. Chicago, S. F. & C. R. Co.* 112 Mo. 463; *Jarrett v. Morton*, 44 Mo. 277. Our

conclusion is that the validity of the release was properly put in issue by the reply.

**Black, Ch. J., and Brace, J.,** concur in this opinion.

**Burgess, J.,** dissenting:

Finding myself unable to agree to some of the propositions asserted in the majority opinion of the court, I feel justified in giving my reasons, and those of my associates who agree with me, why I do not do so. Mr. Chitty, in his work on Pleadings, says that "to a plea of release he [the plaintiff] may reply *non est factum*, or that it was obtained by fraud." 1 Chitty, Pl. 16th Am. ed. p. 608. He also gives the form of reply of fraud where the defendant has pleaded a release. 2 Chitty, Pl. 455. But from the general way in which the author thus states the law it is impossible to tell what kind of release he has reference to,—whether all kinds or mere receipts or acquittances. If the latter, there is no question as to the correctness of the rule, as a receipt may be contradicted at any time by verbal testimony. In the case of *Wild v. Williams*, 6 Mees. & W. 490, the court refused to strike out a plea *quis darrein continuance* setting up a release on affidavit showing release was obtained by fraud, holding that the plaintiff could contest the plea on that ground under a replication setting up the fraud. It is scarcely necessary to say that in that case, as the release had not been executed at the time of the commencement of this suit, it could not have then been set aside, because not in existence. In the cases of *Webb v. Steele*, 18 N. H. 280, and *Iloitt v. Holcomb*, 23 N. H. 585, the rule as laid down by Mr. Chitty is adhered to. So it is also in the case of *Bussian v. Milwaukee, L. S. & W. R. Co.* 56 Wis. 825, and in *Dixon v. Brooklyn City & N. R. Co.* 100 N. Y. 170. In the case of *O'Donnell v. Clinton*, 145 Mass. 461, the plaintiff returned, or offered to return, the money received by him on the settlement before instituting his suit. So did the plaintiff in the case of *Peterson v. Chicago, M. & St. P. R. Co.* 38 Minn. 511. The case of *Lusted v. Chicago & N. W. R. Co.*, 71 Wis. 391, was a case in which the plaintiff sustained personal injury, and whose stock was injured at the same time in a collision, and he was induced by fraud and fraudulent representation to settle and compromise the case for \$50, when he executed a receipt in full of all damages to stock and personal injuries; and it was held that it was unnecessary for him to offer to refund the money received by him before bringing his suit for the injuries sustained to his person, because no such thing was embraced in the settlement. The same rule was announced in the case of *Ryan v. Gross*, 68 Md. 377. In the case of *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120, the same rule is announced. It was also held in that case that, as the contract of settlement was obtained by fraud, it was absolutely void, and need not be rescinded in order to remove it out of the way to the assertion of a right; and, further, that under such circumstances the party might bring his action with-

out first paying or tendering back the money that he had received on the settlement. The case of *Mullen v. Old Colony R. Co.*, 127 Mass. 86, 34 Am. Rep. 849, is cited as an authority as supporting the rule announced in that case. The facts in the case last cited were that the signature of the plaintiff was obtained to a paper purporting to be a settlement and discharge of the cause of action by fraudulent representations that it was merely a receipt for a gratuity, and the court, in speaking with reference thereto, says: "It is well established that, if a party enters into a contract, and in consideration of so doing receives money or merchandise, and afterwards seeks to avoid the effect of such contract as having been fraudulently obtained he must first give back to the other party the consideration received. *Coolidge v. Brigham*, 1 Met. 547; *Estabrook v. Sweet*, 116 Mass. 303. And if, after accepting a certain sum in settlement of an unliquidated claim for damages under a contract, one seeks to pursue his remedy for the damages on the ground that the settlement was procured by fraud, or is not binding upon him, he must first repay the amount received. *Brown v. Hartford F. Ins. Co.* 117 Mass. 479. The principle on which these decisions rest is just, but it applies to those cases only where that which was received, and which must be returned, was the consideration of the contract or settlement which the receiver intended to make, and understood that he was making, and which he seeks to avoid by reason of fraudulent practices of the other party, which led him to agree to its terms. It does not apply to cases where a party holds out that he gives the consideration for one thing, and by fraud obtains an agreement that it was given for another thing." In the case at bar the plaintiff knew what the settlement and release embraced, but avers that it was obtained from him by fraud and fraudulent misrepresentations, and in this respect comes clearly within the rule announced in the case of *Mullen v. Old Colony R. Co. supra*, which requires that the parties to the settlement be placed *in statu quo* before the claimant can recover. In the case of *Vautrain v. St. Louis, I. M. & S. R. Co.*, 8 Mo. App. 538, 78 Mo. 44, the defense was that the settlement and receipts were obtained by fraud and, although plaintiff had received \$200, which was expressed in the receipt to be in full satisfaction of his demand against the road company, the court held that, as it was not shown that it was paid under an agreement of settlement of the damages, he was not bound to return it; clearly intimating that, if it was so received, as a condition precedent to his recovery, he must return it, though the opinion is not very distinct on the point. These authorities are all predicated on the theory announced in the case of *Chicago, R. I. & P. R. Co. v. Lewis, supra*, that when a settlement and release are obtained by fraud it is absolutely void as to all the parties thereto, and the party suing is not bound to refund the money received by him under such circumstances before bringing his suit; or that the party from whom he received the money was indebted to him in a still larger sum, and that for that 25 L. R. A.

reason he had the right to retain the money thus received. The first proposition does not seem to be sustained by either reason or authority, as contracts of settlement, although fraudulently obtained, are not absolutely void, but only voidable. *East Tennessee, V. & G. R. Co. v. Hayes*, 83 Ga. 558; *Home Ins. Co. of New York v. Howard*, 111 Ind. 544; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75.

As to the second proposition, the rule can have no application in this case, where all liability is denied. The court of appeals (46 Mo. App. 79), in its approval of the case of *Chicago, R. I. & P. R. Co. v. Lewis, supra*, and cases which announce a similar doctrine, makes no distinction between cases where a liability is admitted and where all liability is denied, although such distinction really exists. Dissenting opinion of Biggs, J., in this case, in the court of appeals; *East Tennessee, V. & G. R. Co. v. Hayes*, and *Gould v. Cayuga County Nat. Bank, supra*; *Alexander v. Grand Ave. R. Co.* 54 Mo. App. 66.

Some of the authorities which announce a contrary rule with respect to the failure of plaintiff to return to defendant company whatever he had received of value from it by way of compromise, and for the release of his right of action, and to rescind the contract, will now be adverted to. The case of *Gould v. Cayuga County Nat. Bank, supra*, was an action brought to recover damages for the alleged breach of an agreement made by the defendants to return to the plaintiffs thereon certain United States bonds loaned by him to the bank. The defense was a return of the bonds, and a compromise agreement, whereby the bank agreed to pay plaintiff, in satisfaction of his claim against it, a certain sum of money, which plaintiff accepted. To this answer plaintiff made reply that he was induced to enter into the compromise agreement by fraud of defendants. No offer to return the money was made. Earl, J., in delivering the opinion of the court, said: "The compromise agreement, unless annulled, is an absolute bar to this action. It is a general rule, laid down in the text-books and reported cases, that a party who seeks to rescind a contract into which he has been induced to enter by fraud must restore to the other party whatever he has obtained by virtue of the contract. *Cobb v. Hatfield*, 46 N. Y. 538. He cannot retain anything he received under the contract and yet proceed in disaffirmance thereof." It was further held in that case that, as it was an action at law upon the original claim, plaintiff must show that he rescinded the fraudulent compromise prior to the commencement of the action; and that, as no rescission was shown, a final determination by the court that plaintiff was entitled to more than the sum paid was no answer to the objection. It was also held that the rule is different where the compromise was of an undisputed claim, and that the offer to rescind might be made for the first time in the complaint. That is a leading case, and one of the best-considered cases anywhere reported. "It is idle to say that the distinctions between legal and equitable actions have been wiped out by

modern practice. It is true that all actions must be commenced the same way; that in every form of action the facts constituting the cause of action or defense must be strictly stated; that fictions in pleadings have been abolished, and that both kinds of actions are triable in the same courts. But the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out. *Reubens v. Joel*, 13 N. Y. 488; *Goulet v. Asseler*, 23 N. Y. 225. At any rate, the difference between an action to rescind a contract and one brought, not to rescind it, but based upon the theory that it had already been rescinded, is as broad as a gulf. They depend upon different principles, and require different judgments." *Gould v. Cayuga County Nat. Bank, supra*. The rule is laid down in *Beans v. Gale*, 17 N. H. 573, 43 Am. Dec. 614, as follows: "If one has been induced to make a contract to pay money or to deliver anything by such means that he is entitled to rescind the transaction, he must, in order to do so, first restore the other party whatever may have been received in exchange for the money or other things he seeks to recover back, and to which he would become entitled as his own property immediately upon the rescission of the act, whose proper effect would have been to vest in the other party." The reason of the rule, as stated by Chief Justice Shaw in *Thayer v. Turner*, 8 Met. 550, is that "the plaintiff, as far as it is in his power, shall put the defendant *in statu quo*, by restoring and revesting his former property in him, without putting him to an action to recover it back, before he can exercise his own right to take back the property sold, or bring an action for it." *Kimball v. Cunningham*, 4 Mass. 502, 8 Am. Dec. 230. In the case of *Doans v. Lockwood*, 115 Ill. 490, it was held that, when the vendor had received any valuable consideration or note of the purchaser upon a sale of goods, he cannot rescind the contract for fraud without first returning, or offering to return, the consideration received, whatever it may be. So when a party is induced to sell property upon false and fraudulent representations as to amount of property, and to take a note to secure the payment of the purchase price, he may rescind the contract by offering to return the note; but he cannot maintain replevin for the property sold until he does so. *Moriarty v. Stofferan*, 89 Ill. 528. If anything has been paid by the purchaser, although he obtained the property through fraud, before the vendor can recover it he must restore whatever value he received to the purchaser. The parties should be put *in statu quo* as far as possible. *Stevens v. Hyde*, 32 Barb. 171; *McMichael v. Kilmer*, 76 N. Y. 36; *Graham v. Meyer*, 99 N. Y. 611; *Baird v. New York*, 96 N. Y. 567; *Tisdale v. Buckmore*, 33 Me. 461; *Cumplin v. Burton*, 2 J. J. Marsh. 216; *Gifford v. Carvill*, 29 Cal. 589; *Estes v. Reynolds*, 75 Mo. 563; *Biabeo v. Ham*, 47 Me. 543; Bigelow, Fr. pp. 73, 74; *Kreuzer v. Forty Second Street, M. & St. N. Ave. R. Co.* 38 N. Y. S. R. 461.

When one has received anything of value on a settlement of a right of action, and executed

a release thereof, it follows inevitably that, the contract of settlement not being void, it constitutes an insuperable barrier against a recovery so long as it is not rescinded or avoided by an offer to return the consideration paid for it. It was, in principle, so held in *Horne Ins. Co. of New York v. Howard*, 111 Ind. 544. It was there decided "that it did not alter the case that the compromise may have been brought about by fraud and misrepresentation of the defendant, or that in the end it was found that a sum largely in excess of the amount paid to settle the disputed liability was due the plaintiff." See also *Brown v. Hartford F. Ins. Co.* 117 Mass. 479. In *Lee v. Lancashire & Y. R. Co.* L. R. 6 Ch. App. 527, the plaintiff was injured by a railway accident, and sent in a claim for £691. The defendant paid him £400, and took a receipt acknowledging that sum to be in full discharge of his claim. He afterwards sued the company to recover further compensation, and it pleaded that the plaintiff had accepted the £400 in full satisfaction and discharge of the right of action. Plaintiff then filed his bill to restrain the company from relying on the plea, and, while he was defeated upon another ground, Lord Justice James expressed the opinion that he could get no relief in that court on the ground of mistake in giving the discharge, "except on the terms of giving back the £400, and being put exactly in the same position as he was in when the transaction was accepted." In the case of *East Tennessee, V. & G. R. Co. v. Hayes*, 83 Ga. 558, the plaintiff was injured by a railway accident. The defendant pleaded a settlement of the claim, and the payment of \$100 to plaintiff in satisfaction thereof. Issue was taken on this plea, and it was held by the court that plaintiff could not successfully reply by showing that the agreement of release was obtained by defendant's fraud, without also showing that before commencing his suit he had tendered to the defendant the sum received, with demand of return of what defendant had received from him; thus rescinding the settlement. Bigelow, Fr. 73, 74; Beach, Mod. Eq. Jur. § 552; dissenting opinion of Biggs, J., St. Louis court of appeals, in this case; *Alexander v. Grand Ave. R. Co.* 54 Mo. App. 70. The same rule has been announced by the St. Louis court of appeals in the case of *Cahn v. Reid*, 18 Mo. App. 115; and by this court in the cases of *Jarrell v. Morton*, 44 Mo. 275; *Hart v. Handlin*, 43 Mo. 171; and in *Estes v. Reynolds*, 75 Mo. 563. The rule is, in actions of trover or replevin to recover property parted with, and all actions based solely upon the original relations between the parties, the plaintiff must show that he rescinded the fraudulent contract before the commencement of the action, by returning or offering to return to the party from whom it was received whatever of value was received for the release; in other words, that he had a cause of action when he commenced his action. *Gould v. Cayuga County Nat. Bank, supra*, and authorities cited. It is also held that, in case where a vendor upon a sale induced by fraud has taken the vendee's note, he may repudiate the contract, and bring his

suit to recover the property sold without first surrendering the note. *Thurston v. Blanchard*, 22 Pick. 18, 83 Am. Dec. 700; *Nichols v. Michael*, 28 N. Y. 264, 80 Am. Dec. 259. The reason is: "As between the parties the note is not property, but a mere promise to pay, which is avoided by the rescission of the contract. It is of no value to the vendee, and needs to be surrendered to him at the trial merely because it might otherwise be used to his detriment." *Gould v. Cayuga County Nat. Bank*, *supra*.

It will thus be seen that the authorities are almost unanimous in holding that, where money or other valuable thing is paid on a settlement to obtain a release of any right of action, before the person to whom it is paid, and who has the right of action, can recover it, he must return or offer to return whatever he has received, if of any value; and this he must do although the settlement or release was obtained by fraud. And it is also manifest from the decided weight of authority that the offer to return whatever of value has been received as a consideration for the settlement or release must be made before or at the time the suit is brought, and the contract or agreement, in so far as it lies in the power of the party desiring to do so, rescinded. This question has never been directly passed upon by the appellate courts of this state in a case where the action was for personal injuries, except in two cases,—the case at bar, in which the St. Louis court of appeals, by a majority opinion, held that, as the plaintiff had been induced by fraud or undue influence to release his right of action, he might sue upon such right of action without first obtaining the annulment of the release by suit in equity; and, as such release was pleaded as a defense to the action, he might, in his reply, set up the fraud or undue influence in avoidance of it. *Biggs, J.*, dissented from this decision. In the case of *Alexander v. Grand Ave. R. Co.* the ruling was directly to the contrary, and in that case it was held that, where fraud is alleged to have been practiced upon a party in the compromise settlement of a claim for damages at which a money consideration passed, a return or offer to return the latter is a prerequisite to the right to annul the contract of settlement, and to sue upon the original cause. While it is true that in the case of *Mateer v. Missouri Pac. R. Co.*, 105 Mo. 351, the answer pleaded a settlement of plaintiff's right of action, and the payment of a money consideration for the release, the question now under consideration was not passed upon or adverted to, so that case cannot be considered as an authority on this question. In this state, the question as to whether the plaintiff, before suing or at the time thereof, under the circumstances disclosed by the evidence, must have placed the

defendant *in statu quo* by returning or offering to return to it everything of value received by him in consideration for the release, is an open one, the nearest approach to an adjudication upon that question by this court being the case of *Blair v. Chicago & A. R. Co.* 89 Mo. 334, wherein it was held that the plaintiff, who, as she alleged in her petition, had by fraud been induced to compromise a right of action that she had against the defendant therein for damages, might include in the same petition two counts,—one to set aside the settlement for fraud, offering to return the money received by her on the settlement; and the other an action on the case for damages. That this is the proper practice seems clear. A proceeding to set aside a settlement or release obtained by fraud should be by a proceeding in equity, and should be tried by the court. Moreover, in a case like this, the evidence should be clear and satisfactory, "such as will preponderate over presumption or evidence on the other side." It must be clearly and distinctly proven. *Bump, Fr. p. 567*. By proceeding in this way, the burden of proof rests on the plaintiff to establish the fraud; while in an action at law, when fraud is set up as a defense in obtaining the release, the case is triable before a jury, and a preponderance of evidence is only required in order to set aside the settlement. Not only this, but when the proceeding is, in the first place, to set aside the settlement and release, an opportunity is offered for a fair trial of the questions relating to the bona fides of the settlement and release, disconnected from the hearing of any facts relating to the main facts at issue in the case. This is but fair and equitable. The plaintiff should have embraced in his petition, in connection with the count for damages, a separate count to set aside the settlement and release, and with an offer to refund to defendant everything of value received from it in consideration of such settlement and release, as was done in the case of *Blair v. Chicago & A. R. Co. supra*.

The question of tender was argued both orally and in elaborate briefs, both in division and in banc, and no suggestion was made that the question was not properly for decision, and it was only discovered since the first submission that it was not saved in the circuit court. For this reason we considered it in division No. 2, and, as this opinion expresses our views, we will not rewrite the opinion filed in division No. 2, but we hold that the release can only be set aside in a court of equity, and therefore dissent from the view taken by a majority of the court on that question.

*Gantt, P. J.*, and *Sherwood, J.*, concur in this opinion.



## TENNESSEE SUPREME COURT.

A. N. AKIN, Trustee of the Bank of Columbia,  
v.

W. J. JONES *et al.*

(.....Tenn.....)

1. Sending a draft to a bank for collection with instructions to remit in New York exchange is equivalent to an agreement that the money collected may be used by the collecting bank, and precludes the claim that such proceeds are held in trust, where the bank fails before it has paid the collection.
2. Payment to an assignee of an insolvent bank of over-drafts allowed by the bank on which it had canceled drafts held by it for collection, cannot be regarded as payments to the assignee of such canceled drafts so as to give the sender of them a right to such proceeds as a trust fund.
3. A check by one bank upon another, sent in payment of the collection of a draft, is not an equitable assignment of any portion of a general deposit on which it is drawn.

(January 17, 1894.)

CROSS-APPEALS from the Chancery Court for Maury County in a proceeding by the Trustee of the Bank of Columbia to settle the affairs of the trust, the Trustee appealing from so much of the decree as recognized a priority of J. W. Manier & Co. upon the assets in his hands, and Manier & Co. appealing from so much of the decree as refused to recognize a priority as to other portions of their claim. *Affirmed on defendants' appeal, and reversed on complainant's appeal.*

The facts are stated in the opinion.

*Messrs. Sam Holding, E. H. Hatcher, and George T. Hughes* for complainant.

*Mr. J. C. McReynolds*, for defendant.

Where paper is sent to a bank indorsed, "for collection," with instructions to remit the proceeds, the bank holds said paper as the agent or trustee for sender, and such funds as it collects on same are trust funds held by it for the sender.

*Commercial Nat. Bank of Pennsylvania v. Armstrong*, 148 U. S. 50, 87 L. ed. 868; *National Butchers & Drovers Bank v. Hubbell*, 7 L. R. A. 853, 117 N. Y. 384; *Blaine v. Bourne*, 11 R. L. 119, 23 Am. Rep. 429; *City Bank of Sherman v. Weiss*, 67 Tex. 381, 60 Am. Rep. 29; *Manufacturers Nat. Bank of Boston v. Continental Bank of St. Louis*, 2 L. R. A. 699, 148 Mass. 553; *Ryan v. Paine*, 66 Miss. 673; *Kinney v. Paine*, 68 Miss. 258.

As the bank in this case held the collections as agent or trustee charged with the duty to collect them by receiving money therefor, which, if received, would have been a trust fund, and as it received therefor not money but improperly an overdraft or debt against the drawers and maker, the owners of the collec-

tion can claim these overdrafts or debts in the hands of the assignee.

*Ryan v. Paine*, and *Kinney v. Paine*, *supra*; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722; *First Nat. Bank of Central City v. Hummel*, 8 L. R. A. 788, 14 Colo. 259; *Englar v. Offutt*, 70 Md. 78; *Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 28 L. ed. 698; *Continental Nat. Bank of New York v. Weems*, 69 Tex. 489; *Borches v. Morgan*, 5 Cent. L. J. p. 58; *Perry*, Tr. § 447.

If these overdrafts made to pay the collections owned by Manier & Co. were paid to the assignee, it amounted in a court of equity to a payment of the collections themselves to him.

In Tennessee a check drawn against funds as between voluntary assignee of drawer and the holder, is an equitable assignment *pro tanto* of the fund.

*Morse, Banks & Banking*, §§ 491 *et seq.*; *Code, Tenn.* (58) § 1959, *Milliken & Vertess*, 2716; *Springfield v. Green*, 7 Baxt. 302; *Schoolfield v. Moon*, 9 Heisk. 173; *Planters Bank of Tennessee v. Merritt*, 7 Heisk. 193.

Assignee under a voluntary assignment occupies the shoes of assignor.

*Nashville Trust Co. v. Fourth Nat. Bank of Nashville*, 15 L. R. A. 710, 91 Tenn. 345.

Drawing and delivering a check when no funds to meet it is a fraud. So also it is to withdraw funds against which a check has been drawn.

*Morse, Banks & Banking*, §§ 359, 587; *Pease v. Landauer*, 63 Wis. 20, 53 Am. Rep. 247.

A check is an equitable assignment *pro tanto* of the fund drawn against.

*First Nat. Bank of Cincinnati v. Coates*, 8 Fed. Rep. 540; *German Sav. Inst. v. Adae*, Id. 106; *Pease v. Landauer*, *supra*.

*McAllister, J.*, delivered the opinion of the court:

The question presented in this record, stated in general terms, is whether the holder of two certain checks, drawn by the Bank of Columbia prior to making a general assignment, is entitled to payment in full out of certain funds in the hands of the assignee of said bank, or whether said check holder is merely a general creditor of said bank, and, as such, only entitled to a ratable share in the distribution of its assets. It appears from the record that on the 17th October, 1891, the Bank of Columbia made a general assignment for the benefit of its creditors. The trustee named in the deed having declined to serve, A. N. Akin was duly appointed, and has been administering the trust. The present bill was filed by the trustee against the creditors of said bank for the settlement of all matters growing out of said trust, and for the adjudication of all questions of priorities.

The defendants J. W. Mainer & Co. are merchants, doing business in Nashville, and on about September 29, 1891, inclosed to the Bank of Columbia a draft on Massey & Son, of Lipscomb, Tenn., for the sum of \$137.20, drawn by Manier & Co. to their own order, and indorsed by said firm to the Bank of Co-

NOTE.—As to the effect of the insolvency of a bank to which commercial paper has been sent for collection, see *note* to *National Butchers & Drovers Bank v. Hubbell* (N. Y.) 7 L. R. A. 853.

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lumbia for collection. Massey & Son, the drawees of said draft, on the 15th of October, 1891, gave their check on the Bank of Columbia in payment of said draft, which overdrawed their account in said bank in the sum of \$102.12. It appears that Massey & Son had to their credit in said bank, at the time of drawing the check, the sum of \$35. The draft was canceled by the bank, and delivered up to Massey & Son. Manier & Co., in their letter inclosing the draft for collection, had directed the bank to remit the proceeds in New York exchange. On the 16th October, 1891, the Bank of Columbia sent to Manier & Co. its check on the Merchants' National Bank of Louisville, covering proceeds of draft on Massey & Son. Manier & Co. received said check October 17th, and immediately telegraphed to the Merchants' National Bank of Louisville to know if this check would be paid, and were informed that it would not be paid. It appears that on the same day the Bank of Columbia made a general assignment for the benefit of its creditors. Manier & Co. on same day returned this check to Bank of Columbia, informing its cashier they would claim payment in full out of the assets of said trust. It further appears that at the time Manier & Co. received the draft on the Merchants' National Bank of Louisville, Ky., there was to the credit of the Bank of Columbia in said Louisville bank something over \$2,250. All drafts drawn on the Louisville bank by the Bank of Columbia subsequent to October 14, 1891, were refused payment when presented. Some time after the assignment, the Merchants' National Bank of Louisville, with the assent of the trustee of the Bank of Columbia but without the knowledge of Manier & Co., paid out of the funds to the credit of the Bank of Columbia such drafts as had been presented to it, in the order of presentation, until the whole fund was exhausted. The telegram sent by Manier & Co. to the Merchants' National Bank was received, and payment of their check refused, before the presentation of money of the drafts which were afterwards paid. No offer has been made to pay the draft held by Manier & Co., and there are now no funds with which to pay it to the credit of the Bank of Columbia in the Louisville bank. It further appears that, after the affairs of the Bank of Columbia went into the hands of the assignee, Massey & Co. paid their overdraft, amounting to \$102.12, in full to said assignee. This is a full statement of facts appearing in the record with respect to the check on the Merchants' National Bank of Louisville given by the Bank of Columbia to Manier & Co. for the proceeds of their draft on Massey & Son.

The other claim of Manier & Co. is based upon the following statement of agreed facts: It appears that on or about September 8, 1891, Manier, & Co. inclosed to the Bank of Columbia, for collection, the note of W. K. Stephens, dated July 3, 1891, payable to the order of Manier & Co., and due October 1st thereafter, for the sum of \$195.95. The bank was directed to remit the proceeds of the note to Manier & Co. in New York exchange. On the 18th of October, 1891, W. K. Stephens, the

maker of this note, paid it by an overdraft on the Bank of Columbia. At the time his check was given, the account of Stephens was overdrawn in the sum of \$1,100, and had remained overdrawn since May 31, 1891. On the 18th October, 1891, the Bank of Columbia sent to Manier & Co. their check on the Importers' & Traders' National Bank of New York for the sum of \$195.45, with the advice that it was given for the amount collected on the Stephens note. This check was received in due course of mail by Manier & Co., and at once forwarded by them to New York, and presented for payment. Payment was refused, and thereupon the check was protested and all proper notices given. Manier & Co. immediately notified the trustee for the Bank of Columbia, and made claim on him for the full amount of the check. As already stated in connection with the Massey & Son draft, the Bank of Columbia, on the 17th of October, 1891, made a general assignment for the benefit of its creditors. It further appears that, when the check was presented to the Importers' & Traders' National Bank of New York, there was to the credit of the Bank of Columbia in the New York bank sufficient funds to meet it. Subsequent to the presentation of defendants' check, the Importers' & Traders' National Bank paid to the trustee of the Bank of Columbia the balance to the credit of said bank, and this amount the trustee now holds, as a separate fund, subject to the orders of the court in this case. It should be stated that, after the affairs of the bank went into the hands of the assignee, it was ascertained that Stephens' account was overdrawn on October 16th (the last day the bank transacted business) in the sum of \$1,400, and that it had been overdrawn more than \$300 since July 31, 1891. The assignee, acting upon the advice of counsel, afterwards compromised and settled Stephens' overdraft, realizing something more than 50 per cent of same which went into the trust fund.

Upon the foregoing facts, the chancellor decreed, viz.: First. That Manier & Co. had the right to repudiate the check on Louisville given by the Bank of Columbia in payment of the Massey & Son draft, in violation of instructions to send New York exchange. Second. That in respect to the amount of Massey & Son's overdraft on the Bank of Columbia, to wit, the sum of \$102.12, which was made by paying to the said bank the draft of Manier & Co. on Massey & Son, and which was collected by the trustee of said bank after its failure, as to this amount, Manier & Co. were entitled to be paid in full, and in preference to the general creditors of said bank. Third. But as to the sum of \$35, which Massey & Son had on deposit when they gave their check to the bank for the draft of Manier & Co., and which, therefore, the bank actually received before its failure, as to this amount Manier & Co. were not entitled to be paid in full in preference to the general creditors of said bank, but were only entitled to receive their *pro rata*. Fourth. That, as to the Stephens collection, Manier & Co. accepted the check on the Importers' & Traders' National Bank in pay-

ment of said collection, but that said check was not an equitable assignment *pro tanto* of the funds of the Bank of Columbia in the hands of the New York bank, and which afterwards came into the hands of the trustee of the Bank of Columbia; and that, therefore, Manier & Co. were only general creditors of said Bank of Columbia, and, as such, were only entitled to receive their *pro rata* upon said note. From so much of said decree as adjudges that Manier & Co. are entitled to be paid in full the sum of \$102.12, in preference to the general creditors of the Bank of Columbia, the complainant, A. N. Akin, appealed, and has assigned errors. The defendants Manier & Co. have appealed from so much of said decree as adjudges that they are only entitled to receive their *pro rata* upon the check of the Bank of Columbia on the Importers' & Traders' Bank of New York, given in payment of the Stephens note.

It is assigned as error by counsel for A. N. Akin, trustee, that the chancellor adjudged that Manier & Co. were entitled to be paid in full, in preference to the general creditors, the amount of Massey & Son's overdraft, which was collected by the trustee. It is insisted on behalf of the trustee that although indorsements for collection vest no title to the draft in the bank, and, if the draft is collected by the trustee of the bank after its failure, the law imposes a trust upon the proceeds in favor of the owner, yet, if the draft is collected by the bank before its failure, and while it is a going concern, and the transaction of payment is complete between the bank and the drawee, then the relation of the bank to the owner of the draft is that of debtor and creditor, and there is no trust in favor of the owner, and he has no preferred lien upon the assets of the bank in the hands of the assignee, but can only take his *pro rata* share in the distribution of the assets. On the other hand, it is insisted on behalf of Manier & Co. that when paper is sent to a bank indorsed for collection, with instructions to remit the proceeds, the bank holds said paper as the agent or trustee for sender, and funds collected on same are trust funds, held by it for sender; that the bank in this case held the collections as agent or trustee, charged with the duty to collect them in money, which, if received, would have been a trust fund; but, as the bank improperly received an overdraft or debt against the maker, the owners of the collection can claim these overdrafts or debts in the hands of the assignee. Defendants Manier & Co. further insist that if these overdrafts, made to pay their drafts, were afterwards paid to the assignee, it amounted in a court of equity to a payment of the collections themselves. The general rule on this subject is that an indorsement for collection vests no title to the paper in the bank, and, if the paper passes into the hands of the assignee after insolvency, the owner may recover it specifically, or, if the assignee collects the paper, the owner may recover the proceeds; but, if the bank makes the collection before the assignment, it simply becomes an ordinary contract debtor of the owner, and he cannot impress any trust upon the proceeds. 1 Morse, Banks & Banking,

§ 248. Of course, there may be special facts in a case which will take it out of the ordinary rule, and create a trust on the funds collected. Such special facts were found in the case of *Continental Nat. Bank of New York v. Weems*, 69 Tex. 489, cited by counsel for defendant. In this case the agreement between the two banks in reference to the proceeds was that "they should be preserved by said bank as the property of the complainant, and returned to it as such." The court thought these special facts settled the question of trust in favor of the complainant; but the rule undoubtedly is that unless there is some agreement or course of dealing whereby the funds are to be held separate, and the identical proceeds remitted, the owner of the drafts stands upon no higher ground than the other creditors of the bank in a case where the bank collects the draft prior to making a general assignment. It will be noticed that in this case Manier & Co. directed the bank to send New York exchange; that is to say, Manier & Co. directed the Bank of Columbia to send them its check on New York in payment of the proceeds of collection. As stated by counsel: "This is the determining fact in the record. It was virtually an express direction not to send the identical moneys collected, nor to hold them separate for Manier & Co., but was equivalent to an agreement that the bank might use the money collected, and pay Manier & Co. by its check on New York. Any agreement or understanding or course of dealing whereby the bank is to use the identical moneys collected, and substitute its own obligation in its stead, destroys all idea of a trust."

It is argued, however, that the overdrafts made by the drawees on the Bank of Columbia to pay their drafts due to Manier & Co. were afterwards paid to the assignee, and such payment amounted in a court of equity to a payment of the drafts themselves to the assignee. This view of the case cannot be maintained. The transaction between the bank and Massey & Son and W. K. Stephens, the drawees of the drafts, was a completed transaction. Massey & Son and Stephens gave their checks on the Bank of Columbia for the amount of the drafts drawn against them, respectively, and the drafts were canceled and delivered up to the drawees. The fact that the bank allowed the drawees to overdraw their accounts does not affect the question of payment. In his work on Commercial Paper, Mr. Randolph says: "If the holder of a bill directs that it be paid to a certain banker, procuring credit with such banker will amount to a payment of the bill. So, if the amount of a note is credited to a bank holding it for collection (according to the custom of dealings between the banks), it will be a payment, although the bank making the note and giving the credit failed on the day it was so credited." 8 Randolph, Com. Paper, §§ 1395-1456. The doctrine has been extended, and collecting banks have been recognized as authorized to receive their own certificates of deposit in payment, and the debtor is discharged, even though the bank fails before remitting. See *Howard v. Walker*, 92 Tenn. 456.

The next question presented is in respect to the check given by the bank of Columbia on the Importers' & Traders' National Bank of New York in payment of the Stephens note. It is insisted by counsel for Manier & Co. that they are entitled to be paid in full, for the reason that this check was an equitable assignment *pro tanto* of the funds of the Bank of Columbia in the hands of the New York bank, and that, the New York Bank having refused to pay the check, and having returned the funds in its hands to the trustee of the bank of Columbia, defendants are entitled to the payment of their check in full. It is insisted that the assignee for the benefit of creditors takes the property and choses in action of his assignor, not as a purchaser for value, but as a volunteer, and therefore subject to all the defenses and equities against them in the hands of the assignor, and not only so, but that he holds as the representative of the assignor and his estate. This principle is well settled, and will not be further noticed. *Nashville Trust Co. v. Fourth Nat. Bank of Nashville*, 91 Tenn. 336, 15 L. R. A. 710. The other question, however, in respect to equitable assignments, is involved in much conflict of authority. Mr. Morse, in his work on Banks and Banking (vol. 2, § 493), formulates the question thus: "Is a check an equitable assignment between the drawee and a bona fide holder for value, so that the latter will be preferred over general creditors of the drawer in case of his insolvency before the check is cashed?" The author answers the question by stating that the most numerous body of decisions sustains the view that a check is neither a legal nor an equitable assignment as between drawer and payee, nor a sufficient foundation for any action by the holder against the bank. The author qualifies the statement with the remark that there may exist special facts giving an equation of easy solution, as if the check is drawn on a designated fund, or is accepted by the bank, or if the bank charges the amount to the drawer, or settles with him on the basis of allowing for the check. In these and other instances, the author states, there is no doubt the bank can be held in an action by the holder. Counsel for Manier & Co. cite several dicta to be found in our own cases to the effect that a check is an appropriation by the debtor of so much of his deposit in bank to his creditor. See *Springfield v. Green*, 7 Baxt. 302; *Schoolfield v. Moon*, 9 Heisk. 173; *Planters Bank of Tennessee v. Merritt*, 7 Heisk. 193. It will be found upon an examination of these cases that the only question presented for adjudication was in respect to the liability of the drawer,—whether he was discharged by the failure of the holder to present his check in a reasonable time, the bank in the meantime having become insolvent. The case of *Imboden v. Perrie*, 13 Lea, 504, involved more of the features presented in this case than any other reported in this state. In that case the question arose between creditors. One creditor held a check of the debtor against a general deposit of the debtor in bank, while the other was an attachment creditor of that fund. The question was fairly raised in

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that case whether the check worked an equitable assignment of the fund in bank to the check holder before the presentation of the check or notice to the bank. If so, the check-holding creditor was entitled to priority. If not, then the attachment had priority. Judge Turney, in delivering the opinion of the court against the defendant's theory of equitable assignment, cited approvingly the opinion of Chief Justice Church in *Atty-Gen. v. Continental L. Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55, to the effect that checks drawn in the ordinary form, not describing any particular fund or using any words of transfer of the whole, or any part of any amount standing to the credit of the drawer, but containing only the usual request, are of the same effect as inland bills of exchange, and do not amount to an assignment of the funds of the drawer in bank. "This doctrine," he continues, "accords with the relation between the parties. Banks are debtors to their customers for the amount of their deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of the payee. Until presented and accepted, it is inchoate. It vests no title, legal or equitable, in the payee to the fund. Before acceptance the drawer may withdraw his deposits. The bank owes no duty to the holder until the check is presented for payment. Knowledge that checks have been drawn does not make it obligatory upon the bank to retain the deposits to meet them. These rules are indispensable to the safe transaction of commercial business." It is contended by counsel for Manier & Co. that the case of *Imboden v. Perrie* did not raise the identical question here presented. It is insisted that the question in that case arose between creditors, but that the question presented here is between the drawer and the payee of the check, the assignee standing in the shoes of the drawer. The case of *Atty-Gen. v. Continental L. Ins. Co.*, *supra*, cited with approval by Judge Turney in the 13 Lea case, presented the exact state of facts found in this record. In that case the insurance company gave its check upon a trust company in payment of a loss, the company having at the time on deposit a sum exceeding the amount of the check, but prior to its presentation a receiver of the insurance company was appointed, who withdrew all the funds deposited with the trust company. In an action by the check holder against the receiver to recover the whole amount of the check out of the funds in his hands, it was held by the court of appeals of New York that the check, not having been drawn on a particular fund, was not an equitable assignment *pro tanto* of a general deposit, and that the check holder was not entitled to payment in full in preference to the claims of other creditors. See also *Risley v. Phenix Bank of New York*, 33 N. Y. 818, 33 Am. Rep. 421; *Attna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 87, 7 Am. Rep. 814.

We are of opinion that the great weight of authority is opposed to the contention of defendants, and establishes the doctrine that the delivery of a check against a general deposit

is not a legal or equitable assignment of any portion of the fund.

*The decree of the chancellor to the extent that it allows defendants priority in the payment of*

*the Massey & Son overdraft is reversed, and in all other respects affirmed.*

The costs will be paid by the trustee

## UNITED STATES CIRCUIT COURT, DISTRICT OF INDIANA.

CAIRO, VINCENNES & CHICAGO R. CO.

v.

BREVOORT.

(62 Fed. Rep. 129.)

**1. The right of an adjoining landowner to make a new bank for a navigable river, which forms the boundary between two states, or by artificial structures to turn the water upon the lands upon the opposite side of the river, is not a local question on which a federal court is bound by state decisions, but depends upon general principles of law.**

**2. A railroad company in bridging a stream must provide a sufficient waterway for the passage of the water, including the superabundant water which flows into and down the stream in times of ordinary floods.**

**3. A riparian proprietor has no right to erect a levee or artificial bank along the margin of a stream which will cause superabundant water in times of ordinary floods to flow upon the lands of the opposite riparian proprietor.**

**4. The flow of a river when swollen beyond the low-water mark of the dry seasons by the ordinary rains which fall in wet**

### NOTE.—What is surface water?

The question, what is surface water, has caused the courts almost as much trouble as the one as to the rights respecting surface water, the cases upon which may be found in the note to Gray v. McWilliams (Cal.) 21 L. R. A. 593.

It seems to be easier to determine that a particular quantity of water is or is not surface water than to formulate a comprehensive definition. Therefore the courts have decided most cases upon the facts before them and in so doing have given prominence to some one fact which in the particular case was of commanding importance, and the result has been that while the cases are numerous in which the question has been decided, each deals with only a part of the subject and an examination of several is necessary before a comprehensive view can be obtained.

### Distinguished from watercourse.

In a great majority of the cases particular water has been adjudged to be surface water because it was not a watercourse. It will be necessary therefore to state here the definitions of watercourse made for the purpose of differentiating surface water, while rejecting all others.

#### a. What is a watercourse?

A watercourse is a stream of water usually flowing in a definite channel, having a bed and sides or banks and usually discharging itself into some other stream or body of water; it must be something more than a mere surface drainage over the entire face of a tract of land occasioned by unusual freshets or other extraordinary causes. Luther v. Winnibimet Co. 9 Cush. 174; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; Jones v. Wabash, St. L. & P. R. Co. 18 Mo. App. 261.

To constitute a watercourse the flow of water must possess that unity of character by which the flow on one person's land could be identified with that on his neighbor's land. Briscoe v. Drought, 11 Ir. C. L. Rep. 260.

To maintain the right to a watercourse it must be made to appear that the water usually flows in a certain direction and by a regular channel with banks or sides. Wagner v. Long Island R. Co. 2 Hun, 663, 5 Thomp. & C. 163.

There is a broad distinction between a regular flowing stream and occasional and temporary outbursts of water which in times of freshets fill up low places and run over and inundate adjoining lands. To maintain the right to a watercourse or

brook it must be made to appear that the water usually flows in a certain direction and by a regular channel with banks and sides. It must have a well-defined and substantial existence. Ashley v. Wolcott, 11 Cush. 192.

To be a watercourse the stream must have a well-defined and substantial existence. Schlichter v. Philippy, 67 Ind. 204.

There must be evidence of a permanent stream of running water. Weis v. Madison, 76 Ind. 233, 30 Am. Rep. 135.

#### b. How far channel necessary or sufficient.

It will be observed that in the above definitions a channel with banks is made a conspicuous element of a watercourse as distinguished from surface water. But there are many flowing currents of water which have no channel with banks which could not be classed as surface water.

The overflow of a lake does not become mere surface water by the fact that it spreads through marshes and swamps to a considerable width on its way to a natural outlet. Case v. Hoffman, 20 L. R. A. 40, 84 Wis. 438.

Marsh lands through which overflow water from a lake reaches a natural stream are not governed by the rules applicable to mere surface water. West v. Taylor, 16 Or. 165.

A stream from a spring does not become surface water by the fact that some distance from its source it becomes so sluggish and widely diffused that the flow is not sufficient to break the turf, if there is a continuous current along the surface in a natural depression. Gillett v. Johnson, 30 Conn. 180.

The mere fact that because of the level character of the land the water of a brook spreads over a wide space without apparent banks does not deprive it of its character as a watercourse, if it usually flows in a continuous current. Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349.

Water from a spring does not become surface water which may be diverted by the upper proprietor by the fact that for a part of its course it spreads several rods in width and the current is not sufficient to cut through the sod, if there is a current and lower down it again narrows up and is sufficient in volume and velocity to cut a channel for itself. Hinkle v. Avery (Iowa) May 12, 1893.

But water from springs which after running in a definite channel for a certain distance spreads itself over the surface, and never again attains a

seasons, or by the melting of snows, does not constitute surface water which may be turned by embankments.

5. The easement of a railroad company under a deed conveying the same estate which could have been acquired under condemnation proceedings, prevents the construction by the owner of the fee of levees on a river bank, which would change the natural condition of a river over which the road runs, in time of ordinary floods, thereby causing injury to the railroad approach and track, or rendering the company liable for injuries to other persons by water impeded by the bridge.

(June 9, 1894.)

**ON DEMURRER** to a bill filed to enjoin the construction of an embankment along the edge of the Wabash river, which it was alleged would materially injure the complainant. *Overruled.*

The facts are stated in the opinion.

regular course and channel, becomes mere surface water. *Hawley v. Sheldon*, 64 Vt. 491.

And water which issues from springs at the base of a range of hills and flows sluggishly and without any determinate channel over adjoining lands towards a natural creek is mere surface water. *White v. Sheldon*, 35 Hun, 138.

And in Iowa it has been held that it is not sufficient that the waters customarily or naturally flow in a known direction and course if they have no banks or channels in the soil. *Livingston v. McDonald*, 31 Iowa, 180, 89 Am. Dec. 533.

And in New Jersey it was held that water flowing over the edges of a basin in which collects surface water in the form of a pond continues to be surface water although it flows in an appreciable channel, if there is no flow except in times of heavy rains. *Bowlsby v. Speer*, 31 N. J. L. 354, 88 Am. Dec. 216.

In England it has been said that there is a distinction between water which comes no one knows exactly whence, and flows no one knows exactly how, either under ground or on the surface, unconfined in any channel either as rainfall or from springs of the earth which may vary from day to day—and water once confined in a regular channel. *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 486, 34 L. T. N. S. 402, 19 Week. Rep. 569.

Conversely there are many channels which have been cut by water which could not be classed as watercourses.

Thus a channel made by mere surface water resulting from rain and snow is not a watercourse unless there is ordinarily and most frequently a moving body of water flowing through it. *Hill v. Cincinnati, W. & M. R. Co.* 109 Ind. 511.

The existence or nonexistence of a channel with banks is not therefore of itself sufficient to determine the question.

In fact in Illinois it has been held that, if the conformation of the land is such as to give the surface water flowing from one tract to the other a fixed and determinate course so as to uniformly discharge it upon the surrounding tracts at a fixed and definite point, the course thus uniformly followed is a watercourse within the meaning of the rule applicable to that subject. *Lambert v. Alcorn*, 21 L. R. A. 611, 144 Ill. 813.

But that ruling is not in accord with the weight of authority upon that question. See note to *Wharton v. Stevens* (Iowa) 15 L. R. A. 630.

#### a. The source of supply.

Some cases have given some prominence to the question of the source of the supply.

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*Messrs. Rely & Emison* for defendant in support of demurrer.

*Messrs. C. S. Conger and Elliott & Elliott* for complainant, *contra*.

**Baker, District Judge**, delivered the following opinion:

The questions for decision arise upon a demurrer to the bill of complaint. The grounds of demurrer are that the bill of complaint does not state facts entitling the complainant to any equitable relief. The facts stated are that the complainant has constructed, owns, and operates a line of railway along the bank of the Wabash river, in the state of Illinois, opposite to a tract of land owned and occupied by the defendant, which is situated in Knox county, in the state of Indiana; that the complainant is a corporation organized under the laws of the state of Illinois, and is a citizen of that state; that it owns and operates a branch or short line of railroad which crosses the Wabash

The overflow from artificial basins or marshes which follows no definite course and only exists in times of floods is surface water. *Broadbent v. Ramsbotham*, 11 Exch. 602, 25 L. J. Exch. 118.

To be a watercourse the source of supply must be more permanent than mere surface water. *Jeffers v. Jeffers*, 107 N. Y. 680.

But the source is not alone sufficient to determine the question, for streams may be composed wholly of water falling in the shape of rain or snow. *McKinley v. Union County Chosen Freeholders*, 39 N. J. Eq. 171; *Kelley v. Dunning*, 39 N. J. Eq. 433.

#### d. Source and channel.

A combination of source and channel may furnish a more accurate test.

Water which has a definite source, as a spring, and takes a definite channel, is not surface water. *Pyle v. Richards*, 17 Neb. 182.

Spring water which has acquired a well-defined channel is no longer surface water. *Dudden v. Guardians of Clutton Union*, 1 Hurlst. & N. 627, 38 L. J. Exch. 144.

So it has been held that water rising to the surface in springs or boggy ground and flowing in no definite channel, or the supply of which is not constant, is to be regarded as mere surface water. *Hawstron v. Taylor*, 11 Exch. 390, 26 L. J. Exch. 33.

#### e. Permanence of flow.

The question of the permanence of the flow cannot be made the determining feature.

For the flow need not be permanent to form a watercourse. *Rose v. St. Charles*, 49 Mo. 509.

Although a usual flow of water is an essential element of a watercourse. *Fryer v. Warner*, 29 Wis. 511.

And depressions which are dry except when it rains are not watercourses. *Benson v. Chicago & A. R. Co.* 78 Mo. 514.

If surface water has flowed in a certain direction for such a length of time as to have naturally formed a bed and banks and a well-defined stream of flowing water, even though it may sometimes be dry at the place where it had formed such bed and banks, it may still be a watercourse. *Eulrich v. Richter*, 41 Wis. 318.

#### f. Water which has joined a watercourse.

After water enters a stream and commences to flow within its banks it is no longer to be considered surface water. *Jones v. Hannovan*, 55 Mo. 442.

When once surface water has found its way to the beds of well-defined streams and has joined their currents it ceases to possess any of the

river from the Illinois side, and extends thence over lands in Knox county, Ind., to the city of Vincennes, in said county; that the branch line of railway is constructed upon and across the lands of defendant, where the railway crosses the Wabash river into Knox county, Ind.; that on the Indiana side, where said railway is constructed from the Indiana bank of the river for a short distance, the branch railway is built upon trestlework, in such manner that the water overflowing the Indiana side of the river, in times of floods, passes through the trestlework; that the defendant has built a levee on his lands upon and along the banks of the river, on the Indiana side, near to said trestlework, and intends and threatens to continue said levee upon and across the complainant's right of way, and to join the same to the embankment and end of said trestle, where the same unites with an embankment or filling of solid earthwork, upon which the railway is constructed. It is further

averred that the complainant has constructed its railway across the river upon a bridge with a sufficient opening on both sides of the river to suffer and permit the water accumulating in times of floods to pass, without material obstruction, through and under said bridge and trestlework; that a part of the plan, in constructing the bridge, was to leave open trestlework on the Indiana side of the river for the passage of flood water; and that, if the defendant shall complete his proposed levee, it will hold the flood water, when the river is high, within so narrow a channel that it will thereby become higher than it otherwise would, and would endanger the bridge, trestlework, and embankments of the railway, as well as the tracks and superstructure erected thereon, and would cause the right of way and other large bodies of land on the Illinois side of the river to be overflowed, subjecting the complainant to many suits by the owners of such lands for damages. The bill further avers that the

qualities of surface water. *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38.

Water flowing in a channel and fed by springs along its banks and bed, and melting snow in the mountains, is a watercourse, although at certain times it may be dry and at a certain point it spreads out over sandy soil so that a portion of it is absorbed. *Barnes v. Sabron*, 10 Nev. 236.

The channel universally taken by a stream which ordinarily loses itself in a sink hole whenever the water rises high enough to overflow the sink cannot be blocked up although overflows do not average to occur as often as once a year. *Carrier v. East Tennessee, V. & G. R. Co.*, 7 Lea, 388.

#### *Distinguished from basins or marshes.*

In *Curtis v. Ayrault*, 47 N. Y. 73, it appeared that except in times of high water the water stood three or four feet deep over a marsh without overflowing into a natural watercourse adjacent, and the court said that the waters which stood upon the marsh or were held in partial suspension in the earth were in legal effect surface water.

If a swamp or marsh is made by water oozing from the surrounding hills which is generally wholly absorbed by the marsh, and water only flows from it in times of excessive rains and melting snows, the water may be treated as surface water. *Boyn-ton v. Gilman*, 53 Vt. 17.

Water which collects in a quarry does not cease to be surface water so that it cannot be pumped into a natural watercourse, into which before the interruption it was accustomed to drain. *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 470.

When surface waters reach and become part of a permanent body of water retained in a natural basin forming a lake they lose their character as surface water, and the rules applicable to such waters do not longer apply. *Schaefer v. Marthaler*, 84 Minn. 457, 37 Am. Rep. 78; *Alcorn v. Sadler*, 66 Miss. 221.

A lake formed by living streams and emptying itself by filtering through a bed of gravel at one end towards which it flows with such rapidity as to create a continual current, is not surface water. *Hebron Gravel Road Co. v. Harvey*, 90 Ind. 122, 46 Am. Rep. 199.

#### *Definition of surface water.*

Besides the above cases which have attempted to define by exclusion several direct attempts have been made to define affirmatively.

Surface water is that which is diffused over the surface of the ground derived from falling rains

and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and then it becomes the running water of a stream and ceases to be surface water. *Crawford v. Rambo*, 44 Ohio St. 287.

The wild water that lies upon the surface of the earth or temporarily flows over it as the nature of artificial elevations or depressions may guide or invite it, but without a channel, and which may be caused by the falling of rain, or the melting of snow and ice, or the rising of contiguous streams or rivers, is within the rule governing surface water. *Taylor v. Fickas*, 64 Ind. 167, 81 Am. Rep. 114.

Water is surface water while it is oozing through the soil, or diffusing and squandering itself over the surface following no defined course. *Schaefer v. Marthaler*, and *Alcorn v. Sadler*, *supra*.

The term "surface water" includes such as is carried off by surface drainage, i. e., drainage independently of a watercourse. *Morrissey v. Chicago, B. & Q. R. Co.* (Neb.) Nov. 21, 1893.

Water which squanders itself over an indefinite surface is not a proper subject-matter for the acquisition of a right by usage. *Briscoe v. Drought*, 11 Ir. C. L. Rep. 250.

Water flowing down the side of a valley, with no marked stream or bank and no water but at exceptional seasons of the year, is mere surface water. *Morrison v. Bucksport & B. R. Co.* 67 Me. 353.

Surface water is such as falls from the clouds in the form of rain or snow, or rises to the surface in springs. *Gray v. McWilliams*, 21 L. R. A. 593, 98 Cal. 157.

From all the cases and definitions it would seem that surface water is water on the surface of the ground the source of which is so temporary or limited as not to be able to maintain for any considerable time, a stream or body of water having a well-defined and substantial existence.

#### *A question for the jury.*

In New York it has been said that the question whether or not a watercourse exists is for the jury. *Vernum v. Wheeler*, 35 Hun, 55.

#### *Water overflowing river banks.*

The attempt to class flood water from a stream as surface water has led to almost endless confusion. It is obvious that in some cases the overflow might be so slight and the water so widely diffused as to

complainant has been in the undisturbed possession and use of its right of way, as it now exists, and did exist at and before the time when the defendant began to construct his levee, for over twenty years; that it obtained the same by deed from the owner of the land, from whom the defendant long afterwards acquired his title. It is further averred that the complainant owns a right of way, 200 feet in width, over and across the defendant's land, held by a deed conveying all the right and privileges incident thereto, it being the purpose of the grantors in said deed to grant to said company such exclusive interest and estate in said strip of land (and no other interest or estate) as said company would acquire therein, were the same condemned to the use of said railroad by regular proceed-

ings under the statutes of the state in that behalf made and provided.

In support of the demurrer, counsel for the defendant contend that the riparian proprietor may lawfully protect his property from floods by erecting a dike or levee on the bank of a stream, though its necessary effect may be to turn its superabundant waters on the land of his neighbor; that the waters of a stream, when swollen beyond its banks by ordinary and habitually recurring floods, are in the nature of surface water; and that such waters are a common enemy, which such proprietor may fight off as he will. And it is further contended that the complainant, by its deed of conveyance, has acquired only an easement of way, and that the defendant retains the paramount title, and may law-

come within the above definition of surface water, and that in other cases the torrent is such as to preclude any resemblance to ordinary surface water.

As said by the supreme court of Georgia, whether or not flood water is surface water "depends upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel." If the flood water becomes severed from the main current or leaves the stream, never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season.

The authorities hold that a stream may be wholly dry at times without losing the character of a watercourse. So, on the other hand, it may have a "flood channel," to retain the surplus waters until they can be discharged by the natural flow. The low places on a river act as natural safety-valves in times of freshet." *O'Connell v. East Tennessee, V. & G. R. Co.* 18 L. R. A. 397, 37 Ga. 246.

Therefore, to attempt to make the rights with reference to flood water of a river depend upon whether or not it is surface water is useless. The only safe course is to treat flood water as a class by itself and then determine the respective rights according to the character of the flood.

Moreover, all time spent in determining whether or not it is surface water is wasted, for if it is decided to be such the further question immediately arises. What are the rights in regard to it which will depend upon what is sought to be done with it? (See note to *Gray v. McWilliams*, 21 L. R. A. 563, 98 Cal. 157.) Bringing in the surface water question merely complicates the matter and leads to conflict.

There are some cases in which the question of liability for raising the banks of a stream so as to cause the water to flow upon an adjoining owner has been discussed without any consideration of whether or not the flood water thereby diverted was surface water. *Wallace v. Drew*, 59 Barb. 418; *Moyer v. New York Cent. & H. R. Co.* 88 N. Y. 851; *Ordway v. Canisteo*, 66 Hun. 569; *Mundy v. New York, L. E. & W. R. Co.* 75 Hun. 479; *Ashberry v. West Seneca*, 33 N. Y. S. R. 431.

In England the courts have gone to the full extent of treating the flood water as a part of the stream and have ascertained the rights and duties of riparian owners accordingly.

There is no solid ground for distinction between the ordinary water of a stream and its flood water. *Menzies v. Breadalbane*, 8 Bligh, N. S. 414.

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So there is no difference between the rules governing the flood water and those governing the ordinary water of the stream. *Rex v. Trafford*, 1 Barn. & Ad. 374.

While this decision was reversed on appeal it was because the facts stated in the special verdict were not sufficient to sustain the judgment. The appellate court in the course of its opinion states that there appears to be no doubt that at common law the land holders would have the right to raise the banks of the river or brook from time to time as it became necessary upon their own lands so as to confine the flood water within the banks, with the single restriction that they did not thereby occasion any injury to the lands or property of other persons. 8 Bing. 204, 1 Moore & S. 401, 2 Crompt. & J. 265, Tyrw. 201.

Flood water cannot be dammed back. *Lawrence v. Great Northern R. Co.* 18 Q. B. 643.

#### a. The right to build levees.

There are places in which the overflow of the river is so disastrous that the safety of life and property demand the right to protect against the overflow the same as in the case of the sea which Lord Tenterden said was a common enemy. And in such cases the right is held to exist.

In *Dubose v. Levee Comrs.*, 11 La. Ann. 163, the court treated the right of the public to erect the levee as controlling and that of the landowner along the bank as subordinate.

In *Mailhot v. Pugh*, 30 La. Ann. 1869, the court holds that embankments against overflowing rivers may lawfully be erected, stating that such is the civil law, and further stating that one cannot claim damages for injuries to which he has contributed by his culpable indolence in refusing to aid the common object of fighting off flood water.

The state has an absolute power to construct levees. *Bass v. State*, 34 La. Ann. 494.

The flood water of a river may be fought off as a common enemy. *Lamb v. Reclamation Dist.* No. 103, 73 Cal. 125; *McDaniel v. Cummings*, 8 L. R. A. 575, 88 Cal. 515.

In California where the lower owner is compelled to permit surface water to pass off over his land, it is held that overflow water from a river is not within the rule, but that water which seeps or percolates through a levee along the bank of the river may be considered within the rule. *Gray v. McWilliams*, 21 L. R. A. 563, 98 Cal. 157.

It is worthy of note that the courts in which such right is maintained are those which have adopted the rule which recognizes a servitude in the flow of surface water.

The same result is reached in Indiana by holding that flood water is surface water, therefore it may be kept back by levees.

Levees may be constructed to protect against



fully erect his levee thereon, doing no unnecessary injury to the complainant. Cases are cited from the supreme court of this state, which, it is claimed, support these contentions. These cases, if of the character claimed, would be authoritative expositions of the law for the control and guidance of the courts of the state in regard to what constitutes surface water; but they would not be binding on the federal courts, unless the question is one of local law. The right of an adjoining landowner to make a new bank for a navigable river which forms the boundary between two states, or, by artificial structures, to turn the waters onto lands on the opposite side of the river, is not a local question, but one depending for its determination upon the general principles of the

law. The Wabash river, as the court judicially knows, and as the bill avers, is a navigable stream and public highway, upon which interstate commerce is carried; and, this being so, it must follow that questions relating to the channel and banks of the river are in no just sense local in their nature. It is firmly settled that the decisions of the state courts are not controlling, and ought not to be followed, upon questions of general law, where such decisions are found to be at variance with the general principles of the law. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 87 L. ed. 772, and cases there cited. The Indiana cases cited and relied on, in my judgment, have settled the law for this state that the superabundant water of a stream which, at times of ordinary floods, spreads

flood water if the channel of the stream is not obstructed. *Shelbyville & B. Turnp. Co. v. Green*, 99 Ind. 205.

Flood water of a river may be treated as surface water within the rule which permits a landowner to protect himself against such water. *Jean v. Pennsylvania Co. (Ind.)*, Jan. 12, 1894.

Although in *Evansville & C. R. Co. v. Dick*, 9 Ind. 488, an earlier case, a railroad company was held liable for obstructing flood water.

In *Hoard v. Des Moines*, 62 Iowa, 826, the court says, "that the owner of lowland along a river has no right to have the overflow water pass over his land on to that of other persons, requires no argument nor authority to demonstrate."

On the other hand, in *Avery v. Empire Woolen Co.*, 88 N. Y. 582, it is said that there is no right to embark against the flood water of a creek so as to interfere with its natural flow.

Flood water cannot be turned upon the land, lying upon the opposite side of the stream. *Burwell v. Hobson*, 12 Gratt. 323, 65 Am. Dec. 247.

Flood water of a river cannot be prevented from crossing the land of one person to the damage of others. *Nininger v. Norwood*, 73 Ala. 277, 47 Am. Rep. 412.

There is no right to fill up trestle work away from the main channel of the river, if thereby the amount of water flowing over adjoining land will be increased. *Noe v. Chicago, B. & Q. R. Co.* 78 Iowa, 360.

#### b. Cases holding flood water to be surface water.

Overflow water from a river is surface water. *Cairo & V. R. Co. v. Stevens*, 73 Ind. 233, 38 Am. Rep. 120; *Cairo & V. R. Co. v. Houry*, 77 Ind. 304; *Shelbyville & B. Turnp. Co. v. Green*, 99 Ind. 205.

Overflow water is subject to the rules governing surface water to the extent that it cannot be concentrated in a single channel and cast on to the land of a lower proprietor. *McCormick v. Kansas City, St. J. & C. B. R. Co.* 70 Mo. 359, 35 Am. Rep. 481.

Overflow water is surface water which cannot be dammed against in such manner as to injure an adjoining owner. *McCormick v. Kansas City, St. J. & C. B. R. Co.* 57 Mo. 483.

Overflow water of a river is practically surface water. *Morris v. Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343.

In *Abbott v. Kansas City, St. J. & C. B. R. Co.* 88 Mo. 271, 53 Am. Rep. 581, and *Jones v. St. Louis, I. M. & S. R. Co.* 84 Mo. 151, it was assumed that flood water of a river which had overflowed; its banks was surface water.

Flood water which has spread over the surrounding country is surface water. *Scheider v. Missouri Pac. R. Co.* 39 Mo. App. 63.

35 L. R. A.

#### a. Cases holding that it is not surface water.

It is difficult to see upon what principle the flood waters of a river can be likened to surface water. *Crawford v. Rambo*, 44 Ohio St. 237.

The overflow of a river is not surface water. *Barden v. Portage*, 79 Wis. 123.

Flood waters are not surface water which may be fought off. *O'Connell v. East Tennessee, V. & G. R. Co.* 13 L. R. A. 397, 87 Ga. 243.

Overflow water cannot be obstructed. *Sinai v. Louisville, N. O. & T. R. Co. (Miss.)* Dec. 4, 1893; *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 233, 36 Am. Rep. 480.

In connection with the latter case attention is called to the fact that in Missouri the rule is that there is no liability for obstructing the flow of surface water. The court in attempting to treat flood water as surface water overruled its former decisions, but subsequently became dissatisfied with such result and in turn overruled *Shane v. Kansas City, St. J. & C. B. R. Co.* *supra*, by *Abbott v. Kansas City, St. J. & C. B. R. Co.* 88 Mo. 271, 53 Am. Rep. 581. Whereas if the two classes of cases had been treated as distinct it might have avoided the uncertainty.

There are some cases which are so plain that they might safely be treated as cases of surface water.

Thus if the water of a stream ceases to remain in the channel and spreads out over the surface of lowlands and runs in different directions in swags and flats without any definite channel, it ceases to be a stream or watercourse. *Munkres v. Kansas City, St. J. & C. B. R. Co.* 73 Mo. 514.

And an embankment may be placed across an opening in the bank of a river into which the water runs in the form of a bayou, and in time of flood through which it runs and spreads itself over the adjacent country away from the river. *St. Louis, I. M. & S. R. Co. v. Schneider*, 30 Mo. App. 620.

Conversely water which has left the bed of a stream and is wandering over the adjacent land ceases to be surface water when it is turned back into the stream. *Sullens v. Chicago, R. 1. & P. R. Co.* 74 Iowa, 659; *Moore v. Chicago, B. & Q. R. Co.* 75 Iowa, 263.

So water which in time of flood is accustomed to pass from one river to another over lowlands lying between them is not surface water which can be dammed back. *Spelman v. Portage*, 41 Wis. 144.

So where in times of ordinary high water the stream extending beyond its banks is accustomed to flow down over the adjacent lowlands in a broader but still definite stream it has still the character of a watercourse, and the law relative to watercourses is applicable rather than that relating to mere surface water. *Byrne v. Minneapolis & St. L. R. Co.* 36 Minn. 212.

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out, and overflows its banks and channel, is to be deemed surface water, and, as such, that each proprietor may fight it off as he will, without liability to any one for damages occasioned thereby. *Taylor v. Fickas*, 64 Ind. 167, 81 Am. Rep. 114, was an action by an upper riparian proprietor against a lower one to recover damages for obstructing and throwing back the waters of the Ohio river, which, having been swollen by rains, had overflowed its banks. It was alleged that: "During times of high water and overflow, the water from the said river runs over the said tracts of land with a strong and rapid current,—the general current of the same running from east to west, first over the land of the plaintiff, and then over that of the defendant; the water in said current over said land varying in depth from two to ten feet,—and that the water (which is in fact a portion of the said river) has run in that manner, during seasons of high water, and during times of overflow, from time immemorial."

It was held that these waters were in the nature of surface water, and that the lower proprietor might lawfully fight them off as he saw fit, without regard to the damages caused thereby to the upper proprietor. The court says: "In the complaint before us, there is no averment of any watercourse, except, indeed, by way of parenthesis, that the place, during floods, is a part of the Ohio river. But the facts averred clearly show that it is not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of a watercourse, but that the flow is over the entire surface of the land, is occasioned by temporary causes, and is not usually there. The rights of the appellee, therefore, are such as a proprietor may have in surface water, which, as we have seen, is a part of his land; and the injuries or inconveniences which the appellant is alleged to have suffered are such as arise from the changes, accidents, and vicissitudes of natural causes."

In the case of *Cairo & V. R. Co. v. Stevens*, 78 Ind. 278, 88 Am. Rep. 139, the question arose upon a complaint charging that the defendant "negligently and unskillfully built and constructed an embankment, and failed, negligently and carelessly, in the construction of the embankment, to make any culvert," and that "by reason thereof the water coming upon the land of the plaintiff, and flowing thereon from the river and from the surrounding lands, has been stopped and hindered by said embankment from flowing under said embankment." In deciding the case, the court, upon the authority of *Taylor v. Fickas*, *supra*, assumed that the water which injured the plaintiff was surface water, but did not enter into a consideration of the question whether the water of a swollen stream would be regarded surface water. The court says:

"With reasonably near approximation to accuracy, it may be laid down as a general rule that, upon the boundaries of his own land,—not interfering with any natural or prescriptive watercourse,—the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing

water, from or across adjacent lands; and for any consequent repulsion, turning aside, or heaping up of these waters, to the injury of other lands, he will not be responsible."

In the case of *Shelbyville & B. Turnp. Co. v. Green*, 99 Ind. 205, it is held that a riparian proprietor may, by levees on his own land, protect it from overflow by floods,—not, however, obstructing the channel of the stream; and for this purpose he may build a levee over the graveled way of a turnpike company having an easement upon his land,—not materially injuring the use of the way,—even though his levee causes a greater overflow of water upon the land of others, and upon the turnpike.

In the case of *Jean v. Pennsylvania Co.* (Ind.) 36 N. E. Rep. 159, it is held that the overflow caused by a river spreading beyond its banks in time of high water must be regarded, and may be treated, as surface water. The same principle has been recognized in the following cases: *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Benthall v. Seifert*, 77 Ind. 302; *Cairo & V. R. Co. v. Houry*, Id. 864; *Hill v. Cincinnati, W. & M. R. Co.* 109 Ind. 511; *Weddell v. Hapner*, 124 Ind. 315; *Barnard v. Shirley*, 185 Ind. 563, 24 L. R. A. 568.

It is insisted—and, I think, with justice—that the opinion in *Taylor v. Fickas*, *supra*, upon which all subsequent Indiana cases rest, is based on an unfounded assumption. The court assumed—what is not true, in law or physics—that the water of the Ohio river, in times of ordinary floods, is surface water. The cases cited lend no just support to the assumption on which the opinion rests. It is settled law here, as well as elsewhere,—settled beyond serious debate,—that a railroad company, in bridging a stream, must provide a waterway for the passage of the water which flows into and down the stream in times of ordinary floods, but it is not bound to provide outlets for surface water. If the water of the Wabash river, in times of ordinary floods, is surface water, a railway company would be under no obligation to provide an outlet for its superabundant water at such times; and the ultimate result would be that all the company need do is to provide outlets sufficient to pass the water which flows in the channel, and within its banks. Such, however, is not the measure of its duty. Either the cases which hold that a railroad company, in bridging a stream, must provide a sufficient waterway for the passage of the superabundant water which flows into and down the stream in times of ordinary floods, are unsound, or else the doctrine of *Taylor v. Fickas*, *supra*, and of the cases which follow it, cannot be upheld.

In the decision of the case before me, it is not necessary to repudiate the doctrine of *Taylor v. Fickas*, *supra*, and of the other cases which follow it, because there is an essential difference between the facts in the present case and the facts in the cases hereinbefore cited and criticised. In those cases the embankments or obstructions complained of did not run upon and along the bank of the stream, but they were placed at right angles thereto, while here the levee runs upon the

bank, and parallel with the river. In this case the riparian owner proposes to change the bank by erecting an artificial upon the natural bank. There is also a plain difference between the backing up of flood waters on one side of the stream, and a change of the bank so made as necessarily to cast the water which flows in the stream at times of ordinary floods upon the proprietors of lands on the opposite side of the river. No Indiana case has been cited, and none is believed to exist, holding that a riparian proprietor has the right to erect a new bank along the margin of a stream, the necessary effect of which is to cast its superabundant waters, in times of ordinary floods, upon the lands of the opposite riparian proprietor, without responsibility for the proximate damages occasioned by such new bank. The flow of a river, when swollen beyond the low-water mark of the dry seasons by the ordinary rains which fall in wet seasons, or by the melting of snow, does not constitute surface water. The waters of a natural stream are not surface water, in any just sense, and the waters of a stream are those which are cast into it by rainfalls and melting snows. Ordinary rainfalls are such as are not unprecedented and extraordinary; and hence floods and freshets which habitually recur, though at irregular and infrequent intervals, are not extraordinary or unprecedented. It has been well said that "freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years, though at no regular intervals." Gould, *Waters*, § 211c. The waters cast into a stream by ordinary floods must have a channel in which they are accustomed to flow, and, if they have, that channel is a natural watercourse, with which no riparian proprietor can lawfully interfere to the injury of another. If there is a natural waterway or course, and its existence is necessary to carry off the water cast into the stream by ordinary floods, that way is the flood channel of the stream; and, if it is the flood channel of the stream, the water which flows there cannot be regarded as surface water. Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow. Surface water ceases to be such when it enters a watercourse in which it is accustomed to flow; for, having entered the stream, it becomes a part of it, and loses its original character. "A stream," says Gould, "does not cease to be a watercourse, and become mere surface water, because, at a certain point, it spreads over a level meadow, and flows for a distance without defined banks, before flowing again in a definite channel." Gould, *Waters*, § 264. It must necessarily follow from this general principle that where water naturally flows, though the volume may change with the varying seasons, there is a natural watercourse, even though at times the place where the water flows in ordinary floods may become entirely dry. It can make no difference that the boundaries within which the water flows change with varying seasons, for the way which nature has pro-

vided for its flow is the stream, and water flowing in that waterway is not surface water. As is well said in *Crawford v. Rambo*, 44 Ohio St. 279: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time, and the land over which it flows must be regarded as its channel. So that, when, swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood channel; and when, by drought, it is reduced to its minimum, that is its low-water channel."

Lord Tenterden, with whom originated the expression that "surface water is a common enemy," held, in *Rex v. Trafford*, 1 Barn. & Ad. 874, that the water of a stream was not surface water, and declared that the doctrine announced in *King v. Commissioners of Sewers*, 8 Barn. & C. 355 (the case in which he used the above expression), had no application to the waters of a natural stream. In the course of his opinion, he observes: "It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made in the ordinary course of water flowing in a bounded channel at all seasons of the year, and the extraordinary cause which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these feeders cannot be justified. No case has been cited or has been found that will support such a distinction."

In the case of *O'Connell v. East Tennessee, V. & G. R. Co.*, 87 Ga. 246, 13 L. R. A. 397, the supreme court of Georgia states the question before it thus: "The precise question in this case is whether the owner of land on the bank of a river can, without liability, erect on his own land an embankment which increases the overflow, in times of flood, upon the lands of the opposite proprietor, to the injury thereof."

After a full and careful consideration of the question it was held that there was no such right. In the course of the opinion the court observed: "The surplus waters do not cease to be a part of the river when they spread over the adjacent low grounds, without well-defined banks or channels, so long as they form with it one body of water, eventually to be discharged through the proper channel."

In *Mensies v. Breadalbane*, 8 Bligh, N. S. 414, the court says: "It is clear, beyond the possibility of doubt, that, by the law of England, such an operation cannot be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that course by a sort of new waterway, to the prejudice of the proprietor on the other side."

In *Burwell v. Hobson*, 12 Gratt. 823, 65 Am. Dec. 247, it is held that the water of a

stream, when swollen by ordinary floods, is not surface water. Speaking of the concession of counsel that the general rule is that the flow of a stream cannot be lawfully obstructed, and the denial of its application to the case before it, the court said:

"But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods by erecting a dike or other obstruction, though its necessary effect may be to turn the superabundant water on the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream is not laid down or recognized by any elementary writer, or in any adjudged case, so far as I have seen. The utmost extent to which the authorities go in that direction is that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change in the natural flow of the stream, and to prevent its old course from being altered. Angell, *Watercourses*, § 333. But he has no right to build anything which, in times of ordinary flood, will throw the waters on the grounds of another proprietor, so as to overflow and injure them. If, in the case of such an obstruction, it appear that the injury arose from causes which might have been foreseen, such as ordinary freshets, he is liable for the damage. *Id.* § 349. That the supposed distinction does not exist was expressly decided in *Rea v. Trafford*, 1 Barn. & Ad. 874."

The same principle is recognized or expressly decided in the following cases: *Jones v. Hannocan*, 55 Mo. 462; *Wharton v. Stevens*, 84 Iowa, 107, 15 L. R. A. 630; *Gerrish v. Clough*, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; *Hartshorn v. Chaddock*, 135 N. Y. 116, 17 L. R. A. 426; *Byrne v. Minneapolis & St. L. R. Co.* 38 Minn. 212; *Wallace v. Drew*, 59 Barb. 413; *Ordway v. Canisteo*, 66 Hun, 569, 835; *Carriger v. East Tennessee, V. & G. R. Co.* 7 Lea, 388; *West v. Taylor*, 16 Or. 165.

With reasonably near approximation to accuracy, it may be laid down as a general rule that all the waters of a river, which form one body, when flowing within the boundaries within which they have been immemorially accustomed to flow, in times of ordinary floods, constitute waters of the river, and are not surface waters.

The complainant owns a right of way over and across the lands of the defendant, 200 feet in width. Its title thereto was acquired by a deed of conveyance from the same party from whom the defendant subsequently ac-

quired his title. The deed conveyed to the complainant all the right, title, and estate which could have been acquired under condemnation proceedings under the statute of the state in that case made and provided. The complainant acquired an easement in the land, whose nature and extent are such as is necessary for the purpose of maintaining and operating its railway. The estate of the complainant is the dominant, and that of the defendant the servient. *Davidson v. Nicholson*, 59 Ind. 411; *Robinson v. Thrailkill*, 110 Ind. 117. The grant of an easement conveys all such incidental rights as are necessary to the enjoyment of the thing granted. The use to which an easement is devoted, or for which it is created, determines its character; and, to the extent that the use is necessary to carry out the purpose of the grant, the rights of the owner of the easement are paramount. An easement granted to a railway is essentially different from any other. The nature of railway service requires exclusive occupancy. A railroad company is held to the highest degree of care, and the exercise of this care necessarily requires that it should have complete dominion over its right of way. It is bound to prevent obstructions from being placed on its tracks, and is required to keep them fenced in, and free from rubbish or other combustible materials. The duties of a railway company are due to the public as well as to individuals, and these duties it must preform at its peril. The rules which apply to the use of streets or highways fail, when applied to railroads, because the necessities of their use are different. The railroad must have the exclusive possession and control of the land within the lines of its location, and the right to remove everything placed or growing thereon, which it may deem necessary to remove to insure the safe management of its road. *Hayden v. Skillings*, 78 Me. 493; *Brainard v. Clapp*, 10 Cush. 10, 57 Am. Dec. 74; *Hazen v. Boston & M. Railroad*, 2 Gray, 577; *Proprietors of Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 11, 6 Am. Rep. 181; *Jackson v. Rutland & B. R. Co.* 25 Vt. 150; *Connecticut & P. R. Co. v. Holton*, 33 Vt. 43; *Atlantic & Pacific Teleg. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 153, Fed. Cas. No. 632.

The construction of the levee as proposed would be a plain invasion of the complainant's exclusive rights.

It follows from the foregoing considerations that *the demurrer must be overruled*, and it is so ordered.

## ILLINOIS SUPREME COURT.

Sarah J. BARROWS, *Appl.*,

v.

City of SYCAMORE.

(150 ILL. 568.)

1. A standpipe or water tower placed in a street is an unlawful use thereof, although the fee belongs to the city which erects the tower.
2. Special injury is necessary to give a private right of action for the unlawful placing of a standpipe or water tower in a street.
3. The mere conclusion of the pleader that a standpipe or water tower is liable to blow over or burst is not a sufficient averment of special damages.
4. An allegation that a standpipe obstructs the light to a building is a sufficient allegation of special injury to the owner.

(June 12, 1894.)

**A** PPEAL by plaintiff from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit for De Kalb County in favor of defendant in an action brought to recover damages for the erection by defendant in a public street in front of plaintiff's property of a standpipe or water tower. *Reversed.*

The facts are stated in the opinion.

*Messrs. Jones & Rogers*, for appellant:

The pleadings show that plaintiff cannot successfully carry on her hotel business and can neither sell nor rent her said property.

Can a city, in the construction of waterworks, thus damage private property without making compensation for such damage?

Private property shall not be taken or damaged for public use without just compensation. Const. 1870, art. 2, § 13; *Rigney v. Chicago*, 102 Ill. 74.

If the market value of plaintiff's property is greatly depreciated on account of the construction and erection of this structure in a public street so near to said property as these pleadings aver, then there is a damage.

*Stockton v. Chicago*, 186 Ill. 484; *Springer v. Chicago*, 13 L. R. A. 609, 185 Ill. 560; *Chicago, B. & N. R. Co. v. Bowman*, 122 Ill. 595; *Chicago, P. & St. L. R. Co. v. Leah*, 41 Ill. App. 589.

In considering the depreciation of market value, all facts that contribute to produce damage as shown by the evidence may be considered.

*Chicago, P. & St. L. R. Co. v. Greiney*, 187 Ill. 633; *Chicago, P. & St. L. R. Co. v. Blume*, 137 Ill. 452; *Chicago, P. & St. L. R. Co. v. Niz*, 137 Ill. 144.

And this damage includes all actual inconveniences and damages the property may sustain in its use for the present and in the future.

**NOTE.**—Compare with the above case the Oregon case of *Savage v. Salem*, 24 L. R. A. 787, in which the court refused to treat tanks placed in a street for use in performing a contract for sprinkling the streets as nuisances per se.

As to the right to receive light and air from a street, see notes to *Case v. Minot (Mass.)* 23 L. R. A. 548.

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*Chicago, P. & St. L. R. Co. v. Blume*, and *Chicago, P. & St. L. R. Co. v. Niz*, *supra*.

As to land not taken, the landowner can recover only for the depreciation in its market value.

*Chicago, P. & St. L. R. Co. v. Greiney*, and *Springer v. Chicago*, *supra*.

The erection of such a structure or water tower in a public street, 135 feet high and 45 feet in circumference, is not the natural nor legitimate use of the street but is a diversion of the street from the use for which it was originally taken, and the owner of a lot adjoining a street does not take it subject to any such easement.

*Lahr v. Metropolitan Elec. R. Co.* 104 N. Y. 268; *Morrison v. Hinkson*, 87 Ill. 539, 29 Am. Rep. 77; *Lakes Erie & W. R. Co. v. Scott*, 8 L. R. A. 880, 132 Ill. 429; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 292; *Chicago, P. & St. L. R. Co. v. Aldrich*, 134 Ill. 15.

This property was used for resident and hotel purposes and if its value for such purposes was and is depreciated on account of the erection and maintenance of the structure in question on the part of the city, then we have a right to recover for damages thus occasioned.

*Johnson v. Freeport & M. R. R. Co.* 111 Ill. 419.

The plaintiff has a property right in the street adjacent to her lot different from that of the general public and in the nature of an incorporeal hereditament in the street adjacent to her premises.

*Crawford v. Delaware*, 7 Ohio St. 459; *Bingham v. Doane*, 9 Ohio, 168; *Little Miami and Pittsburgh, C. & St. L. R. Cos. v. Hambleton*, 40 Ohio St. 501; *Rensselaer v. Leopold*, 106 Ind. 29; *Denver v. Bayer*, 7 Colo. 113; *Story v. New York Elec. R. Co.* 90 N. Y. 123, 43 Am. Rep. 146; *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279, 48 Am. Rep. 342; *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550.

And the same view is maintained in *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123; *Hannon v. Chicago, M. & St. P. R. Co.* 61 Iowa, 588; *Buchner v. Chicago, M. & N. W. R. Co.* 56 Wis. 403; *Mulholland v. Des Moines, A. & W. R. Co.* 60 Iowa, 740; *Carli v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 41 Am. Dec. 290; *Edmison v. Lowry* (S. Dak.) 17 L. R. A. 275; *Morrison v. Hinkson*, 87 Ill. 589, 29 Am. Rep. 77.

*Messrs. Carnes & Dunton*, for appellee:

A demurrer to a pleading admits the truth of the facts well pleaded, but does not admit the conclusions sought to be drawn from them.

*Arens v. Weir*, 89 Ill. 25; *Greig v. Russell*, 115 Ill. 483; *People v. Hatch*, 33 Ill. 9; *Compher v. People*, 12 Ill. 280; *Stone v. Russell*, 36 Ill. 18; *Story*, Eq. Pl. 9th ed. § 452, and note a; *Whart. Ev.* § 840.

A demurrer does not admit arguments, inferences, and conclusions of law.

5 Am. & Eng. Encyclop. Law, p. 560, note 7; *Com. v. Allegheny Bridge Co.* 20 Pa. 185; *Ellmaker v. Franklin F. Ins. Co.* 6 Watts & S. 489; *Millard v. Baldwin*, 3 Gray, 484.

A demurrer does not admit inferences from facts, arguments, or conclusions.

*Com. v. Allegheny County Comrs.* 87 Pa. 377;

*State v. Collins*, 5 Wis. 839; *United States v. Ames*, 99 U. S. 45, 25 L. ed. 800; *Dillon v. Barnard*, 88 U. S. 21 Wall. 437, 22 L. ed. 676.

Under our statute cities are given exclusive control of all streets and alleys within the corporate limits. The fee of the streets is in the corporation, and the dominion over them is as absolute as that of the owner of other lands.

*Cairo & V. R. Co. v. People*, 92 Ill. 170; *Moses v. Pittsburgh, Ft. W. & O. R. Co.* 21 Ill. 522; *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 807; *Chicago & N. W. R. Co. v. People*, 91 Ill. 251; *Quincy v. Bull*, 106 Ill. 387.

In 2 Dillon on Municipal Corporations, 2d ed. 551, it is laid down: "The use of streets for the purpose of laying down water-pipes stands upon the same principle as their use for sewers and gas-pipes.

The municipal authorities may build a reservoir or cistern in a street to retain water with which to sprinkle streets or extinguish fires.

*West v. Bancroft*, 32 Vt. 367; *Lewis, Em. Dom.* §§ 126, 128.

The erection of lamps for street lighting, of hydrants, fire-plugs, drinking fountains, and water-troughs are all familiar and well-authorized uses of streets as well as the erection of statuary and ornaments.

*Rigney v. Chicago*, 102 Ill. 64; *Shawneetown v. Mason*, 82 Ill. 837, 25 Am. Rep. 821.

For any act obstructing a public and common right no common private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than any other person.

*Chicago v. Union Building Assn.* 102 Ill. 379, 40 Am. Rep. 598; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795.

There can be no recovery for a mere theoretical injury where the act complained of is of itself lawful.

3 Sutherland, Damages, 397; *Chicago, B. & N. R. Co. v. Bowman*, 122 Ill. 595; *McReynolds v. Baltimore & O. R. Co.* 106 Ill. 152; *Peoria & P. U. R. Co. v. Peoria & F. R. Co.* 105 Ill. 110.

The doctrine of ancient lights does not prevail in this state.

*Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Tinker v. Forbes*, 186 Ill. 231.

But even in jurisdictions where the doctrine of ancient lights is upheld, the law is, that to form a basis for recovery there must be a substantial privation of light sufficient to render the occupation of the house comparatively uncomfortable. Mere diminution of a ray or two of light will not suffice.

Addison, Torts, § 208; *Back v. Stacey*, 2 Car. & P. 466.

**Wilkin, J.**, delivered the opinion of the court:

This is an action on the case by appellant against appellee, in the circuit court of DeKalb county, to recover damages for an alleged injury to real property. The circuit court sustained a demurrer to the declaration, and rendered judgment against the plaintiff for costs, from which she appealed to the appellate court of the second district, and from a judgment of affirmance in that court prosecuted this appeal.

The cause of action set up in the declaration is that plaintiff is the owner of a certain

lot in the city of Sycamore, with a two-story building on the southwest corner thereof, fronting south and west on State and Main streets, which she used and occupied as a residence and hotel; that the city "injuriously, unjustly, and wrongfully constructed, or caused to be constructed and erected, at or near the center of the intersection of said streets, and at a distance of about 564 feet from said hotel building, a standpipe, or water tower," 15 feet in diameter, and about 185 feet high, having a capacity of 179,000 gallons, made of steel or iron plates, 5 feet wide, riveted together, the lower course being nine sixteenths of an inch thick, and those above diminishing to the upper course, which was three sixteenths of an inch. This structure is alleged to have caused an injury to plaintiff's building, which is set forth in each of the four counts of the declaration as follows: First count: "Which standpipe, by reason of the fact that there is a constant apprehension that it may fall over upon said hotel building, and, by its great weight, injure, crush, or destroy the same, or that it might blow over upon said property, or burst and flood the same, greatly depreciates in value the premises for residence, hotel, and business purposes, and especially greatly depreciates in price the market value of said premises." Second count: "Which standpipe is liable to fall or blow over upon said premises, and, by its great weight, injure, crush, or destroy said building, and is liable to burst, and flood said premises, and thus injure the same, or destroy the said hotel building, and thereby greatly depreciates in value said premises," etc. Third count: "Which standpipe is of a dangerous character, and is liable to fall or blow over upon said hotel building, and, by its great weight, injure, crush, or destroy the same, and is liable to burst and flood said premises, and thus injure the same, or destroy the said hotel building; and the standpipe is a constant menace to plaintiff's property, and the liability of said structure and structures of like character to fall or blow over or burst has thereby greatly depreciated in value said premises for residence, hotel, or other business purposes, and especially greatly depreciates in price the market value of said premises." Fourth count: "And, by reason of defendant's constructing or causing to be constructed, said standpipe, as above stated, in the public streets of said city, and so near to plaintiff's hotel building, said standpipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting room in the southwest corner of said hotel building, and obstructs the view from said hotel building; and said standpipe, being of so great height, and in front of and near said plaintiffs' said premises, casts a shadow upon said hotel building, and makes the appearance of said premises unsightly, and otherwise injuriously affects said premises, and thus plaintiff's said premises are less convenient and comfortable for residence and hotel purposes; and by reason of the wrongful acts and doings of the defendant as aforesaid, and the injuries done to plaintiff's

property as aforesaid, the market value of plaintiff's said premises is thereby greatly decreased." Each of these counts concludes with the averment "that, by means of the premises, the said defendant has greatly injured and damaged the said property of plaintiff, within the meaning of the constitution and laws of the state of Illinois; yet the said defendant has never paid, nor offered to pay, to the said plaintiff, any of the damage so injuriously and unjustly caused to the plaintiff's said property, nor has any proceeding been instituted by the defendant for the purpose of having just compensation therefor ascertained; and the plaintiff avers that, by reason of the premises above set forth, the plaintiff's said property has been greatly damaged and depreciated in value, to the damage of said plaintiff of the sum of three thousand (\$3,000), and therefore she brings her suit," etc. It thus appears that the declaration proceeds both upon the ground that placing the standpipe in the street was wrongful, and, even if authorized by law, plaintiff's property could not, under the constitution, be damaged thereby without just compensation, which had not been ascertained. The demurrer was, in effect, general to each count, viz., it made no objection to the declaration on account of duplicity or the mere form of pleading, and therefore the only question presented for our decision is, does either of the counts state, in substance, a good cause of action?

It is insisted on behalf of the city that, being the owner of the fee in the streets, and having the absolute control over them, it had a right to build the standpipe in them, and that, if injury resulted thereby to plaintiff's property, it is *damnum absque injuria*. The soundness of this position depends upon whether the placing of a structure like that described in the declaration in the streets of a city is consistent with the objects for which streets are established, and held by municipal authorities in trust for the public use. The general rule, long recognized by this court, is that, having the free and exclusive control over streets, municipal authorities may appropriate them to any use not incompatible with the object for which they were established. *Quincy v. Bull*, 106 Ill. 387, and cases there cited. In the application of the rule, it has been held in the case cited and others that a city council may lawfully authorize the laying of railroad tracks upon, and water, sewer, and gas pipes under, public streets, and that property owners could neither enjoin such use, nor recover damages to property occasioned thereby. Laying pipes under the streets for the purpose of distributing water and gas, and carrying off sewage, is lawful, both because it is necessary for the health, comfort, and convenience of the inhabitants, and because it in no way interferes with, and is not incompatible with, the use of such streets for public travel. Railroad tracks may be lawfully laid in streets for the same reason, as stated in the *Moses Case*, 31 Ill. 522, cited in *Quincy v. Bull*, *supra*: "A street is made for the passage of persons and property, and the law cannot define what exclusive means of trans-

portation and passage shall be used." It was, however, held in *Stack v. East St. Louis*, 85 Ill. 877, 28 Am. Rep. 619, and cases cited to the same effect in *Ligare v. Chicago*, 189 Ill. 46, that, in permitting the use of streets for other purposes than public thoroughfares, "the city has no right to so obstruct them as to deprive the public and adjacent property holders of their use as streets. The primary object is for ordinary passage and travel, and the public and individuals cannot be rightfully deprived of such use." It does not follow, therefore, that, because railroad tracks may be put on or pipes under streets, structures like the one described in this declaration can be built in them. Water and gas pipes, with hydrants, lamp-posts, and other appliances, are necessary for the distribution of water and light over the city, and the streets may be legitimately used for that purpose; but it would scarcely be contended that the water or gas works themselves could be lawfully built in a public street, as not being inconsistent with the public use. In fact directly the contrary was held in *Morrison v. Hinkson*, 87 Ill. 587, 20 Am. Rep. 77, as to waterworks. It was there said: "But it is not conceded that the erection of a water tank in the center of the street, occupying one half of the width thereof, and the erection and operating of a steam engine in connection therewith, even for the purposes of supplying the city and the residents thereof with water, are some of the uses of a street as such, for which the ground may be appropriately used under a dedication thereof as a street. The owner of a lot adjoining a street does not take the same subject to any such easement." It is true it was stated in that case that the proof did not show in whom the fee of the street was vested, but, if the same could not be said here (there being no allegation in the declaration as to that fact), still, as shown by *Stack v. East St. Louis*, *supra*, and cases there referred to, the fact that the title is in the city gives it no right to prevent its use as a street. The fee-simple title, though in the city, is held in trust for the public use as a street. Nor do we regard the fact that the tank in *Morrison v. Hinkson*, occupied more of the street, and was filled by machinery immediately attached, also in the street, distinguishes that case in principle from this. A standpipe is but a part of the machinery and appliances with which water is forced into the pipes throughout the city. There is no necessity for placing it in a public street, and, so far as appears in this case, neither the health, comfort, nor convenience of the public or individual citizens is promoted by so doing. Therefore, placing it there was an unlawful use of the street, and the dimensions of the structure, and the manner of operating it, in the decision of this case, affect only the question of damages, to be hereafter considered. Our opinion, then, is, that the allegations of the declaration, admitted by the demurrer, show that the city wrongfully placed the structure in its streets.

It does not, however, follow that a good cause of action in the plaintiff is shown by her declaration. It is well settled that for obstructions to streets, resulting in no special

injury to an individual, the public alone can complain. *McDonald v. English*, 85 Ill. 282; *Morrison v. Hinkson*, *supra*. The individual right, under our present constitution, is thus stated in *Rigney v. Chicago*, 102 Ill. 80: "While it is clear that the present constitution intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like will generally cause a direct depreciation in the value of neighboring property; yet that is clearly a case of a *damnum absque injuria*. So as to an obstruction in a public street,—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that, by reason of such disturbance, he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. When the action is by an individual, the special injury is the gist of the action, and, unless it is alleged and proved, there can be no recovery." *McDonald v. English*, *supra*.

Under this rule, it is too clear for argument that neither of the first three counts of the declaration shows a right of action in the plaintiff. The special injury attempted to be set up in each of these counts is that her property has been depreciated in value, because of the danger of the building being destroyed or damaged by the standpipe falling or being blown upon it, or by bursting and flooding it with water, but not a single fact is alleged upon which the apprehension of such danger can be based. In the first count, nothing but the apprehension itself is alleged; and in the second and third, merely that it (the standpipe) is "liable" to fall, blow over, or burst. Why the apprehension exists, or why it is liable to fall, etc., is left wholly to conjecture. It certainly will not be contended that the manner in which it is constructed, as shown by the declaration, necessarily renders it dangerous. No one will deny that such a structure could be rendered reasonably secure by proper stays and braces, though it might not be so without. True, as in the instances referred to by counsel for appellee, water towers and standpipes have fallen or been destroyed, but the same is true of every kind of buildings,—perhaps of all superstructures. If this one is liable to fall, blow down, or burst, that liability must arise from certain facts, and those facts must be pleaded. Here we have nothing but the mere conclusion of the pleader. The fourth count avers that "said standpipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting room in the southwest corner," etc. We are unable to see why this is not a sufficient allegation of special injury to plaintiff's property to entitle her to recover. *Rigney v. Chicago*, *supra*. The extent of the injury is a question of fact, to be determined upon plea and trial. We think the circuit court erred in sustaining the demurrer to the fourth count.

*Reversed and remanded.*

## DELAWARE COURT OF ERRORS AND APPEALS.

Mayor and Council of WILMINGTON, *Pf.*  
*in Err.*,  
v.

Joseph W. VANDEGRIFT.

(.....Del.....)

- \*1. The municipal court of the city of Wilmington is an inferior court established by the general assembly in pursuance of the constitution of this state, and has jurisdiction of common nuisances in said city.
2. Coasting upon the public streets of the city of Wilmington is intrinsically a common nuisance, independently of any ordinance of the city council declaring it so to be; and the neglect of the city police to abate and

\*Headnotes by WOLCOTT, CL.

NOTE.—Upon the question of the liability of a municipality for acts of its police officers, see note to *Whitefield v. Paris* (Tex.) 15 L. R. A. 733.  
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suppress such a nuisance involves no municipal liability for damage done to a person passing along said street by one thus engaged in coasting.

(June 22, 1896.)

ERROR to the Superior Court for Newcastle County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries inflicted upon plaintiff by persons coasting upon a public street in defendant city. *Reversed.*

The facts are stated in the opinion.

Mr. Charles M. Curtis, for plaintiff in error:

Where the ground of the action is neglect of the corporation to remedy causes of danger occasioned by the wrongful acts of others, notice of the condition of the street, or what is equivalent to notice, is necessary to give a right of action against the corporation.



2 Dill. Mun. Corp. § 1020.

The use of the public roads and streets by persons coasting in such manner as to make the highway unsafe for travelers, as alleged in the plaintiff's declaration, constitutes a nuisance.

Wood, Nuisances, § 251; *Faulkner v. Aurora*, 85 Ind. 150, 44 Am. Rep. 1; *Schultz v. Milwaukee*, 49 Wis. 254, 85 Am. Rep. 779.

The duty of prevention of the nuisance alleged is a public governmental and police duty, just as is the duty to prevent breaches of the peace and to enforce other general laws.

Therefore, the neglected duty of the defendant city in this case was a general duty imposed by a general law of the state, and is imposed upon it as a public instrumentality of the state, as the agent of the sovereignty of the state.

*Galveston v. Poeninsky*, 62 Tex. 118, 50 Am. Rep. 517.

A municipal corporation is not liable for injuries to persons while on the highways which do not result from a defect in the construction of the street or failure to maintain the street in a safe condition as a street, and is not liable for injuries to travelers done by an unlawful use of the highway by persons not the officers or agents of the corporation, and which use was not authorized or licensed by the corporation or the source of profit to it.

*Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Barber v. Roxbury*, 11 Allen, 318; *Lafayette v. Timberlake*, 88 Ind. 330; *Vinal v. Dorchester*, 7 Gray, 421.

The manner in which a highway is used by the public is a different thing from its quality and condition as a street.

*Barber v. Roxbury*, *supra*; *Lafayette v. Timberlake*, 88 Ind. 332; *Vinal v. Dorchester*, *supra*.

A clear example of the application of the rule appears from the following cases where persons were injured while lawfully in the highway by persons firing cannons in the highway.

*Norristown v. Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 771; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857; *Campbell v. Montgomery*, 53 Ala. 527, 25 Am. Rep. 656.

Another illustration of the rule is the case of persons injured while in the public streets by fireworks discharged by persons in the public streets or squares, and the following cases establish that the municipal corporations are not liable for such injuries:

*Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 305; *Hill v. Charlotte*, 72 N. C. 55; *Lincoln v. Boston*, 3 L. R. A. 257, 148 Mass. 578; *Speir v. Brooklyn*, 21 L. R. A. 641, 139 N. Y. 6.

Municipal corporations are under no common-law liability to pay for property of individuals destroyed by mobs or riotous or disorderly assemblages.

2 Dill. Mun. Corp. § 950; *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375.

A municipal corporation is not liable in an action for damages for injuries to a traveler on the streets of the city caused by his having been struck by a person coasting, sledding, or sliding on said street, even though such use rendered the street unsafe and dangerous, and 25 L. R. A.

though the municipal authorities had notice of such use, and neglected to stop it.

*Cooley*, Const. Lim. 203, note 1; *Elliott, Roads & Streets*, 465; *Schultz v. Milwaukee*, 49 Wis. 254, 85 Am. Rep. 779; *Lafayette v. Timberlake*, 88 Ind. 330; *Faulkner v. Aurora*, 85 Ind. 150, 44 Am. Rep. 1; *Hutchinson v. Concord*, 41 Vt. 271, 98 Am. Dec. 584; *Ray v. Manchester*, 46 N.H. 59, 88 Am. Dec. 192; *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105; *Shepherd v. Chelsea*, 4 Allen, 18; *Pierce v. New Bedford*, 129 Mass. 584, 87 Am. Rep. 887; *Ball v. Woodbine*, *supra*.

Cities are not liable for the failure of their officers to perform police duties or for the manner of the performance of such duties.

*Western College of Homeopathic Medicine v. Cleveland*, *supra*; *Hart v. Bridgeport*, 13 Blatchf. 289; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857; *Norristown v. Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 777; *Lincoln v. Boston*, 3 L. R. A. 257, 148 Mass. 578; *Faulkner v. Aurora*, 85 Ind. 150, 44 Am. Rep. 1; *Lafayette v. Timberlake*, *supra*; *Odell Trustees v. Schroeder*, 58 Ill. 353; *Mitchell v. Rockland*, 52 Me. 118; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272.

The defendant is not liable for failure to pass an ordinance prohibiting coasting on the public streets.

Whether an ordinance relating to any subject-matter shall be passed or not by the legislative body of a city is always discretionary, and for failure to discharge discretionary duties a municipal corporation is not liable.

*Cooley*, Const. Lim. 203; *Elliott, Roads & Streets*, p. 464; *Dill. Mun. Corp.* 203; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Robinson v. Greenville*, *supra*; *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787; *Faulkner v. Aurora*, *Lafayette v. Timberlake*, and *Hutchinson v. Concord*, *supra*; *Campbell v. Montgomery*, 53 Ala. 527, 25 Am. Rep. 656; *Hill v. Charlotte*, 72 N. C. 55; *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105; *McDade v. Chester*, 117 Pa. 414.

*Mr. John Biggs* for defendant in error.

*Wolcott, Ch.*, delivered the opinion of the court:

This was an action on the case, instituted in the court below against the mayor and council of Wilmington (a corporation existing under the laws of the state of Delaware) by Joseph W. Vandegrift, to recover damages for injuries received while walking along French street, in the city of Wilmington, at or near its intersection with Seventh street. It is alleged in the declaration that the plaintiff in error willfully and negligently suffered boys and other persons to frequently use said Seventh street for the purpose of sledding and coasting thereon in an unlawful and improper manner, and that by reason of such allowance of such unlawful use of said Seventh street the defendant in error, on the night of the 3d day of December, A. D. 1890, while lawfully walking along French street, at or near its intersection with Seventh street, was run into and knocked down by a sled propelled by the weight of one Joseph McHugh, and thereby seriously

injured. Wherefore, he claimed large damages. To the declaration the plaintiff in error demurred generally, and, in accordance with the act of assembly in that behalf, specified divers causes of demurrer to the said declaration and the several counts thereof. The court overruled the demurrer, and rendered judgment in favor of the defendant in error. Thereupon, the plaintiff in error brought the case to this court to be reviewed on writ of error. The judgment was assigned as error.

For the purposes of this case, it is unnecessary to notice separately the several counts in which the cause of action is variously described. It is sufficient to state that the declaration contains a circumstantial statement of the injuries complained of, and a distinct averment that they were the result of the willful negligence of the plaintiff in error. The demurrer admits all the facts set forth in the declaration, that are properly pleaded, to be true. The only question, therefore, with which this court can deal, is whether those facts, in law, constitute a sufficient ground of action. To determine this question, it is necessary to ascertain what the duties and powers of the plaintiff in error were in respect to the prevention and suppression of the practice of coasting on the streets of Wilmington, or such other unlawful use thereof as would interfere with, or render unsafe, public travel. This will necessarily involve the duty of making a critical examination of those provisions of the city charter relating to that subject, and the regulations established by the city authorities in that behalf. While this court, sitting as a court of errors, cannot go outside of the record for any facts upon which to rest its judgment, yet we think, notwithstanding the allegation of actionable negligence, and the admission made by the demurrer, that the act of assembly from which the plaintiff in error derives its existence, and the ordinances enacted in pursuance thereof, are as much the subjects of legitimate inquiry as if they were literally incorporated in the pleadings before us. The averment that the accident complained of was the result of a willful disregard of a corporate duty was more in the nature of a conclusion of law than a bare statement of fact; and consequently the demurrant cannot be concluded by the admission that it makes, only so far as such averment is sustained or supported by the law of its being, and the principles that underlie the duties and liabilities of municipal corporations. To decide the question presented by the record in this case independently of the charter of the municipality of Wilmington and the ordinances, would limit the scope of our inquiry to the consideration merely of the regularity of the pleadings, and thus leave untouched the real essence of the controversy, and subject the parties to the necessity of pursuing their rights in the court below according to the course of law in that jurisdiction prescribed. While general principles are always of great assistance in determining the liabilities of a municipal corporation in civil actions for private injuries, yet the terms employed by the legislature to convey or impart its powers are of first im-

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portance in ascertaining its duties and corresponding liabilities.

The counsel for the defendant in error assumed in his argument that the practice of coasting on Seventh street, as alleged in the declaration, was a public nuisance, and contended with much force that the plaintiff in error was liable for the damages thereby sustained by his client, because no steps were taken by it, through the agency of the street and sewer department, pursuant to the authority given to define and remove nuisances in section 81 of its charter, to declare such practice to be a nuisance, and prohibit the continuance thereof, after its dangerous character had been brought to its knowledge. Now, let us see whether this contention is met or satisfied by any of the provisions of said charter. By section 14 of the charter a municipal court is created, and by section 15 its jurisdiction is limited and defined. By the latter section it is given "sole and exclusive jurisdiction to inquire of, hear, try and finally determine all those criminal matters and offences enumerated in the 15th section of the 6th article of the amended Constitution, and committed within said city and to punish all persons convicted of said offences or any of them agreeably to the laws of this state." The 15th section of the 6th article of the Constitution, referred to, confers upon the general assembly of this state power to establish inferior courts, and clothe them with jurisdiction of certain criminal matters, and among them are enumerated nuisances. It is therefore clear that the municipal court of the city of Wilmington had jurisdiction of public nuisances, as it is an inferior court established by the general assembly of this state pursuant to the section and article of the constitution before referred to. Was the practice of coasting, as set forth in the declaration, such a nuisance as was contemplated by the framers of the constitution? We have no doubt that it was, for it answers to and contains all the elements necessary to constitute a nuisance indictable at common law, and punishable under the laws of this state. A learned writer on the subject defines a common or public nuisance "to be an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of a right common to all." Seventh street is a well-known public highway in the city of Wilmington, and for purposes of travel the people had a right to the free and uninterrupted use thereof. The occupation of said street by persons indulging in the sport of coasting, as described in the declaration, was unlawful, independently of any ordinance; and certainly endangered the lives and safety of the people, and constituted a serious obstruction of the public in the exercise or enjoyment of a common right. It was therefore a common nuisance, and clearly within the definition quoted. The municipal court, it will be observed, is clothed with full power to punish persons convicted of such an offense, agreeably to the laws of this state. What is that punishment? The 18th section

of chapter 127 of the Revised Code provides that "assaults, batteries, nuisances, and all other offences, indictable at common law and not specially provided for by statute, shall be deemed misdemeanors and shall be punishable by fine and imprisonment, or either, according to the discretion of the court." Now, since the municipal court of Wilmington has complete jurisdiction of all nuisances indictable at common law, committed within its limits, with full power to inflict severe punishments upon offenders, what more effectual mode could have been devised than has been done for the prevention and suppression of the practice of coasting as alleged in the declaration? Clearly none. The passing of an ordinance by the street and sewer department imposing a fine upon any person who might be engaged in such sport would have been an idle exercise of its legislative functions, and would have fallen far short of the end intended to have been accomplished thereby.

It is claimed, however, that the jurisdiction of the municipal court over nuisances could not be legally invoked, because no ordinance was ever passed, expressly defining this particular sport or practice to be a nuisance. But does its jurisdiction in respect to nuisances remain dormant or inactive until the acts and conditions that constitute nuisances are defined by ordinances to be such? Surely not, for the bare statement of such a proposition, in view of the express language or terms in which such jurisdiction is conferred, demonstrates its utter fallacy. Such jurisdiction was given without reservation of condition, and its utility or efficiency was not made to depend upon the contingency of the passing or not passing of ordinances defining such offenses to be nuisances. With the same propriety it might be contended that the court of general sessions, sitting in either county of this state, could not exercise jurisdiction of nuisances committed without the city of Wilmington until the legislature had first declared by statute what the essentials of a common nuisance are. While it is true that the legislature may declare what a nuisance is, in the absence of such a declaration the court would be compelled to take cognizance of such matters, and conduct the same to a final hearing and determination. So the municipal court of Wilmington, notwithstanding the authority vested in the legislative body of the city to define nuisances, cannot, because of the omission to exercise such authority, legally refuse to assert its jurisdiction of the same, when formally and properly invoked. Of what practical use could the passage of such an ordinance be? For no definition of a nuisance, that included coasting on the streets of Wilmington, could be formulated by the wit of man that could make it any more or less a nuisance than it was. It was intrinsically a common nuisance, the definition whereof is too well known, and its ingredients and characteristics too well understood, to require even the sanction of the legislature of the state, much less the legislative body of any municipality therein, to make it more definite, or to impart more certainty to its signification than

it already possesses. Another prevailing reason why the definition of a public nuisance by ordinance is not made a condition precedent to the exercise of jurisdiction of the same by the municipal court is that it would tend rather to confusion than to simplicity in the trial and conviction of persons charged with the commission of such an offense. It is not probable that the legislative body of Wilmington could by ordinance improve on the common-law definition of a nuisance, embracing notorious obstructions of a public highway, which has for so long a time stood the test of the most severe judicial scrutiny and examination. There being then no necessity for such an ordinance (conceding for the moment that none was ever passed), no duty in respect thereto ever arose; and, there being no duty, there was no liability. It borders on the absurd to suppose that the legislature intended by the incorporation of the city of Wilmington to impose any such unnecessary and superfluous duty on the legislative branch of its government.

In this connection, it may be asked, why was the authority given to "the council," now the "street and sewer department," to define nuisances, as provided in section 31 of the city charter? At first blush, it may appear to be inconsistent with the construction given to section 15 as to the powers and jurisdiction of the municipal court; but, upon a close examination of both sections together, this apparent inconsistency wholly disappears, for this authority may be construed to have effect without interfering or clashing with the jurisdiction of the municipal court, as provided in the first branch of the jurisdiction clause of said section 15. It may well have been given to declare such acts, conditions, and objects to be nuisances that are not clearly within the legal notion of a public nuisance at common law. How far such authority extends is a question we shall not stop to consider, as it is unnecessary for the purposes of this decision. It is certain, however, that a nuisance such as that described in the declaration was not intended to be brought within the general authority to define nuisances, for it is an offense against the state, the measure of whose punishment is fixed by a general law of the state; and any definition thereof, if contrary to the legal and well-settled definition of a common nuisance, would be void, and any definition merely declaratory of the same would simply be useless.

Having arrived at the conclusion that no municipal liability attached to a failure of the legislative body of the city to pass an ordinance defining coasting on its streets, as alleged in the declaration, it only remains now for the court to consider whether the neglect of the city constables to suppress such sport, upon the principle of *respondent superior*, made the city liable to the defendant in error for the injuries received at the time designated in the declaration. The decision of this question depends upon the solution of a preliminary question, which is whether such officers were, in respect to such a police duty, the agents or servants of the state, or of the city in its corporate capacity.

If the agents or servants of the former, clearly the city is not liable. It is sometimes quite difficult to draw the line of distinction between strictly corporate duties and public duties, as to the police officers of a municipality, but in this case the distinction is so well marked that we are not embarrassed with any perplexing question of that sort. By section 15 of the city charter the legislature conferred upon the municipal court sole and exclusive jurisdiction of the entire group of offenses (including nuisances) enumerated in the 15th section of the 6th article of the Constitution, with power to hear, try, and finally determine the same under the laws of the state of Delaware. It frequently occurs that the state, in the distribution of its powers, for the sake of convenience and expediency, confides to certain local governments, within well-defined territorial limits, the power to administer criminal justice therein. But, because such authority is limited to a certain locality or district, it does not make the duties which the possession of such power imposes, nor the agents charged with the performance thereof, any more or less public in their character. The preservation of the peace is one of the most important functions of state governments, and it makes no difference to what tribunal that duty or power is intrusted. It is still essentially a matter of public concern, and does not lose its public character. To commit any of the offenses within the city of Wilmington, of which the municipal court thereof is given sole and exclusive jurisdiction, would be an infraction of the laws of the state, and therefore against its peace and dignity, and punishable by said court, as it would be in the state court having general jurisdiction of the same according to the general provisions of law in that behalf. Assaults and batteries are included in the same category as nuisances. Now, could it be claimed with any show of reason that the duty of the police officers to break up street fights and brawls is not a public duty, and that for the nonperformance or neglect thereof the municipality would be liable to any one for a private injury occasioned thereby? Clearly not, because it is such a duty as relates to the execution of a state law, and the officers charged therewith, though servants of the municipality, are, to the extent of such duty, public officers, and for the neglect to perform the same no municipal liability attaches. The same is equally true as to the duties of police officers in regard to nuisances. The municipal court of Wilmington is therefore a public instrumentality constituted by the legislature for the trial and punishment of such criminal disorders as are enumerated in the section and article of the constitution before referred to,

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and the duties of the municipal officers selected to execute its process in respect to such offenses are also stamped with the same character.

Thus far, we have treated the contention of the learned counsel for the defendant in error that no ordinance was ever passed against the practice of coasting, as set forth in the declaration, as being true. Is it true in fact? By section 81 of the city charter the authority is given to the legislative body of the city generally to prescribe and regulate the use of the highways, streets, squares, lanes, and alleys of the city, and to have and exercise control over the same, subject to the charter limitations, and to the general supervision and control of the general assembly. This power is sufficiently broad to cover nuisances occurring within the limits of any of the streets of the city that involved the idea of obstruction. Doubtless, the nuisance complained of had the effect to obstruct said Seventh street, and thereby obstructed the public in the exercise or enjoyment of a public right, and therefore clearly came within the power to prescribe and regulate the use of streets. That being so, if there was an ordinance prohibiting such an obstruction at the time of the accident set forth in the declaration, it clearly absolved the city from any liability on the score of not having declared such an obstruction to be a nuisance, and punishing the same by the imposition of a penalty. Upon examination, we find that in pursuance of such authority an ordinance was passed many years ago, section 8 of which is as follows: "If any person shall place, or leave in any street or public lane or alley of this city a wagon, cart, gig, sleigh or other carriage without a horse or beast used for drawing the same attached thereto; or shall without lawful permission obstruct any open and public street, lane or alley of this city, every person so offending shall forfeit and pay a fine of two dollars." City Code, p. 472. It cannot be pretended that those persons engaged in the sport of coasting at the time mentioned in the declaration, or any time previously thereto, could not have been arrested, tried, convicted, and punished for a violation of said ordinance; so that the contention of the counsel of the defendant in error in this regard is not true in fact. Therefore, in any view of the case, the only neglect of duty was the failure of the city constables to abate or suppress the nuisance complained of in the declaration, which, as we have already shown, involves no municipal liability.

The court is therefore of the opinion that the judgment of the court below should be reversed.

## ALABAMA SUPREME COURT.

J. J. SULLIVAN, *Appt.*,  
v.  
SULLIVAN TIMBER CO.

(.....Ala.....)

1. A foreign corporation which is not doing business in the county at the time of the commencement of the suit cannot be sued there, even on a contract made or cause of action arising in the county while the corporation was doing business there, under Const., art. 14, providing that a foreign corporation having a known place of business and authorized agents in the state may be sued in any county "where it does business."
2. A foreign corporation is not doing business in a county so as to subject it to suit there by the fact that it has an agent there who pays taxes on and has possession of an un-employed railroad and machinery, which were mere adjuncts or appurtenances to a mill which the corporation had for verily operated but the operation of which had been suspended.

(June 5, 1904.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Conecuh County sustaining a plea in abatement to an action brought to recover money alleged to be due from defendant to plaintiff. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Stallworth & Burnett* and *Troy & Watts*, for appellant:

In *Home Protection of North Alabama v. Richards*, 74 Ala. 466, it was held that a corporation could not have "within this state a permanent residence," within the meaning of the first paragraph of section 2460 of the Code, and thus be subject to be sued only in the county of such residence, and therefore that section 2642 subjecting the corporation to suit in any county in which it does business was not in conflict with section 12, article 14, of the Constitution.

It follows that personal actions against corporations necessarily fall within the second paragraph of section 2640 of the Code, and may be brought "in the county in which the act or omission complained of may have been done or may have occurred," without regard to the residence of the defendant.

Section 2642 must be construed in connection with this provision of section 2640; otherwise, we have the absurd and unconstitutional result that a natural person is subject to be sued for a tort, in the county where it was committed, while for a like tort, a corporation can only be sued in the county where it does business.

The constitution declares that corporations shall be "subject to be sued in all courts, in like cases as natural persons."

Natural persons under the second paragraph of section 2460 may be sued for torts in the county where the tort was committed.

**NOTE.**—The general subject of who may be served with process in a suit against a foreign corporation is fully covered in the *note* to *Foster v. Charles Betcher Lumber Co. (S. Dak.)* 23 L. R. A. 498.

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It is travesty of justice to hold that a corporation against which a complete right of action exists, either in the contract, or in tort, in the courts of a county, can defeat and destroy the plaintiff's right of action by simply ceasing to do business in the county before suit is commenced.

Owning and operating a railroad through a county is certainly "doing business" in the county.

*Messrs. Gregory L. Smith and H. T. Smith* for appellee.

*Brickell, Ch. J.*, delivered the opinion of the court:

The appellant, by summons and complaint, commenced an action against the appellee, averred to be a corporation under the laws of the state of Florida, doing business in the county of Conecuh. Service of summons was made in that county upon J. W. Black, the president of the company. The complaint contains two counts,—the one, for an account stated; the other, for work and labor done. The defendant appeared and pleaded in abatement, alleging that it had a known place of business, and an authorized agent therein, in the city of Mobile, and that, at the time of the commencement of the suit, it was not doing business in the county of Conecuh. To this plea, the plaintiff demurred, assigning three causes. The first and second were that the plea did not negative the fact that the defendant was doing business in the county of Conecuh when the contracts were made on which the suit is founded; the third, that it did not appear from the plea that the court had not local jurisdiction of the action. The demurrer was overruled, and issue was taken on the plea. The defendant introduced evidence showing that its principal place of business was in Mobile, where it had authorized agents. It owned a sawmill in the county of Escambia, and a railroad running therefrom, three or four miles into the county of Conecuh, and a derrick in that county, which had been used for the purpose of supplying the mill with logs. In consequence of litigation, the operation of the mill had been stopped prior to the commencement of the suit, and after its stoppage the company had not done any business in Conecuh county. The plaintiff introduced evidence showing that, at or about the time of the commencement of the suit, the defendant had a person in possession and taking care of the railroad and derrick; and that, subsequent to the commencement of the suit, an agent of the company paid the taxes on its property in Conecuh county. This was all the evidence, and, at the request of the defendant, the court instructed the jury to find the issue for the defendant. The rulings on the demurrer and the instruction given to the jury form the matter of the assignments of error. It is apparent the case draws in question the construction of the last clause of the 4th section of the 14th article of the Constitution, and of the Statute (Code, § 2642). The section of the constitution, in its entirety, reads: "No foreign corporation shall do any business in

this state without having at least one known place of business, and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process on an agent anywhere in the state." The statute reads: "A foreign or domestic corporation may be sued in any county in which it does business by agent." The section of the constitution and the statute (which, in so far as it relates to foreign corporations, is merely affirmatory of the constitution) are remedial, intended to supply defects or correct mischiefs in the pre-existing state of the law; and in their construction we are to consider what was the law before the constitution was adopted and prior to the enactment of the statute, what were the defects it was intended to supply or the mischiefs it was intended to correct.

By the common law, to maintain a personal action against a corporation, there must have been service of process upon its head or principal officer within the jurisdiction of the sovereignty from which corporate existence was derived. The officer upon whom, in the sovereignty of its creation, service could be legally effected, binding the corporation, it may be, could be found in another jurisdiction, but he was not deemed to bear with him his official functions, and service upon him there effected would not bind or affect the corporation. Whatever of legal proceedings could be pursued against the corporation elsewhere than within the sovereignty of its creation must have been authorized by legislation of the forum in which such proceedings were instituted. *St. Clair v. Cox*, 106 U. S. 354, 27 L. ed. 224; *Aldrich v. Anchor Coal & Development Co.* (Or.) 82 Pac. Rep. 756; *McQueen v. Middletown Mfg. Co.* 18 Johns. 5; *Peckham v. North Parish in Haverhill*, 16 Pick. 274, 286; *Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 244; *Camden Rolling Mill Co. v. Suede Iron Co.* 82 N. J. L. 15.

Upon principles of comity, there was acquiescence in the maintenance of suits in this state by foreign corporations, and the making by them of such contracts as they had by the law of their creation capacity to make, if thereby our own laws or public policy were not offended. *Lucas v. Bank of Georgia*, 2 Stew. (Ala.) 147; *Hitchcock v. United States Bank*, 7 Ala. 386; *Columbus v. Rogers*, 10 Ala. 37; *Western U. Teleg. Co. v. Pleasants*, 46 Ala. 641; *Eslava v. Ames Plow Co.* 47 Ala. 384; *Importing and Exporting Co. of Georgia v. Locke*, 0 Ala. 332; *Thorington v. Gould*, 59 Ala. 461. But there was no statute providing for or regulating suits against them, except the statute authorizing the issue of an attachment for the seizure of property belonging to them, found in the state. Code 1852, § 2513; Rev. Code 1867, § 2938; Code 1876, § 3263; Code 1886, § 2940.

Private corporations created and organized for the transaction of business and the derivation of pecuniary profits are in this country, it is said, mainly the growth of the last seventy-five years. In *McKim v. Odom* (1828) 3 Bland, Ch. 407-418, it was said by Bland, Ch., that no instance of such a corporation in colonial times could be found. *Cook, Stock & Stockholders*, § 1. The in-

creasing number of such corporations, and the variety and extent of the business they were created and organized to transact, their presence by agents, either by acquiescence or by legislative permission, in other states, in the exercise of their general powers, making contracts, acquiring and disposing of property rendered the rules of the common law to which we have referred the source of frequent inconvenience and injustice, compelling a modification or relaxation of them. The principle came to be accepted that if a foreign corporation sent its agents into another state, and there, by acquiescence or legislative permission of the state, engaged in the transaction of business, upon all causes of action there arising it became subject to suit in such mode as the law of the state provided, or, if there was no special provision for such suits, in the mode prescribed for suits against domestic corporations of like character. *Moulin v. Trenton Mut. L. & F. Ins. Co.* and *St. Clair v. Cox*, *supra*; *Baltimore & O. R. Co. v. Harris*, 79 U. S. 13 Wall. 65, 20 L. ed. 854; *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 20 L. ed. 571; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Aldrich v. Anchor Coal & Development Co.* *supra*. But if the corporation was not engaged in the transaction of business, or had not property within the state which could be reached by attachment, though its head or principal officer may there have had his personal residence, or may have been found there casually, there could not be a valid service, of process compelling it to appear; and, without a voluntary appearance, there could be no judgment rendered which would bind or affect it. The period of time at which it must have been engaged in the transaction of business within the state, to authorize a personal action against it, by the service of process on its principal officer or other agent, was the commencement of the suit. The fact that, at some time anterior, the corporation may have been engaged in business or may have had agents within the state, and though, at such time, the contract was made, or the cause of action arose, on which the suit was founded, was not controlling or material. The modification or relaxation of the common-law principle was rested upon the theory that the corporation, by entering the state by its agents, engaging in the transaction of its corporate business, gave to itself "a species of locality in the nature of a domicile," and was presumed to have assented to be sued in the courts of the state, as if it were a domestic corporation. *Camden Rolling Mill Co. v. Suede Iron Co.*, *Aldrich v. Anchor Coal & Development Co.* and *Ex parte Schollenberger*, *supra*. As is well observed in *Lattimer v. Union Pac. R. Co.*, *East Div.* 43 Mo. 109, 97 Am. Dec. 878: "The well established and settled principle is that, to give a court jurisdiction, a real defendant, against whom the plaintiff is entitled to a judgment, must be found and served with process within the limits of the jurisdiction, or some property or chose in action of his must be found there upon which the court can proceed *in rem*. Every attempt on the part of one nation

or state, by its legislature, to grant jurisdiction to its courts over persons or property not within its territory, is regarded elsewhere as mere usurpation, and all judicial proceedings in virtue thereof are held utterly void. This proceeds upon the known maxim, "*Extra territorium jus dicenti impune non paretur.*" The presence of the corporation by its agents, engaged in the transaction of corporate business, was the essential fact which drew it within the jurisdiction of the courts of a state other than the state of its creation, to entertain a personal action against it. The fact must have existed at the commencement of the suit, or the jurisdiction could not exist. If the fact did not then exist, there could be no legal service of process, and there could be no valid operative judgment rendered. It was only by comity that foreign corporations not engaged in interstate or foreign commerce, or not the agencies of the national government, were permitted to make contracts and carry on business within this state. The state had the power to exclude them absolutely, or to prescribe the terms and conditions upon which, within its jurisdiction, it was permissible for them to make contracts or exercise their general powers. The first clause of the section of the constitution which is under consideration prescribes inflexibly, as the condition upon which a foreign corporation may do business within this state, that it shall have "at least one known place of business and an authorized agent or agents therein." The succeeding clause declares that "such corporations" (by which we understand not any and every foreign corporation, but the corporation which has designated for itself "a known place of business and an authorized agent or agents therein") may be sued in any county where it does business.

When the constitution is read in the light of the pre-existing law, we understand what were the defects and mischiefs it is intended to supply and correct, the changes it is intended to make, and the scope and extent of its provisions. By comity or mere acquiescence, a foreign corporation may not now make contracts from which it can derive rights or benefits, or transact any part of the business for which it was organized. The condition upon which it may do business, fixed and prescribed by the constitution, is inflexible and is unalterable, by legislation. *Furrior v. New England Mortg. Secur. Co.* 88 Ala. 275; *New England Mortg. Secur. Co. v. Ingram*, 91 Ala. 887; *Nelms v. Rabinburg American Land Mortg. Co.* 92 Ala. 157. The corporation, having fixed for itself a known place of business, and placed therein authorized agents, thereby gives to itself a locality or domicile, and, so long as it continues there to do business, may be sued as a domestic corporation may be sued at its domicile or principal place of business. The liability to suit does not now rest upon the theory that the corporation, by sending its agents into the state for the transaction of business, is presumed to consent to be sued here. The assent is expressed in the condition upon which it can legally transact corporate business within the state. It is not the purpose

of the constitution to confine the corporation in the transaction of business to the locality or domicile it may designate as its "known place of business." The constitution speaks in recognition of the known fact that the business foreign corporations are created and organized to transact is varied, entering into nearly all the industries, commerce, and interests of the county; that, in the course of the transaction of its business, the corporation would probably send its agents into other counties, beyond "the known place of business" it had designated, for the transaction of such corporate business as was intrusted to them. In such counties, while doing business there, the constitution subjects the corporation to suit, as well as within its domicile or "known place of business." But it must be observed that the essential fact upon which the liability to suit in other counties depends is that it "does business" in such counties; as the essential fact rendering it liable to a personal action in the courts of the state prior to the constitution was that it was doing business within the state. The material changes which the constitution works are that the corporation becomes liable to suit in any county in which it does business, and the process may be served, compelling it to appear, upon an agent anywhere in the state. The words of the statute are plain and unambiguous. There is no room for construction or interpretation, or for an inquiry into the policy of the provision or the motives which it may be supposed induced its adoption. It speaks of the present, not of the past or of the future. The words "does business" are equivalent in meaning to, and expressive of the same thought as, the words "doing business." Unless we deflect these words from their plain and usual signification, or import into the constitution words not found there, we are constrained to the conclusion that a foreign corporation, having a known place of business in the state, is not subject to a personal action in a county beyond such place of business, unless, at the time of the commencement of suit, it was doing business in such county, and that it is immaterial that the contract was made or the cause of action arose on which the suit is founded at some past time, when the corporation was doing business in such county. There was no purpose to compel a corporation to a continuance of business at a place because at some time it had transacted business there. There is not a word found in the constitution which would justify the imputation of such a purpose to its framers. Such a purpose would as illy comport with the principles of natural justice as a purpose to constrain a natural person to a continuance of a particular occupation because he once pursued it, or to its continuance in a particular locality because he had there pursued it. With full knowledge that corporations, of necessity or from mere convenience, are frequently changing their places of business, the provision of the constitution was framed. The hardships or inconveniences which it is supposed may result if they are not permanently subject to suit in a particular locality, upon causes of action there arising,

because they had there transacted business, are the hardships or inconveniences, and no other, which may result if a natural person change the county or state of his residence. The plea in abatement negatives the fact that the corporation, at the commencement of suit, was doing business in the county of Conecuh, and affirms that it then had in the city of Mobile a known place of business, and an authorized agent therein. It was not necessary that the plea should negative the fact that the corporation was doing business within the county when the cause of action arose. That fact is not, within our view, controlling or material; and the court below did not err in overruling the demurrers to the plea.

When a foreign corporation "does business" within the state, of necessity the business is done by and through agents; and the necessity is recognized by the constitution and by the statute. It is not within the purview of either that the corporate organization, or its head or principal officer, will migrate into the state. The corporation dwells in the sovereignty of its creation, and its organization there remains as defined and declared by the law from which corporate existence is derived. It is contemplated that in this state, and in more than one of its counties, the corporation may have a visible existence by the presence of agents authorized to act for it, exercising such of its powers as may be intrusted to them, making such contracts and transacting such business as may fall within the scope of the authority conferred. The mere presence of an agent within the state, or within a particular county, authorized to transact particular business, not involving an exercise of the corporate powers or franchises, not a part of the business the corporation was created and organized to transact, is not within the proper meaning of the phrases "do business" or "does business," as employed in the constitution and the statute. 2 Beach, Priv. Corp. §§ 416, 890; *D. S. Morgan & Co. v. White*, 101 Ind. 418; *Cleus v. Woodstock Iron Co.* 44 Fed. Rep. 81; *Benliff v. London & C. Finance Corp.* Id. 667; *Carpenter v. Westinghouse Air-Brake Co.* 82 Fed. Rep. 434; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.* Id. 802; *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 17. In *Beard v. Union & American Pub. Co.*, 71 Ala. 60, it was decided that the company, having an agent in the state to receive subscriptions to the newspaper it was publishing, and to collect such subscriptions, was not doing busi-

ness, in the meaning of the constitution; and it was said: "There must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created, to bring the case within the clause;" referring to the first clause of the fourth section. In *Christian v. American Freehold Land Mortg. Co.*, 89 Ala. 198, it was held that the prosecution or defense of an action in the courts of the state is not the doing of business, within the meaning of the constitution; and according to all the authorities, construing similar constitutional or statutory provisions, having in view the like objects or purposes, there are many acts of business a foreign corporation may do without coming within the constitutional or statutory provision. 2 Morawetz, Priv. Corp. §§ 661, 662. The real test is that applied in *Beard v. Union & American Pub. Co. supra*,—is the corporation engaged in the transaction of business, or any part thereof, it was created and organized to transact? If it be, it "does business," within the meaning of the constitution. If it be not,—if the act it is doing or has done is not within its general powers and franchises,—it is not the business to which the constitutional requirement is directed.

When the suit was commenced, the company had an agent or employé in possession and care of the line of railroad it had constructed in the county of Conecuh, and of the machine it had used in the loading of cars with timber. The railroad and the machine were mere adjuncts or appurtenances to the sawmill it had operated in the county of Escambia. The operation of the mill had been suspended, and the railroad and machine were unemployed. The care and protection of unused property, or the payment of taxes which are a charge upon the property, and the payment of which is essential to the preservation of the title to the owner, cannot be deemed the exercise of corporate powers or franchises, nor the transaction of the business, or any part thereof, for which the company was created and organized. These acts did not confer upon the courts of the county jurisdiction to entertain a personal action against the company. That jurisdiction, under the undisputed evidence, pertained only to "the known place of business" the company had designated. We find no error in the instruction given the jury, and the judgment of the circuit court must be affirmed.

*Affirmed.*

## NEW YORK COURT OF APPEALS.

**ELMIRA (SAVINGS BANK, Resp't.,**

**v.**

**Charles DAVIS, Receiver of the Elmira National Bank, Appt.**

(148 N. Y. 680.)

**The preference under state law of the**

**NOTE.—Exceptions to the prohibition of preferences by insolvent national banks.**

**Priority by reason of trust character of deposit.**

**Where the identity of securities or their pro-**

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**debt of an insolvent bank for a lawful deposit by a savings bank is not such a preference as is prohibited by U. S. Rev. Stat. §§ 5236 and 5242, requiring a ratable distribution among creditors of national banks and prohibiting preferences in contemplation of or after committing an act of insolvency.**

(June 5, 1894.)

ceeds, or collections held by the failing bank, or by others for it, as agents for the owner, and not held on a general deposit, can be traced, it seems that the insolvency of the bank and the appointment of



**A** PPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, in favor of plaintiff in a cause submitted to it without action under the provisions of the code, for the purpose of determining the right of plaintiff to recover funds which it had deposited with the bank of which the defendant was appointed receiver. *Affirmed.*

The facts are stated in the opinion.

**Mr. Charles H. Peck**, with **Mr. William A. Beach**, for appellant:

Congress is empowered to prevent preferences to creditors of insolvent national banks, and having so legislated, the federal law is supreme.

The federal law expressly prohibits any preferences whatsoever with the single excep-

tion of protecting the United States against the circulating notes of insolvent national banks.

U. S. Banking Law, § 5236; *First Nat. Bank of Selma v. Colby*, 88 U. S. 21 Wall. 618, 23 L. ed. 688; *First Nat. Bank of Bethel v. National Pahquioque Bank*, 81 U. S. 14 Wall. 402, 20 L. ed. 845; *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. ed. 537; *Batch v. Wilson*, 25 Minn. 299, 33 Am. Rep. 467; *Schmidt v. First Nat. Bank of Selma*, 22 La. Ann. 814; *Turner v. First Nat. Bank of Keokuk*, 26 Iowa, 568; *Venango Nat. Bank v. Taylor*, 56 Pa. 14; *Raynor v. Pacific Nat. Bank of Boston*, 93 N. Y. 374; *Hayes v. Beardsley*, 186 N. Y. 304.

The design of § 5242 is to render effective the provision requiring the ratable distribution,

a receiver will not prevent a recovery by the owner of such property, although thereby he may obtain a priority over the general creditors.

Some of the cases in passing on the question of claimant's right as against the receiver, construe the same as not creating a preference under the federal statute, as, *Tuttle v. Frelinghuysen*, 38 N. J. Eq. 12; *Corn Exch. Bank of Chicago v. Blye*, 101 N. Y. 903, affirming 37 Hun, 473; *Philadelphia Nat. Bank v. Dowd*, 2 L. R. A. 480, 38 Fed. Rep. 172.

Other cases hold that the claimant is entitled to the property or proceeds identified, and this without reference to the federal statute against preference. *First Nat. Bank of Monmouth v. Dunbar*, 118 Ill. 635; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50, 37 L. ed. 363, affirming 30 Fed. Rep. 684; *Griffin v. Chase*, 36 Neb. 323; *Bundy v. Monticello*, 84 Ind. 131; *First Nat. Bank of Crown Point v. First Nat. Bank of Richmond*, 76 Ind. 561, 40 Am. Rep. 261; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 556, 33 L. ed. 683; *Beal v. Somerville*, 17 L. R. A. 231, 5 U. S. App. 14, 60 Fed. Rep. 647.

And in *Flint Road Cart Co. v. Stephens*, 38 Mo. App. 341, where a special deposit with the cashier as indemnity was mingled with other funds and paid out, it was held that the trust character of the deposit still attached to funds on hand, and that this was not a preference under the federal statutes.

A party depositing a draft for collection with an insolvent national bank may reclaim the proceeds in the hands of the bank to which it is sent by the insolvent bank for collection, although this collection is mingled with other collections for the insolvent bank and the balance on hand is reduced some by proper disbursements. The question of preference by insolvent bank is not discussed. *Importers & T. Nat. Bank of New York v. Peters*, 123 N. Y. 272.

A county may have priority on bank funds, in the hands of a receiver, where the deposit by the sheriff is contrary to law and the court holds therefore that no title to the money passed. In this case the deposits were marked "Special" and the identity of the fund was lost and the question of the prohibition of preferences under the federal statute was not passed upon. *San Diego County v. California Nat. Bank*, 52 Fed. Rep. 59. But see *Spokane County v. Clark*, *infra*.

Where a national bank is hopelessly insolvent, and accepts a deposit knowing of such insolvency, the depositor may reclaim the drafts deposited or their proceeds, and this does not contravene U. S. Rev. Stat., § 5234 and § 5242, as plaintiffs do not claim under a transfer from the bank, but under their original title. *Craigie v. Smith*, 14 Abb. N. C. 406; *Craigie v. Hadley*, 90 N. Y. 131, 62 Am. Rep. 9.

And the same was held in *Manufacturers Nat. Bank of Boston v. Continental Bank of St. Louis*, 25 L. R. A.

2 L. R. A. 609, 148 Mass. 553, but the question of preference was not discussed.

But other cases refuse to grant relief where the identity of the funds cannot be traced. *Merchants & F. Bank v. Austin*, 48 Fed. Rep. 26; *Philadelphia Nat. Bank v. Dowd*, 2 L. R. A. 480, 38 Fed. Rep. 172; *St. Louis Brew. Assn. v. Austin* (Ala.) Nov. 7, 1893.

And where a national bank was allowed to continue business on the directors putting in \$100,000, and withdrawing that amount of objectionable securities, and the bank failed before all the securities were selected, the directors could not claim that the balance of the \$100,000 was a special trust fund. *Booth v. Welles*, 42 Fed. Rep. 11.

This case does not discuss preferences under the federal statute.

And in *Spokane County v. Clark*, 61 Fed. Rep. 538, and *Multnomah County v. Oregon Nat. Bank*, 61 Fed. Rep. 912, it was held that a county has no priority of claim on a deposit of its funds in a national bank that becomes insolvent, where the identity of the funds is gone as it is contrary to statute forbidding preferences. This conflicts with the case of *San Diego County v. California Nat. Bank*, *supra*. Where a lien was allowed in that case the deposit was marked "Special" and it was contrary to law, which does not appear in these cases.

And in *Illinois Trust & Sav. Bank of Chicago v. Smith*, 21 Blatchf. 276, it was held that the owner of a draft received by an insolvent national bank for collection is not entitled to prior claim on its assets, where the collection is mingled with its funds and the identity is lost, as it would contravene the federal statutes forbidding preferences.

Where individual partners in a private bank were also directors in a national bank, and used a large part of the national bank assets in their own business and assigned their property for the benefit of creditors, and the national bank also failed, the receiver was entitled to such property as was purchased with the moneys of the bank as he might elect to take, but not to such property in which the trust could not be traced. *Peters v. Bain*, 133 U. S. 694, 33 L. ed. 704.

A transfer of renewal collateral by an insolvent national bank to another party, where such national bank had no title to the same by reason of non-surrender of the original, will not be held to be within the act forbidding preferences, although the maker of such paper may have to pay the same debt twice. *First Nat. Bank of Decatur v. Johnston*, 97 Ala. 655.

The case of **ELMIRA SAVINGS BANK V. DAVIS**, Receiver, holds that U. S. Rev. Stat., §§ 5236, 5242, prohibiting preferences, does not prevent a priority given by a statute of New York to savings banks on their deposits with other banks as the federal act is only intended to protect transfers

without preference, of the assets of insolvent national banks among their creditors.

*National Secur. Bank v. Butler*, 129 U. S. 228, 83 L. ed. 682; *First Nat. Bank of Selma v. Colby*, *supra*; *Robinson v. National Bank of Newbern*, 81 N. Y. 393, 37 Am. Rep. 508; *Market Nat. Bank of New York v. Pacific Nat. Bank of Boston*, 30 Hun, 53, affirmed, 93 N. Y. 648; *Raynor v. Pacific Nat. Bank of Boston*, *supra*; *Hayes v. Beardsley*, 136 N. Y. 803.

The fundamental principles (1) the constitutional power of congress to establish the national banking system, and (2) the incidental power to adopt, in its judgment, all privileges, immunities, conditions, and regulations needful to the operation of that system—will hardly be challenged.

*Farmers & M. Nat. Bank v. Dearing*, 91 U.

and that the federal statute was not intended to disregard lawful rights and superior equities.

The argument in this case by the court is based largely on the doctrine of set-off against insolvent national banks.

As to right of set-off against receiver of insolvent national bank, see *Merrill v. Cape Ann Granite Co. (Mass.)* 23 L. R. A. 313, note; *Stone v. Dodge (Mich.)* 21 L. R. A. 280, note.

#### *Transfers by insolvent national banks.*

A transfer of security to prefer a creditor, by an insolvent national bank is prohibited where the officers ought to have known its condition. *Roberts v. Hill*, 24 Fed. Rep. 571, overruling 23 Fed. Rep. 311; *Brown v. Carbonate Bank of Leadville*, 34 Fed. Rep. 776.

And a transfer by a national bank of securities as indemnity for bills previously drawn by such bank, after it has become apparent that the bank is involved, will be held to have been made in contemplation of insolvency and will be void; although the party receiving security does not know of the bank's insolvency. *Case v. Citizens Bank of Louisiana*, 2 Woods, C. C. 23.

A stockholder in an insolvent national bank cannot secure a depositor by mortgaging to him stock in the bank, as stockholder's liability of an insolvent bank will not allow preferences. *Gatch v. Fitch*, 34 Fed. Rep. 566.

To prevent a preference, the court of equity in absence of action by comptroller, at the instance of a judgment creditor, may appoint a receiver of an insolvent national bank. *Wright v. Merchants Nat. Bank*, 3 Cent. L. J. 351.

In *Irons v. Manufacturers Nat. Bank*, 6 Biss. 301, where a court of equity in aid of execution appointed a receiver of a national bank the question as to how far it would disturb preferences and require repayment from those preferred, was not decided.

Sureties on a bond to obtain dissolution of an attachment against a national bank, will be compelled to give to the receiver of the bank such securities as the attachment was not authorized by law. *Pacific Nat. Bank of Boston v. Mixer*, 124 U. S. 721, 31 L. ed. 567.

This in effect is different from *Price v. Coleman*, 23 Fed. Rep. 604, which held that a transfer by a national bank to secure sureties on a bond to release an attachment against the bank is not void, where the government officials had examined the bank a short time before on suspicion of business and had pronounced it solvent, and it had resumed business, but after giving such security failed finally. The transfer not being made after an act of insolvency, or in contemplation thereof, nor made to give a preference or prevent distribution of assets.

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S. 33, 23 L. ed. 198; *Wilson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 250, 7 L. ed. 414; *United States v. Coombs*, 37 U. S. 12 Pet. 73, 9 L. ed. 1004; *New York v. Miln*, 36 U. S. 11 Pet. 155, 9 L. ed. 669; *Central Nat. Bank v. Richland Nat. Bank of Mansfield*, 53 How. Pr. 138.

In *Veazie Bank v. Fenno*, 75 U. S. 8 Wall. 538, 19 L. ed. 432, it was held that congress has the power to restrain, by suitable enactments, the circulation of any notes, not issued under its authority.

The federal law permits taxation of national banks by the states, but controls the manner and fixes the limitations; and the taxing laws of a state cannot be upheld when in conflict with an act of congress.

U. S. Rev. Stat. § 5219; *National Bank of*

This note does not include cases generally involving the right to attach property of a national bank.

In order to recover from a party taking money or other securities for a certificate of deposit from an insolvent national bank in the ordinary course of business, there should be evidence that the transfer by the bank was in contemplation of insolvency to prefer and to prevent equitable distribution of assets, although the party receiving the paper was a director. *Hayes v. Beardsley*, 136 N. Y. 236.

To the same effect, see *Dutcher v. Importers & T. Nat. Bank*, 59 N. Y. 5.

But the act prohibiting preferences does not forbid transfers of securities for a valuable consideration, under a reasonable expectation of obtaining relief, nor transfers contracted for long prior to insolvency to secure loans being made. *Bell v. Hanover Nat. Bank*, 57 Fed. Rep. 821; *Armstrong v. Chemical Nat. Bank*, 6 L. R. A. 223, 41 Fed. Rep. 234; *Casey v. La Société de Crédit Mobilier de Paris*, 2 Woods, C. C. 77.

And the appropriation on its own claims by a clearing house, of money paid by other banks on call of the clearing house to take up drafts and checks on an insolvent bank, which they had surrendered to its clerk in due course of law in exchange at the clearing house before the bank had suspended and which had been left there as security for a balance due from it to the clearing house, is not an unlawful preference, as the subsequent transaction gives no right of action to the receiver of the bank against the clearing house committee for the amount of the paper on other banks, which it surrendered on the exchange, as the subsequent transactions do not rescind the exchange of securities made while the bank was doing business. *Phillips v. Yardley*, post, —, 61 Fed. Rep. 645, reversing 8 Fed. Rep. 744.

The United States is not entitled to any priority in the payment of a demand against a receiver of an insolvent national bank not arising from advances to redeem circulating notes, even if the funds are in the hands of the United States treasurer from a balance on the sale of bonds, after redeeming the circulating notes of the bank. *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. ed. 537.

A receiver of a national bank will be required to specifically perform an oral contract of sale of property, made by the bank before failure, where the vendee has been put in possession, and the plaintiff is entitled to have applied on such contract his deposit account and certificate of deposit held by him. *Hughitt v. Hayes*, 136 N. Y. 163.

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*Redemption v. Boston*, 125 U. S. 67, 81 L. ed. 698; *Rosenblatt v. Johnston*, 104 U. S. 462, 28 L. ed. 882; *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402; *Wasson v. First Nat. Bank of Indianapolis*, 107 Ind. 206; *National Bank of Virginia v. Richmond*, 42 Fed. Rep. 877; *First Nat. Bank of Wilmington v. Herbert*, 44 Fed. Rep. 158; *First Nat. Bank v. Lindsay*, 45 Fed. Rep. 619; *People v. Smith*, 50 Hun, 89.

The state law does not and cannot give to a savings bank an equitable lien on its deposit in a national bank.

A preference is always an arbitrary statutory right arising upon a given contingency.

*Casey v. La Société de Crédit Mobiliier de Paris*, 2 Woods, C. C. 77.

An equitable lien is of an entirely different nature.

It is in the nature of a trust.

Pom. Eq. Jur. §§ 1238-1239; 18 Am. & Eng. Encyclop. Law, p. 606; *Payne v. Wilson*, 74 N. Y. 358.

If a savings bank have such a lien on its deposits with other banks, it attaches when the deposits are made. It is a novel doctrine that a savings bank upon making a deposit thereby acquires a lien on all the assets of the deposit bank.

The savings bank had the statutory right to make the deposits but the national bank had no legal authority to take them on the conditions asserted. All this the savings bank is presumed to have known and contemplated. Moreover, all this is to be regarded as contemplated by the state legislature in enacting the preferential statute; hence the provision of the state law should be read as expressly excluding national banks from its operation.

*Pacific Nat. Bank of Boston v. Minter*, 124 U. S. 721, 81 L. ed. 567; *Jessup v. Carnegie*, 80 N. Y. 447, 38 Am. Rep. 648; *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. ed. 537.

No logical application can be made in the present case of the doctrine of *Scott v. Armstrong*, 146 U. S. 499, 38 L. ed. 1059, that equitable set-offs against the claims of insolvent banks can properly be made.

In no sense is an equitable set-off a lien, nor does it bear any analogy whatsoever to a lien.

*Hughitt v. Hayes*, 186 N. Y. 167; *Richards v. La Tourette*, 119 N. Y. 59.

A general deposit creates the relation merely of debtor and creditor between the bank and the depositor.

*Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Marsh v. Oneida Central Bank*, 84 Barb. 298; *Aitna Nat. Bank v. Fourth Nat. Bank of New York*, 46 N. Y. 82, 7 Am. Rep. 814; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 288; *People v. City Bank of Rochester*, 98 N. Y. 582.

The deposit in question cannot be classed as a special deposit.

*Morse, Banks & Banking*, §§ 188, 190, 198; *First Nat. Bank of Carlisle v. Graham*, 100 U. S. 699, 25 L. ed. 750.

Mr. Edward Winslow Paige also for appellant.

Messrs. Herendeen & Mandeville, for respondent:

National banks are intended to be placed on 25 L. R. A.

the same footing as state banks by section 180 of the Banking Law of this state, chapter 689 of the Laws of 1892, giving to savings banks making authorized deposits in a bank thereafter becoming insolvent a preference over other depositors in the distribution of the assets of the insolvent bank.

The national banking law is not inconsistent with the provisions of our state banking law, giving a preference to savings banks over other depositors in the distribution of the assets of an insolvent national bank.

Sections 5236, 5242, U. S. Rev. Stat., requiring the comptroller to make ratable dividends and prohibiting preferences, came in question in the line of conflicting decisions in state and federal courts as to the right of equitable set-off by a debtor to a bank, of his claims against the bank, such right being denied in some of the cases, upon the ground that to allow such set-off would be, in effect, to give a preference and to defeat the requirement of ratable dividends. This conflict has finally been settled by *Scott v. Armstrong*, 146 U. S. 499, 38 L. ed. 1059, approving *Yardley v. Clothier*, 17 L. R. A. 462, 3 U. S. App. 207, 51 Fed. Rep. 506, affirming the same case in 49 Fed. Rep. 387; *Louis Snyder's Sons Co. v. Armstrong*, 87 Fed. Rep. 18; *Armstrong v. Warner*, 17 L. R. A. 466, 49 Ohio St. 376, and in effect approving—

*Hughitt v. Hayes*, 186 N. Y. 163. See also *Adams v. Spokane Drug Co.* 23 L. R. A. 334, 57 Fed. Rep. 888; *San Diego County v. California Nat. Bank*, 52 Fed. Rep. 59.

The receiver is a statutory assignee of the bank, and gets no better title than the bank had, and takes the funds in the same plight in which they were held by the bank immediately prior to his appointment and must turn them over accordingly, unaffected by the provisions of the national banking act as to ratable distribution.

*Casey v. La Société de Crédit Mobiliier de Paris*, 2 Woods, C. C. 77; *Corn Exch. Bank of Chicago v. Blye*, 101 N. Y. 803; *First Nat. Bank of Monmouth v. Dunbar*, 118 Ill. 625; *Hade v. McVay*, 31 Ohio St. 231; *Bell v. Hanover Nat. Bank*, 57 Fed. Rep. 821; *Chemical Nat. Bank v. Armstrong*, 59 Fed. Rep. 372.

Even under the stringent provisions of non-preferential bankrupt laws, it has been uniformly held that collateral given at the time of the passing of a present sufficient consideration, even though the possibility or even probability of future insolvency was in the minds of the parties at the time, will be sustained, and contractual rights or equities existing at such a time will be afterward upheld when insolvency occurs.

*Hunt v. Mortimer*, 10 Barn. & C. 44; *Blumenstiel, Bankruptcy*, p. 96, and cases cited; *Clark v. Ivelin*, 88 U. S. 21 Wall. 360, 23 L. ed. 568; *Re Craft*, 2 Ben. 221.

A national bank may lawfully receive a special deposit and must in case of insolvency pay over the same, unaffected by the requirements of the national banking act as to ratable dividends.

*First Nat. Bank of Carlisle v. Graham*, 100 U. S. 699, 25 L. ed. 750.

Section 180 of the Banking Law of this state making deposits by a savings bank a preferred claim against an insolvent national bank is

within the proper sphere of state legislation; is not inconsistent with the proper construction of the national banking act; and to construe the two acts as inconsistent and repugnant would force the national legislation beyond constitutional limitations.

The theory upon which the constitutionality of national bank legislation by congress was finally upheld, is a narrow one, necessarily involving sharp and closely confined limitations.

*Western U. Teleg. Co. v. Atty-Gen.* 125 U. S. 530, 31 L. ed. 790; *Waite v. Dowley*, 94 U. S. 527, 24 L. ed. 181; *Thomas v. Farmers Bank of Maryland*, 46 Md. 43; *First Nat. Bank of Louisville v. Kentucky*, 76 U. S. 9 Wall. 353, 19 L. ed. 701; *First Nat. Bank of Whitehall v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 439; *Farmers & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *Winter v. Baldwin*, 89 Ala. 483.

The statutes of the United States which might control state legislation as long as they affect a bank actively engaged in discharging its duties and performing its work, must be construed as consistent and not repugnant to state legislation, or subject to it, when the bank over which the controversy arises has ceased its active career as a federal instrument.

*Merchants & P. Nat. Bank v. Masonic Hall Trustees*, 65 Ga. 608.

**Gray, J.**, delivered the opinion of the court:

The defendant is the receiver of an insolvent national bank, and the plaintiff, a savings bank, created under the laws of this state, claims, with respect to its deposits theretofore made with the former, to be entitled to be preferred in payment, under section 180 of the Banking Law of this state. Laws 1892, chap. 689. The circulating notes have been provided for, and all other conditions of the banking law have been complied with, so as to entitle the claim to be allowed, if not in conflict with the provisions of the national banking law. The state banking law permits the trustees of savings banks to keep an "available fund . . . on hand or deposit in any bank in this state, organized under any law in this state or of the United States," etc. Section 118. Section 180 provides as follows: "All the property of any bank or trust company which shall become insolvent shall, after providing for the payment of its circulating notes, if it has any, be applied by the trustees, assignees or receiver thereof, in the first place, to the payment in full of any sum or sums of money deposited therewith by any savings bank, but not to an amount exceeding that authorized to be so deposited by the provisions of this chapter, and subject to any other preference provided for in the charter of any such trust company." The sole contention is whether this provision can be given effect in the distribution of the property of insolvent national banks. The appellant insists that it conflicts with certain provisions of the national banking law, which were framed to prohibit preferences, and relies upon the following sections of the Revised Statutes of the United States:

"Sec. 5236. From time to time, after full provision has been made for refunding to the

United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

"Sec. 5242. All transfers of the notes, bonds, bill of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void, and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court."

The provisions of the federal law as to national banks constitute a complete system for their establishment, government, and winding up. *Cook County Nat. Bank v. United States*, 107 U. S. 445, 27 L. ed. 537. As agencies of the government, in the administration of a branch of the public service, the states are without authority to exercise any control over them, or to affect their operation (except so far as congress may permit), where the legislation will conflict with the national law, or will tend to impair or destroy their utility and efficiency in performing the functions by which they are designed to serve the government. *First Nat. Bank of Louisville v. Kentucky*, 76 U. S. 9 Wall. 353, 19 L. ed. 701; *Farmers & M. Nat. Bank v. Dearing*, 91 U. S. 83, 23 L. ed. 198; *Waite v. Dowley*, 94 U. S. 527, 24 L. ed. 181; *Western U. Teleg. Co. v. Atty-Gen.* 125 U. S. 551, 31 L. ed. 794. If the state banking law, in these provisions which we are considering, comes into conflict with the operation of the federal law, the former must be held ineffectual to impede the due execution of the latter in all respects therein intended and provided for. Is that the case here? We are not now concerned with questions of the propriety or justice of the state law in directing the claims of savings banks to be preferred in payment over those of other depositors. That is the law of the state, enacted by its legislature, in furtherance of the protection and security designed to be afforded to the savings of the people; and, if the inhibition of section 5242 of the United

States Revised Statutes does not extend so far as to prevent its operation in such a case, it must be given its full effect. That effect would be to preserve and enforce a right or preference which had accrued to the savings bank in making deposits of its funds with the national bank, and which will be deemed to have been in the contemplation of the parties, and assented to. Their contractual relations were necessarily influenced and shaped by the provisions of this public law, which gave to that class of depositors a superior claim or lien to that of other depositors or creditors upon the property of the bank. Are these provisions for security against a possible loss of the deposits of savings banks inconsistent with that equal distribution among creditors which was intended by the national law to be effectuated when the moment of insolvency arrived? The language of section 5242 does not seem to convey that idea, in providing that "all payments of money to either [i. e. shareholders or creditors] made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." In *Corn Ezech. Bank of Chicago v. Blye*, 101 N. Y. 803, it was said by this court of this section that "it specifically prohibits all transfers of the corporate property made with a view to preferences, and so protects the creditors from any voluntary act of the bank which selects out favored individuals for payment." It is a transfer of property, or a payment of moneys, in contemplation of insolvency, in order to give a preference to the creditor, which the law condemns. Its policy is to secure equality of distribution of the assets among creditors; but it was not intended that, in the distribution, rights lawfully acquired and superior equities should be disregarded and annulled. But we have upon this question a very recent and emphatic declaration by the United States Supreme Court, in the case of *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059. In that case the question related to the right of one who was debtor to a national bank to an equitable offset, as against its receiver, appointed by the comptroller of the currency to close up its affairs for insolvency. Sections 5236 and 5242 were relied upon as forbidding it, because of their requirements that there should be a ratable disposition among the creditors, and that there should be no preference given or suffered in contemplation of or after committing the act of insolvency. Chief Justice Fuller, delivering the opinion of the court, said: "We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities, or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities, or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of

law, prior to insolvency, and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges, or equities whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference; and it is clear that it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank." This is very explicit language, and must be regarded as controlling upon us as a construction placed by the highest federal court upon these provisions of the national banking law. In that case, and in those of *Waite v. Dowley* and *Fret Nat. Bank of Louisville v. Kentucky*, we have authoritative expressions of opinion from which to imply the doctrine that state legislation in regulation of the general conduct of the business of the national bank with its depositors is not an interference with any exercise of the governmental power. If, in the course of its business, through force of state laws, rights are accorded to, or liens are acquired by, depositors or creditors, they are not within the purview of sections 5236 or 5242. The distinction between what is legislation by the state which conflicts with the national banking law and what is a constitutional exercise of state legislative power in relation to national banks is found by considering whether it assails or affects the independence of the national bank, in the performance of its functions as an agency of the general government. With respect to its contracts, its rights and remedies, they may, in general, be subject to or based upon state legislation, without impairing their efficiency as national institutions. *Western U. Teleg. Co. v. Atty.-Gen. supra*. It is the voluntary act of the national bank, in contemplation of its insolvency, and with the view of then preventing the ratable application of its property, which is avoided by the national law. In the present case, while a going concern, it entered into an engagement with the savings bank, which the state law required and regulated, which vested in the latter superior rights or equities, and which, in the possible event of future insolvency, would give to it a prior claim to payment from the assets. When that event happened, and the receiver was appointed, he took over the property of the insolvent concern, as trustee for its creditors and shareholders, under the same conditions as the bank held it, and subject to the right of this plaintiff to be first paid in full before other creditors were paid.

*I think the judgment of the general term below was right, and that it should be affirmed, with costs.*

All concur, except Earl and Peckham, JJ., not voting.

Reversed, 161 U. S. 275, 40 L. ed. 700.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Edward M. ILLINGSWORTH  
v.  
BOSTON ELECTRIC LIGHT CO.

(161 Mass. 552.)

1. Evidence that a bill was rendered to and paid by the owner of electric wires attached to the frames of an electric light company for a part of the expense of repairing a roof to which one of the frames is fastened is admissible in an action by an employé of such owner against the light company for injuries caused by the bad condition of the light wires as tending to show an agreement for a joint use of the frame within the rule which requires of one owner care as to the condition of wires which employés of the other may be required to approach.
2. Reasonable care to keep electric wires in a safe condition is due by an electric light company to persons expressly or impliedly licensed to approach them in performing their duties with reference to other electric wires attached to structures of the electric light company.
3. The question of negligence in leaving uninsulated joints of electric light wires within twelve or fifteen inches of a frame up which persons are required to go in performance of duties with respect to other electric wires is a question for the jury.
4. The employe of one of two joint users of a frame for supporting electric wires does not take the risk of the wires of the other being in bad condition, unless he actually knows of it and voluntarily exposes himself to it.
5. The negligence of a lineman in going up a frame to which are attached electric light wires, as well as those which he is looking after, is a question for the jury, where his pliers caught on a wire and in endeavoring to free them his hand came in contact with uninsulated joints of electric light wires within twelve or fifteen inches of the frame.
6. The lack of reasonable care to keep electric light wires insulated is not excused by reason of the fact that mere contact with such wires is not dangerous unless other conditions exist, in view of the circumstances likely to occur which may render the contact dangerous.

(June 22, 1894.)

**E**XCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County which

resulted in a judgment in favor of defendant in an action brought to recover damages for injuries alleged to have been inflicted upon plaintiff by defendant's negligent failure to properly protect electric wires in contact with which it was necessary for the plaintiff to come. *Sustained.*

Defendant was a corporation whose business was that of furnishing electricity for electric lighting and motive power. On May 11, 1891, its wires were strung over a building numbered 114 Sudbury street in Boston and were fastened upon the arms of a frame attached to the roof of the building. The frame and arms were the property of defendant. Above the defendant's wires, and fastened to an arm of the frame were the wires of the fire alarm of the city of Boston. Plaintiff was in the employ of the city as a lineman in the fire alarm department. And for the purpose of reaching the city's wires he was compelled to ascend the frame through the defendant's wires. While descending the frame his pliers, which were in his belt, caught on a wire and in attempting to extricate them he received the shock which caused the injury for which the suit was brought.

Further facts appear in the opinion.

*Mr. Salem D. Charles* for plaintiff.

*Messrs. E. N. Sheldon and Charles A. Snow* for defendant.

*Field, Ch. J.*, delivered the opinion of the court:

The exceptions recite that the court ruled that there was no evidence for the jury, and ordered a verdict for the defendant. The questions argued relate to the liability of the defendant on the evidence, under Pub. Stat., chap. 109, § 12, and Stat. 1883, chap. 221; under Stat. 1890, chap. 404, § 1; and at common law. There is no evidence of any liability under Pub. Stat. chap. 109, § 12, and Stat. 1883, chap. 221. *Hector v. Boston Electric Light Co. (Mass.) post, 554.* We have no occasion to consider whether it was the intention of Stat. 1890, chap. 404, to give a private person a cause of action for any violation of the first section of that statute, if, in consequence of such violation, such person suffers damage in his person or property. The only provision of that statute which, it is contended, applies to this case, is the requirement that such a corporation as the defendant should suitably and safely attach its wires to strong and sufficient supports, "and insulate them at all points of attachment." This must mean at the points of

**NOTE.**—For another case of injury to a person from electric wires over a roof, see *Clements v. Louisiana Electric Light Co. (La.)* 16 L. R. A. 43.

For injuries to travelers on highways from contact with electric wires, see *Southwestern Teleg. & Teleph. Co. v. Robinson (C. C. App. 5th C.)* 16 L. R. A. 545; *Bourget v. Cambridge (Mass.)* 16 L. R. A. 605; *Ahern v. Oregon Teleph. & Teleg. Co. (Or.)* 22 L. R. A. 635.

For injury to a traveler by a telegraph wire across a highway, which was not due to any electric shock, see *Hayes v. Hyde Park (Mass.)* 12 L. R. A. 242.

25 L. R. A.

For mandamus to compel proper guards or protection against contact with uninsulated wires, see *State v. Janesville Street R. Co. (Wis.)* 23 L. R. A. 759.

For an injunction against bringing a dangerous electric current too near wires which are not dangerous, see *Rutland Electric Light Co. v. Marble City Electric Light Co. (Vt.)* 20 L. R. A. 621.

For injury to a street railway passenger by an electric shock caused by imperfect insulation of wires, see *Burt v. Douglas County Street R. Co. (Wis.)* 18 L. R. A. 479.

attachment to the supports. The provision probably relates to the pins or insulators, or other equivalent devices by which electric wires are usually attached to supports. There is no evidence recited in the exceptions of any defect in the insulation of the wires of the defendant at the points of attachment to the support. There was evidence of "two bad joints" on these wires, about 12 or 15 inches from the frame, to one arm of which the defendant's wires were attached. These joints were "not taped or insulated." "The rest of the wire was insulated." We infer that this is evidence that these joints never had been insulated in any manner. As the evidence was that "the plaintiff's hands were severely burned by the electricity," it was competent for the jury to find that the plaintiff's hands had touched a wire or wires of the defendant. On all the evidence in the case, we think they might have found that his hand or hands touched the defendant's wires at one or both of the joints where the wire was not insulated. It was true that a witness for the defendant—an electrical expert—testified "that this accident might have happened if the wires of the defendant had been in as good condition as skill and knowledge could have made them;" but the jury might have disbelieved this testimony, or, if they believed it, might also have believed that although such an accident was possible, under certain conditions, if the wires had been properly insulated, yet it was much more likely to happen if the wires were not insulated. The same witness testified "that a person taking hold of a perfectly insulated wire would not receive sufficient electricity to injure him."

The evidence that a bill was rendered by the defendant to the city of Boston, and was paid by the city, "charging said city a proportionate part of repairing the roof upon an adjoining building, where there was another frame of the defendant, and from which the wires of the defendant and said city extended to, and were fastened upon, the defendant's frame, where the plaintiff was injured," we think was properly admitted. It had some tendency to show that, by some arrangement between the defendant and the city of Boston, the city was paying a part of the expenses of maintaining the structures on buildings to which the wires of the defendant and those of the city were attached, and that, therefore, the city of Boston attached the wires of its fire-alarm service to the defendant's structure on the building number 114 Sudbury street, where the accident happened, by permission of the defendant, and under some contract or arrangement, whereby the city was to pay the defendant something for the maintenance of such structures. The question, then, is, when two business corporations or two persons, under some agreement between themselves, use the same structures, owned by one of them, as supports for separate lines of wire used by each for the transmission of dangerous currents of electricity, what is the duty, at common law, which each owes to the other in regard to the care each must take to have its wires in a reasonably safe condition at or near the structures where the servants of the other have occasion to go in the usual course of business, and where they must come near

to, or in contact with, the wires? Such servants, when so employed, are more than mere licensees, taking advantage, for their own benefit, or that of their employer, of the passive acquiescence of the licensor. If they are licensees at all, the license, until it is revoked, is coupled with an interest. The two corporations or persons have, in a sense, a common interest in the maintenance and use of the structures to which the wires of each are attached; and each, we think, should be under the same obligation to the other as persons having common rights in a place or passageway are under to one another, not negligently to place a dangerous substance on the common territory, where it reasonably may be anticipated that others, having common rights, may be injured by it. The purpose for which the structures are used renders some danger from electrical currents inevitable, but the danger ought to be made as small as is practicable by the exercise of reasonable care. In the absence of any agreement on the subject, other than what is involved in the permission of the owner of the structures to the other to use them in common for the support of electric wires, on paying some compensation, we are of opinion that the duty of the owner of the structures is to exercise reasonable care in seeing that his wires are kept, so far as is practicable, in a safe condition at such places as the servants of the other are expressly or impliedly licensed to go in performing their duties with reference to the wires attached to such structures. Under this rule there was evidence for the jury that the defendant was negligent in leaving two joints of its wires without insulation, within twelve or fifteen inches of the frame, up which the plaintiff, in the course of his duty, as a person employed in the fire-alarm service of Boston, was required or expected to go. We, of course, express no opinion upon the liability of the city of Boston for the condition of the wires of its fire-alarm service.

It is contended that the plaintiff took the risk, or that he offered no evidence that he was in the exercise of due care. As the plaintiff was not a servant of the defendant, it cannot be said that he took the risk, unless he knew of it, and voluntarily exposed himself to it, and none of these things is necessarily to be inferred from the evidence. Whether he was in the exercise of due care, we think, was for the jury. It appears that the wires of the defendant were insulated, except at these two joints, and the plaintiff reasonably may have expected that the wires about the frame were entirely insulated; and we cannot say, as matter of law, that he was negligent in not seeing the uninsulated condition of these joints. It does not necessarily show negligence that his pliers got caught on another wire although this may have been the cause of his injury. It was not necessarily negligent that he reached round with his hand to clear the pliers, although it may be that by this movement his hand was extended further from the post to which the arms were fastened, which held the wires, than otherwise he would have extended it. We cannot say, as matter of law, on the evidence, that his hand or hands, in this movement, did not touch one or both of the joints, and that this was the cause of the injury.

The exceptions recite that "the undisputed evidence was that mere contact with one electric light wire, even though bare and uninsulated, would cause no injury, unless other conditions supervened," but there is no contention that these other conditions do not often occur. The fact that other circumstances must occur to render contact with such wires dangerous, if it be true, cannot excuse the defendant from taking reasonable care, in view of all the circumstances likely to occur, to have its wires properly insulated at points where the servants of another have the right, derived from the defendant, of coming near to, or in contact with, the wires. We are of opinion that the questions of the defendant's negligence and of the plaintiff's due care were for the jury.

*Exceptions sustained.*

Albert E. HECTOR

v.

BOSTON ELECTRIC LIGHT CO.

(.....Mass.....)

1. **Exceptions filed within the time allowed**, which the opposite party asks to have disallowed, may be amended in the discretion of the presiding justice, with consent of the excepting party, although the time for filing exceptions has passed.
2. **An electric light company allowing its standard for the support of wires on the roof of a building to be used by a telegraph and telephone company** for its wires also does not thereby assume any duty to employes of the latter company in respect to the safe insulation of the electric light wires over the roof of an adjoining building to which no wires of any kind were attached, and on which they had no right to go by reason of permission to use the standard on the former building.
3. **The liability of electric light companies for injuries received from posts, wires, or other apparatus is not affected by Stat. 1883, chap. 221, granting to such companies the right to lay and maintain wires subject to municipal regulations.**

(June 22, 1904.)

**EXCEPTIONS** by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence, which resulted in a verdict in favor of plaintiffs. *Sustained.*

The facts are stated in the opinion.

*Messrs. Everett W. Burdett and Charles A. Snow*, for defendant:

No duty is imposed by law on the owner or tenant of private premises to keep them in a condition reasonably suitable for the use of those who enter upon them for their own business, convenience, or pleasure, and who neither are expressly invited nor are attracted, induced,

enticed, or allured by such owner or tenant so to do, and, accordingly, a trespasser or a bare licensee upon such premises cannot hold the owner or the tenant liable for ordinary negligence on his part with respect to the condition of the premises.

*Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Reardon v. Thompson*, 149 Mass. 267; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 696; *Daniels v. New York & N. E. R. Co.* 13 L. R. A. 248, 154 Mass. 349; *McEachern v. Boston & M. R. Co.* 150 Mass. 515; *Metcalf v. Cunard Steamship Co.* 147 Mass. 66; *Heinlein v. Boston & P. R. Co.* Id. 126; *Files v. Boston & A. R. Co.* 149 Mass. 204; *Gordon v. Cummings*, 9 L. R. A. 640, 152 Mass. 513; *Redigan v. Boston & M. Railroad*, 14 L. R. A. 276, 155 Mass. 44; *Sterens v. Nichols*, 15 L. R. A. 459, 155 Mass. 472; *Plummer v. Dill*, 156 Mass. 426; *Hart v. Cole*, 16 L. R. A. 557, 156 Mass. 475; *Sullivan v. Boston & A. R. Co.* 156 Mass. 378.

There is no evidence in this case of any invitation, express or implied, held out to the plaintiff by either the owner of the Youth's Companion building or the defendant.

The plaintiff when he was injured was, at the highest, a mere licensee upon the premises, the jury having found specially that he was, "at the time of the injury, upon the roof of the Youth's Companion building by virtue of an implied permission or license from the person or persons having proper authority over the roof and control thereof in respect of granting or denying such permission." The defendant maintains that there was not sufficient evidence to warrant this finding of the jury, and that, upon the evidence, the plaintiff was a mere trespasser. If the plaintiff was a trespasser, then "on the evidence and law in this case, he would not be entitled to recover, because the defendants would not owe him, as a trespasser, the duty that is alleged in the plaintiff's declaration; they would not as a matter of law."

*Sullivan v. Boston & A. R. Co. supra.*

In order to maintain this action, it is incumbent upon the plaintiff to establish a distinction between the duty of an owner of premises and that of a lawful occupant.

The owner or occupant of private property is not liable for the results of his ordinary negligence to a trespasser or licensee thereon. No distinction in this respect has ever been drawn between the duty of an owner of premises and that of a lawful occupant.

*Hart v. Cole*, 16 L. R. A. 557, 156 Mass. 475; *Sterens v. Nichols, supra.*

No reason exists for drawing any such distinction.

The court has generally, if not universally, enunciated the rule after considering whether or not the plaintiff is a trespasser or licensee, and not with reference to the defendant's position, whether he is the owner of the premises or has rights less than absolute ownership.

*Hart v. Cole, Sterens v. Nichols, Redigan v. Boston & M. Railroad, and Files v. Boston & A. R. Co. supra.*

In the case of trespassers or licensees, even though the owner knows or has reason to believe that they are likely to be upon his premises, he is not liable for the results of ordinary negligence on his part.

NOTE.—See, in connection with this case, the preceding case of *Illingsworth v. Boston Electric Light Co.* (Mass.) *ante*, 552.

35 L. R. A.



*Reardon v. Thompson and Daniels v. New York & N. E. R. Co. supra.*

The broad rule laid down by Brett, *M. R.*, in *Heaven v. Pender*, L. R. 11 Q. B. Div. 508, to the effect that a man is always liable for the natural and probable consequences of his acts, which he knows, or ought to know, has been considerably departed from and limited in this commonwealth.

The owner of a building is not 'bound to fence or enclose dangerous machinery contained in it for the protection of a mere licensee.'

Buswell, *Personal Injuries*, 1893, p. 111, and cases cited.

Neither would the defendant owe the plaintiff any duty, even if it were maintaining its wires above the roof by the mere consent and permission of the owner. The defendant would then have the same defenses as the owner.

*Bolch v. Smith*, 7 Hurlst. & N. 786; *Reardon v. Thompson*, 149 Mass. 267; *Hart v. Cole*, 16 L. R. A. 557, 156 Mass. 475; Pollock, *Torts*, pp. 453-456; *Southcote v. Stanley*, 1 Hurlst. & N. 247; *Indrmaur v. Dames*, L. R. 1 C. P. Div. 274; *Corby v. Hill*, 4 C. B. N. S. 556; *Tollhausen v. Davies*, 57 L. J. Q. B. 394.

The plaintiff was not a licensee, but a trespasser, upon all the evidence.

If the plaintiff, before he came in contact with the defendant's wire, appreciated the facts of the case, knew or ought to have known everything that it was material for him to know as bearing upon the question of his danger or security in what he proposed to do, and chose to go forward, then he was a volunteer and would not be entitled to recover, because understanding the risk and choosing voluntarily to go forward, he is held to have accepted the risk.

*Whitmore v. Boston & M. R. Co.* 150 Mass. 477; *Lothrop v. Fitchburg R. Co.* 150 Mass. 423; *Lewis v. New York & N. E. R. Co.* 10 L. R. A. 513, 153 Mass. 78; *Miner v. Connecticut River R. Co.* 153 Mass. 898; *Mellor v. Merchant's Mfg. Co.* 5 L. R. A. 792, 150 Mass. 362; *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685.

If a case is submitted to the jury under instructions which permit them to find a verdict which the evidence is not sufficient to sustain, the other party is entitled to a new trial, although the instructions, abstractly considered, were free from objection.

*McCreary v. Boston & M. Railroad*, 11 L. R. A. 359, 155 Mass. 300, and cases cited.

Where facts are undisputed, and also if, viewed in the light of common knowledge and experience, necessarily show that the plaintiff did not use the ordinary caution and vigilance which persons of reasonable prudence exercise, and no excuse for this appears, it is the duty of the court to direct a verdict for the defendant.

*Gaffney v. Brown*, 150 Mass. 479; *Shea v. Boston & M. Railroad*, 154 Mass. 81; *Sullivan v. New York, N. H. & H. R. Co.* 154 Mass. 524.

Plaintiff was guilty of contributory negligence because he did not look to see either where he was going or what he was touching.

*Patterson v. Hemmway*, 148 Mass. 94; *Gaffney v. Brown*, *supra*; *Snowden v. Boston & M. Railroad*, 151 Mass. 220; *Fletcher v. Fitchburg R. Co.* 3 L. R. A. 743, 149 Mass. 127; *Allerton v.* 25 L. R. A.

*Boston & M. Railroad*, 146 Mass. 241; *Oranger v. Boston & A. R. Co.* Id. 276.

The plaintiff was guilty of contributory negligence, because he knowingly and without excuse put himself in a place of danger.

*Murphy v. Webster*, 151 Mass. 121; *Harwood v. Oakham*, 152 Mass. 421.

Bills of exceptions, like other processes, pleadings, and proceedings, are, in proper cases, amendable within the discretion of the court.

*Perry v. Breed*, 117 Mass. 155, and cases cited; *Artilla v. Spaulding*, 121 Mass. 505.

The plaintiff must state what relations or arrangements existed between it and the owner of the roof, before the court can determine upon the declaration, whether the defendant owed the plaintiff any duty.

The words "rightfully there," in the absence of any other allegation showing the nature of the right pursuant to which the plaintiff was upon the roof, must be taken to mean that the plaintiff went there in the proper discharge of the business of his employer and was not a trespasser in so doing because he was there by the license of the owner. He could not be considered to be there by invitation, express or implied, or with rights higher than those of a bare licensee unless he expressly so alleged it.

*McEachern v. Boston & M. R. Co.* 150 Mass. 515; *Stevens v. Nichols*, 15 L. R. A. 459, 155 Mass. 472; *Hart v. Cole*, 16 L. R. A. 557, 156 Mass. 475. *Southcote v. Stanley*, 1 Hurlst. & N. 247; *Hounsell v. Smyth*, 7 C. B. N. S. 731.

If the plaintiff was properly on the roof of 41 Temple place under such circumstances as would create, ordinarily, a duty on the part of the defendant with respect to the condition of the premises, yet the plaintiff on the declaration was a mere trespasser in touching or coming into contact with the defendant's wire, no duty to fence or guard the same being alleged.

*Lane v. Atlantic Works*, 111 Mass. 126; *Hughes v. Macfie*, 2 Hurlst. & C. 744; *Mangan v. Atherton*, L. R. 1 Exch. 239.

*Messrs. Sherman L. Whipple and William M. Noble* for plaintiff.

*Field, Ch. J.*, delivered the opinion of the court:

The exceptions in this case, as amended, were allowed by the presiding justice of the superior court, if it was within his authority and discretion to allow them; otherwise, they were disallowed. The original draft of the exceptions was filed on February 20, 1892, within the time allowed. In April following, the counsel of both parties were heard upon the allowance of the exceptions. The plaintiff's counsel then asked that they be disallowed, which the justice at that time declined to do; but he suggested that the counsel confer together, and that the plaintiff's counsel point out what changes they thought should be made. This was done, and the draft of the exceptions was altered, and some things added to it, with the consent of the counsel of the defendant, who, however, did not admit that all such alterations and additions were necessary. The plaintiff's counsel did not waive their objections to the allowance of the amended draft, but contended that it was substantially a new

bill of exceptions, made up and filed after the time prescribed by the statute for filing exceptions has passed. Copies of the exceptions have been furnished us, showing the difference between the bill as originally filed and the bill as amended. The excepting party has a right, if he chooses, to stand upon his exceptions, as originally filed, and to prove the truth of them, if they are not allowed. The extent to which errors in such exceptions can be corrected on a petition to prove the exceptions was considered in *Morse v. Woodworth*, 155 Mass. 288. The extent to which the presiding justice can allow the excepting party to amend his bill of exceptions has not been determined. In such a case as this is, where many questions of law were raised at the trial, one of which was that upon all the evidence the plaintiff could not recover, it is hardly possible that the original draft of the exceptions, without any change, would be entirely acceptable to either the presiding justice or to the other party. The other party, under the statute, has a right to be heard upon the allowance of the exceptions; and the practice has been to permit the excepting party, if he chooses, with the consent of the presiding justice, to amend his exceptions so as to state more accurately and completely the questions of law which were raised at the trial, and included in the bill of exceptions as filed. It is true that the presiding justice is not required by law to allow any such amendments, but his power to allow amendments is undoubted. *Perry v. Breed*, 117 Mass. 155. They cannot be allowed without the consent of the excepting party, but with his consent they can be; certainly, so far as is necessary to make the exceptions conformable to the truth, and the whole truth, with reference to the questions of law raised at the trial, and included in the original bill of exceptions. We have no occasion to consider, in this case, whether a distinct exception taken at the trial, and omitted from the bill as filed, by accident or mistake, can be added by an amendment to the original draft after the time has expired for filing exceptions. In the present bill, we think that the amendments allowed by the presiding justice with the consent of the defendant were such as were within his power and discretion to allow.

The plaintiff was a lineman of the New England Telegraph & Telephone Company, and went upon the roof of the building No. 41 Temple Place, Boston, called the "Youth's Companion Building," for the purpose of affixing a telephone wire to a standard erected upon the roof of the building No. 45 Temple place, which adjoined No. 41 on the side towards Washington street. It was intended that this wire should run from West street to this standard, and thence should avert slightly towards Washington street, and pass across Temple place. He was injured, while on the roof of No. 41, by his left hand coming in contact with a wire belonging to the defendant, through which an alternating electric light current was being transmitted. This electric light wire ran over the southeasterly corner of the building on which he was, and at the point where the plaintiff's hand came in contact with it was about 25 feet from the cor-

ner. The wire formed one side of an alternating electric light circuit; the other wire of the circuit running parallel with it, and at a distance of 17½ inches from it. No wires of any kind were attached to the roof of No. 41 Temple place; and the roof was clean, smooth and unobstructed by anything except a scuttle near the back part of it, a skylight near where the plaintiff fell, and two or three other skylights near the rear of the roof. The roof of the building No. 45 Temple place, was about 20 feet below the roof of the building No. 41, and each was a flat, or nearly flat, roof. Near the center of the roof of No. 45, the defendant, which is a corporation engaged in the business of furnishing electric light and power in the city of Boston, had erected a standard about 25 feet in height, on which were three cross arms, running horizontally and at right angles with the line of Temple place. This standard was used for the purpose of supporting various wires which were attached to it, and ran from it to two other fixtures on the other side of Temple place. The highest cross-arm was about 5 feet long, and had on it four glass insulators, placed 17½ inches apart, attached to which were four arc electric light wires. The next lower cross-arm was placed 2 feet below this, was about 8 feet in length, and had upon it six insulators, placed at the same distance apart, to which were attached electric light wires. The two insulators next to the upright post—one on each side—had attached to them the two alternating electric light wires, and the remainder of the insulators had attached to them four arc electric light wires. The lowest cross arm was placed about 1½ feet below the middle cross-arm, was about 12 feet in length, and had on it ten insulators, placed 12 inches apart, to which were attached ten wires, not electric light wires, of which at least six were telephone wires. All the wires attached to this standard ran north-easterly across Temple place, above the southeast corner of the roof of No. 41, to two fixtures on the other side of Temple place, placed on the buildings No. 24 and 34. All the arc electric light wires ran to a standard on No. 24, and the two alternating electric wires on the middle cross-arm, and the telephone and other wires on the lowest cross-arm, to a standard on No. 34. The wires thus starting from the same standard on No. 45, as they crossed over the corner of the roof of No. 41, diverged, and form two distinct groups of wires, which, for convenience, are called the first and second groups; the wires running to No. 24 constituting the first group, and those running to No. 34 the second group. The point at which the second group of wires crossed the side of the roof of No. 41 next to No. 45, was distant from the southeast corner of the roof of No. 45 about 15 feet, and the point where the first group crossed this side was distant from the same corner about 20 feet; so that there was a distance of about 5 feet between the two groups on the side of the roof of No. 41, next to No. 45. Between the place where these groups of wires crossed the side of the roof of No. 41, next to No. 45, and the rear of the roof of No. 41, there was a distance of about 70 feet, and there was no ob-

struction of any kind on this part of the roof, except two chimneys, each 4 feet in width, nor was there any wire; and any one might have gone on any portion of that part of the roof, and looked down upon the roof of No. 45, without encountering any danger. The first group of wires, as they crossed above the corner of the roof of No. 41, were at distances varying from 4 to 6 feet above the roof; the two alternating electric light wires, which were in the second group, were at a distance of about 2½ feet above the roof, and the telephone and other wires running from the lowest arm of the fixture on No. 45 were about 1 foot below the alternating electric light wires.

The plaintiff at the time of the accident, was at work, with others, for the telegraph and telephone company, in stringing a telephone wire from the top of a building in West street to the standard on No. 45, Temple place, and thence to a fixture on the top of a building on the other side of Temple place. He was told by the foreman to go upon the building No. 45 Temple place, and attach this wire to the standard there. He went up through the building No. 29 Temple place, called the "Warren Building," and out upon the roof of that building; thence across the intervening roofs to the roof of No. 41. There were no steps or other means provided for getting from the roof of No. 41 to the roof No. 45, and there was no ladder or rope on the roof which could be used for this purpose. There was access to the roof of No. 41 through the building No. 41, and also access to the roof of No. 45 through the building No. 45. The plaintiff, after getting upon the roof of No. 41, and after calling to a fellow workman in the street to come up on the roof of No. 45, went to look over the side of the roof of No. 41, to see how he could get down upon the roof of No. 45. He was looking over the side of the roof onto the roof of No. 45, and was stooping down (he had to stoop down to clear a large bunch of the wires), when he felt a current of electricity go through him, and he remembered nothing more. The plaintiff was found lying under the first group of wires with four of his fingers burnt, and a wound upon the side of his head, where the hair was burnt off. The nearer of the two alternating electric light wires, as one approached them in going towards the side of the roof, had upon it some pieces of burnt flesh which showed where the plaintiff had touched the wire; and the insulation of the wire, where it appeared that the plaintiff had touched it, was worn off. The plaintiff had had a long experience with electrical apparatus; was familiar with all kinds of electrical wires, and the proper methods of handling them, and the dangers attendant upon the business. He testified "that he knew the general character of the structures used by the various companies in the prosecution of their business in Boston; that the Boston Electric Light Company has a structure of a peculiar color, of its own, and that the fact last referred to was common knowledge among all linemen; that the telephone company had structures of a different color from that of the Boston Electric Light Company; that the colors of the structures used by the other companies in Boston also differed from the color of the structures of the Boston

Electric Light Company; that linemen, if they were close enough to see the color of a structure, could easily tell whether it belonged to one company or another; that in the prosecution of his work as a linemen, he had occasion, in Boston, to go on to roofs which were crossed by all sorts of wires, and to go upon structures which had all sorts of wires; that on the structure on 45 Temple place he would not have been surprised to find thereon electric light, telephone, telegraph, police signal, and other wires; the telephone wires were sometimes insulated, and sometimes not insulated." It appeared that the alternating electric light wires did not resemble any wires used by other companies, except the police-signal wires. The plaintiff testified, in substance, that he noticed the big bunch of wires, by which he must have meant the first group, but that he did not recollect noticing the others. All he remembered was that there was a big body of wires, and that he had to stoop in order to clear them; he cleared them, and went to the edge of the roof, and looked down; that he could not say whether there were any wires on his left or not; that he noticed that there were different kinds of wires on the roof, after he got onto it; that the only safe rule to follow was to treat every wire as dangerous; that he was very careful not to touch any wire on a roof, because he was liable to get a shock; that even telegraph or telephone wires sometimes got across wires having a dangerous current, and became dangerous; and that the roof on which he was standing was a copper roof, which was a conductor, and made what was called a "ground." It was admitted that the defendant was transmitting through these alternating wires an electric current of 1,000 volts, which was dangerous under certain conditions. But it was contended that to make such a current dangerous the person touching a wire must be "grounded" as it is called; that is, be connected with the earth by substances that are conductors of electricity, while the other wire of the circuit must be grounded at the same time. The accident happened in the morning of March 10, 1890, when it was broad daylight. The jury found, in answer to question submitted to them, that the plaintiff, at the time of the injury, was upon the roof of No. 41 Temple place by the implied permission or license of a person having authority to grant such permission or license. The presiding justice ruled that the plaintiff could not, under his declaration, "claim that the defendant was unlawfully, or without right, maintaining the alternating wires in the position in which they were at the time of the accident; reserving, however, to the plaintiff the right to claim that the defendant negligently maintained said wires in such position." He also ruled "that there was no evidence of any invitation, express or implied," held out to the plaintiff by the owners of the building No. 41, and no evidence of any preparation or adaptation of the building by the owners for the plaintiff's use, and that, "if the plaintiff was a mere licensee, the defendant, if liable at all, was not liable for mere omission on its part to exercise reasonable care as to the position or condition of the wire which caused the plaintiff's injury, but would be liable only for acts of commission," but refused

to rule that there was no evidence of any such act of commission. He also ruled "that a mere licensee, going upon another man's land, must take the premises as he finds them, subject to all their concomitant conditions and perils, and that if the plaintiff was a mere licensee, in order to recover, he must show some change or alteration in the condition of the premises, or wires thereon, whereby injury may arise to persons being upon the roof in question, and that such change or alteration occurred during the existence of the license in question, and that the plaintiff had no notice of such change or alteration." He also ruled that if the plaintiff was on the roof of the building No. 41 as a trespasser, upon the evidence in this case, he would not be entitled to recover. If the plaintiff was a licensee, he stated the law as follows: "The law is that as between a licensee and the owner of the premises, where, as against the owner of the premises, he is a mere licensee, he has to take the premises in the condition in which he finds them. He occupies them as a licensee,—pure licensee,—at his own risk, unless perhaps, in the case of some concealed trap. Now, the defendants claim that at most he was only a licensee, if he was that; and they claim that this same doctrine which applies as between the licensee and the owner of the premises applied between the plaintiff and themselves, as the owners and maintainers of these electric wires. That is what they claim. And so they say there was no duty from them to the plaintiff. Now, the plaintiff claims something more. He claims there was more than that; that, whatever might be his relation to the owners of the Youth's Companion building, yet that he was on that building by the permission of the owners, so that he was not a trespasser, was not there unlawfully, and that then, as between him and the defendants, a new element enters. The plaintiff claims that the defendant placed the electric light wires on the building in Temple place, where they were when plaintiff was injured, and had full control of them at that time (that is, the defendant had full control of them at that time); that through some of these wires, thus placed there passed, in their ordinary and daily use, alternating currents of electricity, which under such conditions as were liable to happen, and might reasonably be expected to occur, became dangerous to human life and safety; that this was known, or reasonably ought to have been known, to defendants and their servants who put up and had charge of the wires; that there was also telegraph wires and telephone wires, with the defendants' knowledge and express or implied consent, attached to the same standard to which the wires of the defendant were attached, and at this place ran near the defendants' wires; and that defendants and their servants knew, or, with the exercise of ordinary prudence and attention, would have known, that the servants of the telephone and telegraph companies, whose wires were attached as aforesaid, would in the usual course of their duty and employment, have occasion to come to said standard, and in close proximity with defendants' said wires, and that the natural and probable consequence might be that, unless defendant used due and proper care in respect to their said wires, the said servants of the said

telephone and telegraph companies, while in the usual course of their employment and duty as aforesaid, and though in the use of due care themselves, might be injured by said wires, and the electric currents thereof. That is what the plaintiff claims. And what is the result? If the plaintiff satisfies you that these claims are well founded, and that plaintiff, at the time and place of his injury, was a servant of the telephone company,—was lawfully on said building,—and then and there rightfully acting in the course of his employment, and where the defendants ought reasonably to have anticipated he might be, then the defendants owed him some duty in regard to their said wires." That duty the presiding justice afterwards defined as "the duty to use reasonable and ordinary care in respect to the condition of these wires, and the location of them. . . . The defendants must use reasonable and proper care in the kind of wire they use, in the care they take of it while in use, and in regard to the location in which they maintained it."

Under this statement of the law, the claim of the plaintiff was, in effect, that the alternating electric light wires were not properly insulated; that, at the particular place where the plaintiff touched one of them, the insulation had been carelessly allowed to be worn off; and that the wires were placed in a position so near to the roof that a person on the roof would naturally come in contact with them. The jury must have found that there was a license or permission given by the defendant to the telegraph and telephone company to attach its wires to its standard on the building No. 45 Temple place. The principal questions argued are whether the defendant owed the telegraph and telephone company and its servants any duty in regard to the proper insulation or position of its wires at the place where the wires ran over the roof of the building No. 41, and, if it did, whether the plaintiff, in going to the side of the roof, as he did, to look down upon the roof of No. 45, for the purpose of finding out how he could get down upon it, was in the exercise of due care.

The first prayer of the defendant for instructions raises the question whether, upon all the evidence, the plaintiff can recover. We doubt if the plaintiff offered sufficient evidence that he was in the exercise of due care at the time and place of the accident. It was daylight, the wires were visible, and the plaintiff knew that some of the wires might be dangerous. If we assume that, as against the owner of the building No. 41, he was rightfully on the roof of that building for the purpose of going down upon the roof of the building No. 45, there was on the side of the roof a long distance, unobstructed, over which he could have looked down with safety. The plaintiff could look down upon the roof of No. 45 in his own way, and the safe place to do this was obvious. Instead of selecting a safe place, he unnecessarily stooped under some wires which he saw, and knew might be dangerous, without noticing another set of wires, lower down, which were in plain sight. In consequence of this conduct, his hand accidentally came in contact with one of

the alternating electric light wires at a point where the insulation was worn off, and he received his injury. If necessary to the decision, it would certainly deserve consideration whether this conduct does not show an unnecessary exposure to a danger which the plaintiff knew, or ought to have known. See *Lothrop v. Fitchburg R. Co.* 150 Mass. 423. Without determining this question, however, we are of opinion that the defendant, on the evidence, owed no duty to the plaintiff to have its wires properly insulated at the place where he received his injury, or to have its wires at that place supported so far above the roof of the building No. 41 that the plaintiff would not come in contact with them when on that roof. On the evidence recited in the exceptions, the most favorable inference for the plaintiff is that the telegraph and telephone company was permitted by the defendant to use its standard on the building No. 45 Temple place, and that, therefore, the plaintiff, as the servant of the telegraph and telephone company, engaged in its business, had an implied license from the defendant to go upon the roof of this building, and attach telegraph and telephone wires to its standard. Whatever may be the duty of the defendant towards its licensees, it must be confined, we think, to licensees when acting within the scope of the license; and the defendant had no reasonable ground to expect that the servants of the telegraph and telephone company would approach this standard in the way used by this plaintiff. If the presumption is that the defendant maintained this standard on the roof of the building No. 45 by contract with or permission of the owner of that building, the inference would be that it had a license from the owner to go through his building, upon the roof, for the purpose of reaching the standard, and attaching wires to it; and this license might be available to the servants of other companies which were permitted to use the standard, if the standard was erected or maintained by the defendant for the use of other companies as well as of itself. *Doty v. Gorham*, 5 Pick. 437, 16 Am. Dec. 417. This was the most direct way of reaching the roof of No. 45, and was the way provided by the owner of the building for reaching the roof; and there was nothing in the situation of this and the adjoining buildings indicating that the roof of building No. 41 was to be used for the purpose of reaching the roof on No. 45. The right to go upon the roof of No. 41 for this purpose could only be derived from the owner or occupant of that building. Whatever may be the duty of the defendant, in stringing its wires over the roof of No. 41, to the owner of that building and his servants, we see no evidence that the defendant intended to authorize the use of this roof by the telegraph and telephone company,

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or had any right to permit the servants of that company to go upon it. Whatever duty, on the evidence, the defendant owed to the plaintiff, as servant of the telegraph and telephone company, under its license to that company to use the standard for the support of telegraph or telephone wires, this duty cannot be held to extend over the whole circuit of the defendant's wires; and the defendant is not required, for the protection of the servants of the telegraph and telephone company, to maintain an effectual insulation of its wires over other buildings than that on which the standard was placed, at places where the defendant had no reason to expect that the servants of that company would go, in the performance of their duties, in using its standard, and where the defendant had neither invited nor licensed them to go.

The first two counts of the declaration are at common law. The third count is under Pub. Stat., chap. 109, § 12, and Stat. 1883, chap. 221. The court required the plaintiff to elect whether he would rely upon the first and second counts, or upon the third, and he elected to rely upon the first and second. As the exceptions must be sustained, and there may be a new trial, it is proper to notice the contention of the plaintiff under the third count, as in the event of another trial the plaintiff may rely upon that count. Pub. Stat. chap. 109, § 12, provides that "when an injury is done a person or to property by the posts, wires, or other apparatus of a telegraphic line the company shall be responsible in damages to the party injured," etc. Stat. 1883, chap. 221, is as follows: "All provisions of law granting to persons and corporations authority to erect, lay and maintain, and to cities and towns authority to regulate telegraph and telephone lines, except sections sixteen and eighteen of chapter one hundred and nine of the Public Statutes, shall, so far as applicable, apply to lines for the transmission of electricity for the purpose of lighting." This last statute relates solely to the authority to erect, lay, and maintain lines for the transmission of electricity for the purpose of lighting, and for the regulation of such lines. It does not relate to the liability of electric light companies for injuries received by any person from the posts, wires, or other apparatus of such companies. This renders it unnecessary to consider whether Pub. Stat., chap. 109, § 12, was intended to include injuries received from an electric current transmitted through wires. It has been argued that this could not have been intended by this section, as telegraphic currents are not dangerous.

In the view we have taken of this case, the questions arising on the demurrer need not be determined.

*Exceptions sustained.*

## MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* T. G. WOODS  
*et al.*,  
v.

John S. TOOKER, Clerk of Lewis and  
Clarke County.

(.....Mont.....)

**Publication of a proposed amendment** two weeks only before election instead of three months, as required by Const., art. 19, § 9, is fatal to the amendment, as the provision is that the secretary of state "shall" cause the publishing for three months; and it is also declared in another section that the provisions of the constitution are mandatory and prohibitory, unless by express words declared to be otherwise.

(September 24, 1894.)

**P**ETITION for a writ of mandamus to compel defendant to file the certificates of relators as nominees for the office of county commissioners, which offices were alleged to be about to become vacant under the provisions of an amendment of the state constitution. *Writ denied.*

**Statement by DeWitt, J.:**

The relators ask a writ of mandamus, directed to the respondent, as county clerk and recorder of Lewis and Clarke county, requiring him, in pursuance to the ballot law (Acts 16th Legal Sess. Laws 1899, p. 185), to file in his office the certificate of the relators' nomination for the office of county commissioner of said county. The petitioners set forth that on September 4, 1894, an assemblage of delegates of the Republican party was duly held, and that at such assemblage the three relators were duly nominated for such office of county commissioner. The formal acts of making the certificate of nomination by the proper officers of the convention are set forth in the petition. It is then alleged that said certificate was duly presented to the respondent for filing, and that he refused, and still refuses, to file the same. The respondent's answer admits all the matter alleged in the petition, and gives his reason for refusing to file the certificate, based upon the following facts: The nominations for said office of county commissioner were for the purpose of electing persons to that office, under the provisions of an alleged amendment to the constitution; and that there is, in fact, no such amendment, and, there being no such amendment, there will be no vacancy in the office of county commissioner, in said county, to be filled at the ensuing election; and that, therefore there is no duty enjoined by law upon the county clerk and recorder to file any certificate of nomination for such office by any political party.

The question presented to this court is whether the constitutional amendment proposed by the legislative assembly by Act ap-

proved February 23, 1891, and voted upon by the electors at the general election in November, 1892, became, and now is, a part of the constitution. The facts in relation to the alleged adoption of the proposed amendment are as follows: The state constitution, adopted October 1, 1889, contains the following: "In each county there shall be elected three county commissioners, whose term of office shall be four years. A vacancy in the board of county commissioners shall be filled by appointment by the district judge of the district in which the vacancy occurs." Article 16, § 4. The act of the legislative assembly referred to, approved February 23, 1891, provides as follows: "Section 1. There shall be submitted to the qualified electors of the state, at the next general election, the following amendment to the state constitution: Section 4, art. 16, shall be amended so as to read as follows: Sec. 4. In each county there shall be elected three county commissioners, whose term of office shall be four years; provided, that the term of office of those elected to succeed those elected October 1, 1889, shall expire on the first Monday in January, 1895; and, provided further, that at the general election to be held in November, 1894, one commissioner shall be elected for a term of two years, and two commissioners for a term of four years. A vacancy in the board of county commissioners shall be filled by appointment by the district judge of the district in which the vacancy occurs." The constitution provides, as to amendments of that instrument, as follows: "Amendments to this constitution may be proposed in either house of the legislative assembly; and if the same shall be voted for by two thirds of the members elected to each house, such proposed amendment, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be), for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared, and distinguished by numbers, or otherwise, that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election." Article 19, § 9. The fact as to the publication of the amendment proposed by the Act of February 23, 1891, is that it was published by the secretary of state in the newspapers as required, but for two weeks before the election of 1892 only, and for no longer period. The question now presented is whether the publication of the proposed amendment for only two

**NOTE.**—In connection with the above case, see the discussion in *Livermore v. Waite* (Cal.) 25 L. R. A. 312, as to the adoption of a constitutional amendment.

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weeks caused the attempt to adopt the amendment to be wholly a failure.

**Mr. Alex C. Botkin** for relators.  
**Mr. C. B. Nolan** for respondent.

**De Witt, J.**, delivered the opinion of the court :

Counsel for relators has presented to us the general rules as to when statutes should be construed to be mandatory and when directory, and has argued, upon their analogies, that the provision of our constitution which requires a proposed amendment to that instrument to be published for three months is directory only, and that a disregard of the provision is not fatal to the adoption of the amendment. The reports are full of decisions which have applied these principles as to the construction of certain provisions of statutes, but we need not enter upon an elaborate examination of these principles, for we believe that in considering the provisions of the constitution for amending that instrument we are entering upon a somewhat different field. We cannot better introduce this consideration than by quoting from *Judge Cooley*, whose language we find cited, and his doctrine largely followed, by the courts which have treated the subject of the construction of constitutional provisions. *Judge Cooley* says: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding

with the immense importance of the powers delegated, and with a view to leave as little as possible to implication. There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application." Pages 94, 95. "And we concur fully in what was said by *Mr. Justice Emmot* in speaking of this very provision, that 'it will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory, and not imperative.'" *Cooley*, *Const. Lim.* 4th ed. p. 99. At another place in the same work this distinguished authority on constitutional law says: "But the will of the people to this end [that is, amending a constitution] can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought, or by an act of the legislative department of the state, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the constitution itself." Page 89, § 80. In another place in the same work we find the following language: "The fact is this: that whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the legislature as if it was devoid even of moral obligation, and to be, therefore, habitually disregarded. To say that a provision is directory seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so must be conceded; that it is so we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory. And if the legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the courts should enforce it. And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law so great as that which is done by an habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed." Page 183, § 180.

The court of appeals of Texas, in construing a constitutional provision, uses the following language: "In considering the subject, we think it necessary to first determine whether, in the construction of the organic law, we may, as we might in the construction of a statute, apply the distinction between directory and mandatory provisions, or whether we must construe all provisions of the organic law to be mandatory." *Hunt v. State*, 23 Tex. App. 897. The opinion of that court then refers to cases which have held constitutional provisions to be directory, and continues in the following language: "But, notwithstanding these decisions are by able courts, the great weigh of authority

seems to be the other way, holding that the courts nor any other department of the government are at liberty to regard any provision of the constitution as merely directory, but that each and every of its provisions must be treated as imperative and mandatory, without reference to the rules distinguishing between directory and mandatory statutes." 22 Tex. App. 398. The opinion then cites *Judge Cooley* as we have quoted him above, and continues: "In our own state we know of no instance in which a constitutional provision has been held to be directory merely. This court has held more than once that constitutional provisions are always mandatory, and has adopted the doctrine laid down by *Judge Cooley*, which we have quoted above. *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Holley v. State*, 14 Tex. App. 505. We believe this to be the sound and only safe doctrine. It seems to us that the rule which gives to the courts and other departments of the government a discretionary power to treat a constitutional provision as directory, and to obey it or not, at their pleasure, is fraught with great danger to the government. We can conceive of no greater danger to constitutional government, and to the rights and liberties of the people, than the doctrine which permits a loose, latitudinous, discretionary construction of the organic law. 'We are taught by the constitution itself that those who administer this government are divided into three co-ordinate departments; each of these can only act within its own limited sphere, and they, respectively, are the servants of the sovereign power, the people. There is no power above the people. There is no discretionary power granted in the constitution for either of these departments, nor for all of them united, to exercise a discretionary expansion and flexible power against its rigid limitations, even though such limitations were imposed by improvident jealousy. If abuse exists by reason of defects in the constitution, present or prospective, the true source of authority, the people have the power, and doubtless the wisdom and patriotism, to correct them; and this, in the American idea, is the safe and only depository.' *Potter's Dwarrr. Stat. & Const.* p. 665. . . . Upon the weight of authority, and, to our minds, upon the soundest of reasons, we conclude that the provision of the constitution under consideration, and all other provisions of our constitution, are mandatory, and can in no case be regarded as directory merely, to be obeyed or not, within the discretion of either or all of the departments united of the government." *Hunt v. State*, 22 Tex. App. 399, 400. See also *Opinion of the Justices*, 6 Cush. 573.

It would seem that the framers of our constitution had in mind the views of *Judge Cooley*, for they did not leave the language of the constitution open to the construction of courts, but set the matter at rest by the following provision: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Const. art. 8, § 29. The court is therefore relieved from much responsibility in the construction of the

organic law. The question is not before us whether the requirement of the constitution that notice of a proposed amendment shall be published for three months is mandatory or directory. The constitution construes itself in this regard, and, as remarked in the opening of this opinion, we seem to be in a somewhat different field than that suggested by relators' counsel as to the construction of statutes.

It being settled that the provision under consideration is mandatory, the inquiry remaining seems to be, What is the consequence of disobedience to the mandate of the constitution? Is the proposed adoption of the amendment nullified, or is the disobedience of the constitution to be treated as simply an omission by the secretary of state? A constitution differs from a statute in that a statute must provide the details of the subject of which it treats, whereas a constitution states general principles, and builds the substantial foundation and general framework of the law and government. It is true that it is a subject of general remark that the modern tendency of constitution makers is to somewhat depart from this practice; but the distinction between a statute and a constitution, as above suggested, certainly remains, and it is still true that constitutions do not generally descend into details. But when we find this practice departed from, and we observe a constitution going into details, such action is significant. Again referring to the eminent constitutional authority above quoted, we repeat: "It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end." Pages 94, 95. Thus *Judge Cooley* holds that if we find in a constitution that which some may undertake to argue should be held to be unessential, it was not intended to be unessential by the people in enacting the provision. See also *Oakland Paving Co. v. Hilton*, 69 Cal. 510, citing *Koshler v. Hill*, 60 Iowa, 554, and citing *Cooley* as above.

The Kansas supreme court, in a case before



it, said: "The two important vital elements in any constitutional amendment are the assent of two thirds of the legislature and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because by them certainty as to the essentials is secured; but they are not themselves the essentials." *Constitutional Prohibitory Amendment Cases*, 24 Kan. 700. In reviewing this Kansas case, the supreme court of California uses the following language: "That the elements mentioned by the learned justice are important and vital cannot be doubted, but that they are the only important and vital elements cannot be conceded. The learned court here assumes, without any reason, that entering on the journals is not vital and important. The convention which framed the constitution of Kansas, and the people who adopted it and made it their paramount law, thought otherwise. This is plainly apparent from their inserting other elements in their constitution. It would be a rash assertion, and one which no sound principle of constitutional law sustains, that the words, 'such proposed amendments . . . shall be entered on the journal,' were inserted in the constitution of Kansas to be observed or not, as the legislature or any other department of the government of that state should think proper. If this is form and machinery, it is form and machinery established by the constitution. It is not unsubstantial and non-essential, but a part of the instrument, which all officers are sworn to support, as much as any other portion of the constitution; for when an oath is taken to support the constitution it embraces the whole instrument. These provisions may not be disregarded, for the reason, says the court, that by them certainty as to essentials is secured. We can conceive of no stronger reason why they should be regarded by legislators and courts. The constitution makers inserted them for that reason. They, in effect, ordain and declare that no other mode or form of machinery is permissible to secure certainty in doing the act permitted. Declaring that those 'requirements are nonessential is in effect saying that the convention which framed the constitution, and the electors which ratified their action, spent their time in framing and inserting in their organic and paramount law nonessential and unimportant provisions." *Oakland Paving Co. v. Hilton*, 69 Cal. 499, 500. We also find the following language used by the supreme court of Alabama: "We entertain no doubt that to change the constitution in any other mode than by a convention every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the legislature, or any other de-

partment of the government, can dispense with them? To do so would be to violate the instrument which they are sworn to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." *Collier v. Friserson*, 24 Ala. 109.

In considering the provisions of our own constitution, and in the light of the decisions, we are clearly of the opinion that the requirement to publish notices of a proposed amendment for three months is not only mandatory, but that it is an essential provision, and that it must be obeyed. We may add further that it seems to us to be a prudent and expedient provision. This requirement of the constitution provides a method for amending that instrument. It is also provided that the constitution may be amended, or a new one compiled, by a convention. Const. art. 19, § 8. This method, of course, is not now under consideration. But it may be said with us as it was said in Pennsylvania: There are only three methods by which a constitution may be changed: First, the method by amendment, as provided in article 19, section 9; second, by convention, as provided by article 19, section 8; and, third, by revolution. *Wells v. Bain*, 75 Pa. 39, 15 Am. Rep. 563. The first method was attempted. But that method was not followed as prescribed. Instead, another method was followed; that is, a method identical with that provided in article 19, section 9, except that the advertisement was for two weeks only, and not for three months. As remarked in California, the constitution framers ordain and declare that no other form or mode or machinery is permissible to secure certainty in doing the act permitted. It is also held in the Alabama case, above cited, that an amendment cannot be made by a method other than that provided. We therefore have this situation: The method for amendment is provided by the solemnity of the constitutional enactment, and another method of amendment has been attempted to be invoked. We can see no other result but that such attempt is nugatory, and of absolutely no avail. The California supreme court, in construing the provision that all of the constitution of that state should be mandatory and prohibitory, said: "We well add here that under our constitution no question can be made whether the provision in it for its amendment is mandatory or directory. That question is settled by the constitution itself, which ordains in the most solemn form and manner that each and all of its provisions are mandatory and prohibitory, unless by express words declared to be otherwise. Article 1, § 22. This section, in our judgment, not only commands that its provisions shall be obeyed, but that the disobedience of them is prohibited." *Oakland Paving Co. v. Hilton*, 69 Cal. 512. The Alabama case is also to the same effect,—that, if a method other than that provided is adopted, the attempt is nugatory. We also find it said in Endlich on Interpretation of Statutes, § 438, as follows:

"It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, and that where an act requires a thing to be done in a particular manner, that manner alone must be adopted." If it is held that the command to the secretary of state to publish a proposed amendment for a certain period is nonessential, and may be disregarded, why may not the legislative department of the government follow the same practice, and disregard the requirement that the proposed amendment shall be voted for by two thirds of the members elected to each house, or the requirement that the proposed amendment, with the ayes and nays of each house, shall be entered in full on their respective journals? If one requirement is nonessential, why is not another? And who is to say what is essential and what is not? And by what rules are such distinctions to be made? The constitution does not itself make them. The framers of that instrument made no distinction in the requirements. They made them all mandatory; and, if a court commences to nullify their commands by construction, we do not know where the court would commence, or where it would end, or where it would draw the line which the constitution says shall not be drawn.

We have felt wholly satisfied that the omission to publish the proposed amendment, as required by the constitution, is fatal to its

adoption; but we have considered the question at perhaps some length, and have quoted from the authorities with much liberality because this is the first time that such a question of construction has been before us. We cannot but be of opinion, with Judge Cooley, that we would be treading upon extremely dangerous ground were we to hold that a solemn constitutional provision was simply directory and nonessential when we face the express mandatory language of the provision, and also the additional and separate command of the constitution that the provision is mandatory. The command of the constitution is in no uncertain voice. We cannot misunderstand it. We cannot do other than render to it the obedience which our duty demands. It provides that an amendment may be adopted by certain methods. Those methods were not employed. Another method was resorted to. That method accomplished nothing. The amendment was not adopted. There being no amendment to the constitution, there are no offices of county commissioners in Lewis and Clarke county to be filled at the election to be held in November, 1894, and there is therefore no duty enjoined by law upon the county clerk and recorder of that county to file any alleged certificates of nomination for such offices.

*The writ of mandamus is therefore dismissed.*  
Pemberton, Ch. J., and Harwood, J., concur.

## NEBRASKA SUPREME COURT.

Joseph L. SHELLENBERGER, *Plff. in Err.*,

v.

Frank T. RANSOM *et al.*

(.....Neb.....)

\*1. Statutes should be so construed as to give effect to the intention of the legislature, and, if a statute is plain and unambiguous,

\*Headnotes by BYAN, C.

there is no room for construction or interpretation.

2. Our statute of descent is plain and unambiguous, and by its own operation, and solely in accordance with its own terms, vests in the heir such estate as he is thereby entitled to, *eo instanti*, upon the death of the intestate from whom the inheritance comes.

3. The former opinion in this case, reported in 81 Neb. 61, disapproved.

NOTE.—How far statutes will be regarded as having abrogated the maxim that one cannot profit by his own wrong.

The authorities directly in point upon the question of the rights of one who commits murder for property are all referred to in the above opinion, in the one handed down after the first hearing which is reported in 10 L. R. A. 810, in *Biggs v. Palmer* (N. Y.) 5 L. R. A. 340, or in the note which is appended to the latter case.

The text-books upon statutory construction which have touched the question agree that there will be no presumption of an intention to repeal the common law. *Endlich*, Stat. Constr. § 127; *Sutherland*, Stat. Constr. §§ 126, 290; *Bishop*, Written Law, § 142.

*Chancellor Kent* says: "Statutes are likewise to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. This has been the language of the courts in every age; and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the per-

fection of reason, and the brightest and noblest inheritance of the subject we cannot be surprised at the great sanction given to this rule of construction." 1 Kent, Com. 464.

*Sedgwick* does not appear to have noticed the question of presumed repeal of the common law but devotes some space to the question of liberal or strict construction of statutes in derogation of the common law (*Sedgwick*, Stat. & Const. L. p. 317), which if bearing upon the question at all can be regarded as simply furnishing a guide to determine how strong in case of the enactment of a statute covering a common-law subject, the language must be to effect a repeal of the common law.

There is no question that the maxim, *nemo commodum capere potest de injuria sua propria*, no one is able to take advantage of his own wrong, is part of the common law.

Broom classes it among the fundamental legal principles. *Broom*, Legal Maxims, p. 206.

*Coke* says: "It is a maxim of law that no man shall take advantage of his own wrong." *Co. Litt.* 143 B. In *Findon v. Parker*, 11 Mees. & W. 680, 12 L. J. Exch. 444, 7 Jur. 903, Lord Abinger, C. B., says: "Every man who has been in a court of law has

(June 27, 1894.)

**S**ECOND hearing upon a writ of error to the District Court for Otos County to review a judgment directing the sale of certain real estate for partition, a portion of which was claimed by persons who procured their title from one who claimed his title by descent from one whom he had killed for the purpose of acquiring the property. *Affirmed.*

The facts are fully stated in the opinion delivered after the former hearing, which is reported in 10 L. R. A. 810, and in the opinion printed below.

*Messrs. O. P. Mason and M. L. Hayward* for plaintiff in error.

*Messrs. John C. Watson, Frank T. Ransom, George D. Scofield, E. F. Warren, C. H. Marple, and W. D. Beckett* for defendants in error.

heard the maxim, no man shall take advantage of his own wrong.

I take it to be a universal principle of law and justice, that no man can take advantage of his own wrong. *Best, J., Doe v. Bancks, 4 Barn. & Ad. 409, Gow. 220.*

Blackstone, in his classification of the common law, recognizes established rules and maxims as one of the branches. 1 Bl. Com. 68.

The question then arises, Will a fundamental principle of the common law be repealed by a statute which is simply prescribing a rule of action upon an entirely different subject, with reference to which the principle may have only occasional and accidental application, when the statute does not notice the general principle and there is nothing in the subject to suggest the question of the applicability to it of such principle?

The answer furnished by the text-writers quoted above is "no," and such, as will be seen by the authorities cited *infra*, is the answer given by the courts.

The subjects are few upon which a complete rule can be formulated in one short legislative session. And unless the formulated rule can be supplemented by existing law the progress will be backward instead of forward.

In the language of Sir Matthew Hale approved by Chancellor Kent: "Where the subject of any law is single, the prudence of one age may go far at one essay to provide a fit law; and yet, even in the wisest provisions of that kind, experience shows us that new and unthought-of emergencies often happen, that necessarily require new supplements, abatements, or explanations. But the body of laws that concern the common justice applicable to a great kingdom is vast and comprehensive, consists of infinite particulars, and must meet with various emergencies, and therefore requires much time, and much experience, as well as much wisdom and prudence, successively to discover defects and inconveniences, and to apply apt supplements and remedies for them; and such are the common laws of England, namely, the production of much wisdom, time, and experience." Preface to Rolle's Abridgement, 1 Kent, Com. 472.

Refusing to presume the repeal of a fundamental principle of the common law by a statute upon a subject which requires no notice to be taken of such principle is vastly different from engrafting an exception upon the statute.

As stated by the Rhode Island court when speaking of the statute of limitations: "There is a wide distinction between ingrafting an exception into a statute by construction, and construing it according to its obvious intent. The rule laid down by Blackstone of considering the old law, the mischief, 25 L. R. A.

*Ryan, C.*, filed the following opinion:

An opinion was filed in this case on the 2d day of January, 1891. Subsequently a rehearing was granted, and thereon renewed arguments were made, and the case was again submitted. No controversy is now made as to the applicability of section 80, chap. 28, Comp. Stat. This question was finally settled by the opinion already filed, which is found reported in 81 Neb. 61. The simplification thus accomplished has left but one question for consideration. This arose upon the demurrer, from which fact it is rendered necessary to state as concisely as possible the facts pleaded. The petition was filed by Frank T. Ransom and John C. Watson, as plaintiffs, against Joseph L. Shellenberger, as defendant. In brief, this petition contained the averments that Emma Shellenberger, the owner of the N. E.  $\frac{1}{4}$  section 5,

and the remedy, when applied to this statute, shows that its purpose was to cut off those cases whose prosecution would, or might, result in fraud. It was clearly not intended to thwart the fundamental maxim that no one may take advantage of his own wrong. Hence, if one by fraud conceals the fact of a right of action for six years, it is not engrafting an exception on the statute to say he is not protected thereby, but it is simply saying he never was within it, since the protection was never designed for such as he." *Reynolds v. Hennessy, 17 R. I. 174.*

In *Fleming v. St. Paul & D. R. Co., 27 Minn. 111*, it appeared that a statute required railroad companies to maintain fences and cattleguards, and provided if they failed to do so they should be liable for all damages sustained by any person in consequence of such failure or neglect. A railroad employé was injured by the derailment of a train coming in contact with a cow on the track, and the rule that he had assumed the risk was held to apply. The court states that the design of the statute was to impose a general liability upon a corporation operating a railroad without a fence, subject to such qualification as the settled rules of law impose in such cases. Nothing short of an explicit declaration to the contrary, or at least exclusive implication, would warrant a different conclusion.

And the rule as above stated has been almost universally applied by the courts. The ground of the decision has not always been clearly perceived or stated, and in some few cases the rule has been lost sight of entirely so that different principles were applied. But the course of decision has been broad and strong against permitting a person to bring himself within the advantage of a statute by his own wrong.

#### *Divorce statutes.*

While it is true that in most statutes providing for divorce an exception is made in case the person seeking the divorce connived at the wrong, yet it is believed that a guilty plaintiff never profited by the absence of such exception. In *Massachusetts* it was distinctly held that—

Connivance will bar a suit for divorce, although not so specified in the statute. *Pierce v. Pierce, 8 Pick. 299, 15 Am. Dec. 210; Robbins v. Robbins, 140 Mass. 523, 54 Am. Rep. 483.* The cases of connivance at adultery are collected in the note to *Wilson v. Wilson (Mass.) 13 L. R. A. 524.*

In the following cases there is nothing to show that any statutory exception prevented granting the divorce:

When husband and wife are each seeking a divorce and are *in pari delicto*—the conduct of each being a constant aggravation to further offense by

township 7 N. range 14 E. of the sixth P. M., died intestate, leaving as her sole heirs-at-law her husband, Leander Shellenberger, and her two children, Maggie Shellenberger and Joseph L. Shellenberger; that upon her death the said land descended to her husband, Leander Shellenberger, during his life, during which time he was tenant of said land by his right of curtesy, Maggie and Joseph L. being entitled to the remainder after his death; that on April 29, 1886, Maggie Shellenberger died intestate, leaving as her only heir her father, Leander Shellenberger, whereupon Joseph L. Shellenberger and Leander Shellenberger became tenants in common of the aforesaid property; that on May 8, 1886, said Leander Shellenberger, and his wife, Miranda Shellenberger, by warranty deed duly conveyed their interest in said real property to plaintiffs, the same being, as

alleged, the life estate of Leander and the undivided one half of the remaining estate; that on the 23d day of July, 1887, said Leander Shellenberger departed this life, whereupon plaintiffs and Joseph L. Shellenberger became the owners of said land as tenants in common. There were other allegations, made with the view of demonstrating the necessity of a partition. The prayer was as follows: "The plaintiffs therefore pray for judgment confirming the shares of the parties as above set forth, and for a partition of said real estate according to the respective rights of the parties interested therein, or, if the same cannot be equitably divided, that the premises may be sold, and the proceeds thereof divided between the parties according to their respective rights, and for such other relief as equity may require." The initial averments of the answer were in denial of each

the other—the court ought not to interfere at the instance of either. *Cate v. Cate*, 53 Ark. 484.

In the struggles for supremacy, or to vent spleen, spite, or hatred the willing actors may fight out the battles of wedded life, but they cannot invoke the aid of the court for a divorce, after their own efforts have failed. *Beckley v. Beckley*, 23 Or. 228.

In *Blurook v. Blurook*, 4 Wash. 496, a divorce on the ground of cruelty was denied, where it appeared that the cruelty was elicited by the plaintiff's conduct.

Proof of any statutory cause for divorce uncondoned is a complete defense to a suit for divorce. *Tillison v. Tillison*, 63 Vt. 411.

A divorce for desertion will not be granted, where it appears that the one charged with desertion was crowded out of the house. *Graham v. Graham*, 158 Pa. 450.

Absence by a husband with the consent and in accordance with the desire of the wife will prevent an annulment of the marriage contract on her petition. *Merriman v. Merriman*, 3 Pa. Dist. Rep. 228.

#### *Statute of Limitation.*

There never has been any question that in equity fraudulent concealment of the cause of action was a good reply to the statute of limitations.

There is some conflict as to when the statute begins to run in cases based on fraud.

But in case of active fraud in concealing a cause of action the courts after much vacillation have with great unanimity refused, as stated in *Reynolds v. Hennessy*, 17 R. I. 174, to permit the defendant to take advantage of his own wrong. In some states such conduct is expressly provided for by statute, but none of the cases arising under such statutes are given in this note.

In an early English case the plaintiff was given leave to amend his replication to set up fraud in avoidance of the statute of limitations. *Bree v. Holbech*, Dougl. 555.

But later cases regarded the expressions in that case as *obiter* and after several expressions by the English judges of opinions on both sides of the question it was decided in *Imperial Gas Light & Coke Co. v. London Gas-Light Co.*, 10 Exch. 30, that fraudulent concealment of the cause of action was no ground for refusing to apply the statute, and a similar ruling was made in *Hunter v. Gibbons*, 1 Hurlst. & N. 459, 26 L. J. Exch. 1, 3 Jur. N. S. 1249.

The question subsequently came before a higher English court and it was held that reply of fraudulent concealment was good. *Gibbs v. Guild*, L. R. 9 Q. B. Div. 59, 51 L. J. Q. B. 818, 46 L. T. N. S. 243, 30 Week. Rep. 591. In that case which was after the passage of the English judicature act consolidated L. R. A.

dating law and equity, the majority of the court doubted the correctness of the cases of *Imperial Gas-Light & Coke Co. v. London Gas-Light Co.*, and *Hunter v. Gibbons*, *supra*, and *Lord Coleridge, Ch. J.*, said: "I do not agree that courts have engrafted an exception upon the statute of limitations. . . . If by engrafting an exception on the statute is meant that a court of equity prevents a particular person from taking advantage of the statute, then, no doubt, that is true, but if it is meant that a court of equity by what is done has altered the terms of the statute, then, with great respect, I demur to it. . . . Courts of equity deal with the statute of limitations as they do with every other legal right, whether existing by statute or common law, not by abrogating it, but by saying on principles well understood in those courts, that in some particular cases it is unjust that a party shall be allowed to exercise those rights, . . . that where the existence of the cause of action is concealed from the person who ought to take advantage of it, by the fraud of the person who creates it, such person shall not take advantage of the wrong which he himself has done."

In this country the courts have been equally positive in their assertions.

The general principle of natural justice and of positive law that precludes a party from deriving a benefit from his own wrong has from an early period been applied by courts, both of law and equity, to the construction of statutes of limitations. It has accordingly been repeatedly held that a party should not be permitted by lapse of time during which he has by his own fraud prevented the party whom he has injured from asserting his rights at law; and that he against whom the statutory bar is interposed may avoid it by showing that he has been kept in ignorance of his claim until within the period limited by law for bringing his suit, by the fraudulent practices of the party setting up the defense. *Way v. Cutting*, 20 N. H. 137.

In *Kane v. Cook*, 3 Cal. 449, the court, in holding that in all cases a fraudulent concealment of the fact upon the existence of which a cause of action accrued, is a good answer to the plea of the statute of limitations, said: "To hold that the statute of limitations ran against them under such circumstances would be to permit the defendant to take advantage of his own wrong; and to sustain a defense which in good conscience he ought not to be permitted to avail himself of." Statutes of limitations were not intended to protect a party who has by fraudulent concealment delayed the assertion of a right against him until the expiration of the period limited by the statute.

In *Bailey v. Glover*, 68 U. S. 21 Wall. 343, 23 L. ed. 635, the court said: "To hold that by concealing a

and every allegation of the petition, except as in said answer the same should be expressly and specifically admitted. Following this denial, the answer was in this language: "That on or about the — day of, — 18—, said Emma Shellenberger died intestate, seised of the premises, leaving as her sole heirs at-law the defendant, Joseph L. Shellenberger, and Maggie Shellenberger, and her then husband, Leander Shellenberger; and upon the death of the said Emma Shellenberger, the said land descended to the said Joseph L. Shellenberger and Maggie Shellenberger, her children and sole heirs-at-law, subject to the life estate of her husband, Leander Shellenberger, during his life, and said Leander became and was the tenant of said land by his right of curtesy, with the remainder after his death to the defendant and Maggie Shellenberger. That on or about

the 27th day of April, 1886, the said Leander Shellenberger willfully, feloniously, and of his deliberate, premeditated malice, did kill and murder his daughter, Maggie Shellenberger, and she then and there died intestate and without issue, leaving her father, Leander Shellenberger, who murdered her for the purpose of possessing himself of her estate and title in fee simple to the land aforesaid; and said plaintiffs claim that, by and through said murder, and the death of said Maggie Shellenberger, the said Leander Shellenberger became a tenant in common of said premises with the survivor, Joseph L. Shellenberger. That on or about the 1st day of May, 1886, the said Leander Shellenberger was arrested and charged with the murder of said Maggie Shellenberger. That the said complainants herein, well knowing of the facts, and being attorneys at law, undertook the defense of

fraud, or by committing a fraud in such manner that it conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure."

Where a debtor promised to confess judgment at a certain term of court, if suit was not brought, so as to save expenses, and delayed doing so until the last day of the term when he announced his intention not to do so, the court refused to permit him to take advantage of his action to bring his case within the statute of limitations, saying that to countenance such chicanery as the making and violating of such an agreement as this would invite into the sacred precincts of a court of justice the arts of the deceitful, and furnish forth a well-appointed place and secure mode of perpetrating frauds. *Newton v. Carson*, 80 Ky. 309.

In *Munson v. Hollowell*, 28 Tex. 475, 84 Am. Dec. 582, the court says that it is a general principle that no one would be permitted in a court of justice to claim protection by means of his own fraud, and holds that, in view of the course of decisions upon the subject, enforcing that principle in case of fraudulent concealment of a cause of action is not engrafting an additional exception to the meaning of the statute of limitations which the legislature did not think proper to make. That case was followed in *Hudson v. Wheeler*, 84 Tex. 287; *Andrews v. Smithwick*, Id. 544; *Brown v. Brown*, 61 Tex. 45; *Calhoun v. Burton*, 64 Tex. 510.

The defendant cannot take advantage of his own wrong to bar the action. *Hughes v. First Nat. Bank of Waynesburg*, 110 Pa. 423.

Where a former slave was induced by the fraud of her former master, and in ignorance of her rights, to continue to labor for him without pay, her action for wages is not barred by the statute of limitations prior to her discovery of the fraud. *Hickam v. Hickam*, 46 Mo. App. 496.

Fraudulent concealment of the conversion of bank notes will prevent the running of the statute against an action of trover. *Arnold v. Scott*, 2 Mo. 13, 22 Am. Dec. 433.

In *Richardson v. Jones*, 3 Gill & J. 163, 22 Am. Dec. 293, which was a proceeding in equity, the court says: "Applicant cannot expect to avail himself of a lapse of time brought about by his own improper conduct."

The probate of a will will not be barred by the twenty years' statute of limitations, in case its existence is fraudulently concealed. *Denke, Appellant*, 80 Me. 50.

Where the person, against whom a cause of action exists in favor of another by fraud or actual fraudulent concealment, prevents such other from

obtaining knowledge thereof, the statute of limitations will only commence to run from the time the right of action is, or by the exercise of reasonable diligence may have been, discovered. *Carrier v. Chicago, R. I. & P. R. Co.* 6 L. R. A. 799, 79 Iowa, 80.

In *First Massachusetts Turnp. Corp. v. Field*, 3 Mass. 204, 3 Am. Dec. 124, the court says: "We should violate a sound rule of law if we permitted defendant to avail himself of his own fraud to bar the action by the statute of limitations."

In *Sherwood v. Sutton*, 5 Mason, 149, the refusal to permit advantage to be taken of the statute of limitations in case of the fraudulent concealment of the cause of action was treated as an exception to the statute; but *Justice Story*, who delivered the opinion, recognizes the ground upon which the case of *First Massachusetts Turnp. Corp. v. Field*, 3 Mass. 204, 3 Am. Dec. 124, was put, that the court would violate a sound rule of law if it permitted defendant to avail himself of his own fraud.

Fraudulent concealment of the cause of action will prevent the running of the statute. *Vance v. Mottley*, 92 Tenn. 310; *Sankey v. McElevy*, 104 Pa. 235, 49 Am. Rep. 575; *Booner Dist. Twp. v. French*, 40 Iowa, 601; *Findley v. Stewart*, 46 Iowa, 655; *Wilder v. Secor*, 72 Iowa, 161; *Cook v. Chicago, R. I. & P. R. Co.* 9 L. R. A. 764, 81 Iowa, 551; *Lewis v. Denison*, 22 Wash. L. Rep. 191; *Rosenthal v. Walker*, 111 U. S. 185, 23 L. ed. 395; *Persons v. Jones*, 12 Ga. 371, 58 Am. Dec. 478; *Re Lands Allotment Co.* [1894] 1 Ch. 618; *Campbell v. Vining*, 23 Ill. 525; *Cole v. McCluthry*, 9 Me. 131; *McKown v. Whitmore*, 31 Me. 448; *Downs v. Harris*, 75 Ga. 384; *Bradford v. McCormick*, 71 Iowa, 129; *Harrisburg Bank v. Forster*, 8 Watts, 12; *Bowman v. Sanborn*, 18 N. H. 205; *Jones v. Conoway*, 4 Yeates, 109; *Glenn v. Cuttle*, 2 Grant, Cas. 273; *Fleming v. Culbert*, 46 Pa. 496; *Wickersham v. Lee*, 83 Pa. 416; *Morgan v. Tener*, 83 Pa. 306; *Ferris v. Henderson*, 12 Pa. 49, 51 Am. Dec. 580.

Some of the courts which at first decided the other way subsequently came to recognize the rule.

Thus in *Mississippi* fraudulent concealment at first appears to be no bar. *Dozier v. Ellis*, 28 Miss. 730.

But the court is not so positive in *Fears v. Sykes*, 35 Miss. 633.

And in *Edwards v. Gibbs*, 39 Miss. 166, it is distinctly ruled that fraudulent concealment will bar the running of the statute.

So in *Tennessee* it was at first held that fraudulent concealment does not make an exception to the statute of limitations. *Cocke v. McGinnis*, 1 Mart. & Y. 361, 17 Am. Dec. 809.

But it was subsequently decided that the statute will not run in case of fraud which has been

said Shellenberger, and, to secure them for their said services, the said Leander Shellenberger did, on or about the third day of May, 1886, with his wife, Miranda Shellenberger, duly convey to the plaintiffs, by warranty deed, duly executed, their interest in said premises, being the estate, as claimed by the complainants, for life of Leander Shellenberger, and one undivided one half of the remainder. That shortly thereafter the said Leander Shellenberger was indicted and charged with the murder of said Maggie Shellenberger, and such proceedings were had in said cause, in the state of Nebraska, against Leander Shellenberger, indicted for the murder of his daughter, the said Maggie Shellenberger, that at the November term of the district court, sitting within and for Otoe county, in the year 1886, he was convicted and sentenced for said murder, which sen-

tence and judgment of the court remain unreversed in said court. That afterwards, and on or about the 23d day of July, 1887, the said Leander Shellenberger was . . . hanged. And the defendant, herein answering charges and avers the fact to be that the said plaintiffs in said petition, at the time they took a conveyance of said premises from said Leander Shellenberger and wife, well knew the facts that the said Leander Shellenberger came to the said lands by the murder of his child, Maggie Shellenberger, and well knew all the proceedings in said court resulting in his conviction, the judgment, and sentence; and this defendant, herein answering, says that the said Leander Shellenberger could acquire no estate, interest, or right or title in and to the lands in controversy by and through his act of the murder of Maggie Shellenberger; and this defendant, in further

fraudulently concealed. *Shelby v. Shelby*, 1 Coke, (Tenn.) 179, 5 Am. Dec. 686; *Reeves v. Dougherty*, 7 Yerg. 222, 27 Am. Dec. 508.

So in *Virginia in Callis v. Waddy*, 2 Munf. 511, it was held that a replication of undiscovered fraud was not a sufficient defense to a plea of the statute of limitations, but in *Vanbibber v. Belrne*, 6 W. Va. 163, the court speaking of *Callis v. Waddy*, *supra*, says that the court in that case decided that a replication that the fraud came to plaintiff's knowledge within the limitation period is not good, but that where "plaintiff replied that the cause of action was fraudulently concealed from plaintiff until within five years next before action brought" it was good.

And in *Rice v. White*, 4 Leigh, 474, the opinion of the justices seems to be to the effect that fraudulent concealment, if properly pleaded, would be a good defense to the statute of limitations.

While in *Ragland v. Owen*, 84 Va. 227, the plaintiff set up fraudulent concealment of the cause of action in avoidance of a plea of the statute of limitations, and the court dismissed the case on the ground that the proof did not sustain the replication.

Some of the federal courts were inclined to refuse to permit an answer of concealed fraud to prevent the running of the statute.

There is no provision in the bankrupt act for the case of concealment of cause of action, and the court can make no exception on that account. *Freelander v. Holloman*, 9 Nat. Bankr. Reg. 381.

In *Andrews v. Dole*, 11 Nat. Bankr. Reg. 361, the opinion of the court is against engrafting an exception on the statute of limitations.

But those decisions have been superseded by subsequent decisions of the United States Supreme Court. *Bailey v. Glover*, 88 U. S. 21 Wall. 343, 23 L. ed. 636; *Rosenthal v. Walker*, 111 U. S. 186, 28 L. ed. 305.

Some cases which are apparently adverse are not so in fact.

In *Smith v. Bishop*, 9 Vt. 110, 31 Am. Dec. 607, the court refused to consider the effect of fraudulent concealment of the cause of action upon the running of the statute of limitations, stating that admitting that a fraudulent concealment would have the effect of preventing the running of the statute, still that concealment must be of facts essential to the action, which was not shown in that case.

Mere silence is not fraudulent concealment. *Bates v. Preble*, 151 U. S. 149, 38 L. ed. 106.

The federal courts will follow the rule in the state courts as to the statute of limitations. *Andrews v. Redfield*, 98 U. S. 225, 25 L. ed. 158; *United States v. Mallard*, 4 Ben. 459. 25 L. R. A.

Exceptions cannot be engrafted on the statute of non-claim against decedent's estate. *Ynietra v. Tarleton*, 67 A. 126.

In that case the concealment was by deceased so that the actual defendant was not guilty of wrong within the rule.

Effort on the part of defendant to avoid service of process is not sufficient to prevent the running of the statute. *Amy v. Watertown*, 120 U. S. 320, 32 L. ed. 353.

Fraudulent concealment of the person of the debtor cannot be made an exception to the statute. *Chemical Nat. Bank v. Klesane*, 38 Fed. Rep. 423.

Defendant's concealment of himself is not sufficient to take the case out of the statute. *Miller v. Lesser*, 71 Iowa, 147.

Hiding under an assumed name will not prevent the running of the statute. *Engel v. Fischer*, 108 N. Y. 400, 55 Am. Rep. 613.

The above four cases while very close to the line are not strictly within the rule because in every one the concealment or evasion would have been unsuccessful if plaintiff had used the remedies at his command.

There are, however, a few cases directly opposed to those cited *supra*.

In *Troup v. Smith*, 20 Johns. 83, the leading case holding the contrary doctrine, the counsel argued that to permit defendant, who has by his own fraudulent concealment prevented the plaintiff from discovering his cause of action to plead the statute in bar would be repugnant to the clearest principles of law and equity. The court said: Courts of equity are perfectly right in saying that a party cannot in good conscience avail himself of the statute when by his own fraud he has prevented the other party from coming to a knowledge of his rights. But "I know of no dispensing power which courts of law possess arising from any cause whatever, and it seems to me that when the legislature" makes certain exceptions to the statute "it would be an assumption of legislative authority to introduce any other provisions." The court then states that the evidence shows no fraudulent concealment, but that the decision is placed upon the ground that the court sitting as a court of law is bound by the express provisions of the statute, and, even if it existed, could not notice the fraud so as to take the case out of the statute. That case has been uniformly followed in subsequent New York cases. *Leonard v. Pitney*, 5 Wend. 30; *Allen v. Mills*, 17 Wend. 202; *Humbert v. Trinity Church*, 24 Wend. 537.

In *Somerset County Freeholders v. Veghte*, 44 N. J. L. 508, the court in deciding that concealed fraud was not available to remove the bar of the statute of limitations, says that the plaintiff has a

answering, says that the said Leander Shellenberger did willfully, maliciously, and of his premeditated malice kill and murder the said Maggie Shellenberger, . . . for the sole purpose of removing her from this life, that he might inherit the lands which descended to her by and through the death of her mother; and the defendant, in further answering, says that it is contrary to the law of the land that any should be permitted to come to an estate or an inheritance by their own willful act of murder; and the said defendant, further answering, says that the said Leander Shellenberger could take no estate from the said Maggie Shellenberger, whose death he had compassed and produced, and that he took no estate to himself, and conveyed none to the said plaintiffs herein, and the said plaintiffs acquired no right, title, or interest in and to the said estate by and

through the death of said Maggie Shellenberger, caused by said Leander Shellenberger, as hereinbefore alleged. The said defendant therefore prays that this court will order a judgment and decree that the said Leander Shellenberger took no estate from the said Maggie Shellenberger, whose death was by him compassed and produced by willful murder, and that the said estate upon her death, and her interest in said estate upon her death, caused by the willful murder of the said Leander Shellenberger, descended to this defendant, and the said Leander Shellenberger took nothing by and through his act of willful murder of his own daughter, and for such other and further relief in the premises as equity and good conscience shall decree. O. P. Mason, Guardian *ad Litem* for Joseph L. Shellenberger."

To this answer plaintiffs demurred, on the

complete remedy in equity, and that the counsel has not favored the court with any theory on which the contention that the exception is available at law could be rested on a logical basis. It nowhere appears, however, that the question of the repeal of the common-law maxim was brought to the attention of the court.

A court of law cannot introduce an exception to the statute of limitations which the legislature has not authorized. *Fee v. Fee*, 10 Ohio, 469, 36 Am. Dec. 108; *Miles v. Berry*, 1 Hill, L. 298; *Clarke v. Reeder*, 1 Speers, L. 398; *Simons v. Fox*, 12 Rich. L. 382; *Baines v. Williams*, 25 N. C. 451; *Hamilton v. Shepperd*, 7 N. C. 115.

In neither of the cases holding the contrary doctrine, however, does it appear that the question of implied repeal of the common-law maxim was brought to the attention of the court.

And the New York court had held that a defendant cannot "return into the state" so as to set the statute running by coming clandestinely with an intent to defraud the creditor by setting the statute in operation and then departing again. *Fowler v. Hunt*, 10 Johns. 464.

#### *Statutes against foreign corporations.*

In the case of statutes prohibiting foreign corporations from doing business in the state until the performance of certain conditions precedent, the great weight of authority is to the effect that the corporation itself will not be permitted to set up the fact that it never complied with the requirements for the purpose of defeating recovery upon contracts which it has entered into. Such is the rule with reference to insurance companies when sued on policies. *Phenix Ins. Co. v. Pennsylvania Co. (Ind.)* 20 L. R. A. 405, note. And it has also been held to be true with regard to corporations generally. See note to *Edison General Electric Co. v. Canadian Pacific Nav. Co. (Wash.)* 24 L. R. A. 321. There is some distinction to be made in cases upon this subject, as some of the courts hold that the contracts are not void when made by such companies, but merely not enforceable by them until they comply with the statute, but the courts which hold the contracts void, so far as suits by the corporation are concerned, refuse to permit the corporation to take advantage of the illegality.

In *Berry v. Knights Templars & Masons Life Indemnity Co.*, 46 Fed. Rep. 439, an insurance company which had not complied with the law of the state where it attempted to do business, set up such failure as a defense to a suit on a policy, but the court held that the defense was not good, on the ground that it could reap no advantage from its own wrong.

25 L. R. A.

#### *Statute compelling railroad company to carry baggage free.*

A statute provided that every passenger on a railway train should be entitled to carry a certain amount of baggage free. The railway company advertised an excursion at reduced fare if the passengers carried no baggage. Plaintiff purchased an excursion ticket, and then placed baggage on board, and the company claimed the right to toll for carrying it. Plaintiff insisted on the right to free carriage under the statute, but the court held that he was not entitled to it. *Wiles, J.*, placed his ruling upon the ground that no one would be allowed to take advantage of his own wrong, and that getting the baggage on board while having only an excursion ticket was a fraud on the company. *Rumsey v. North Eastern R. Co.* 14 C. B. N. S. 641, 32 L. J. Q. P. 244, 10 Jur. N. S. 208, 8 L. T. N. S. 606, 11 Week. Rep. 911.

#### *Statute avoiding auction sales when duty unpaid.*

A purchaser cannot rescind his own contract at an auction on the ground that he has refused to pay the auction duty pursuant to the condition of sale, notwithstanding the statute provides that in case of such refusal the bidding shall be null and void to all intents and purposes. *Malins v. Freeman*, 4 Bing. N. C. 305.

#### *Statute of frauds.*

The cases are so numerous which have held that fraud is not within the statute of frauds that no attempt will be made here to examine those upon the general subject further than to show the generality of the expressions. But there is one branch of that subject which is peculiarly in point. Whenever a contract is not put in writing because of the fraud or influence of one of the parties he is not permitted to reap an advantage because of that fact.

As examples of the sweeping language in which courts have expressed themselves upon the question of using the statute of frauds to protect fraud the following may be quoted:

Viner states (5 Abr. 523, pl. 40) that where the statute of frauds has been used to cover a fraud the court has always relieved.

The statute of frauds cannot be set up as a protection to fraud. *Kinard v. Hiers*, 8 Rich. Eq. 423, 55 Am. Dec. 648.

The statute of frauds cannot be used as a cover to protect the perpetration of fraud. *Teague v. Fowler*, 56 Ind. 569; *Lincoln v. Wright*, 4 DeG. & J. 16, 5 Jur. N. S. 1142.

Fraud is not within the statute of frauds. *Rogers v. Rogers*, 37 Mo. 257; *Green v. Green*, 34 Kan. 740, 55 Am. Rep. 256.

The statute of frauds cannot be used as an in-

ground that it "did not state the facts sufficiently to constitute a defense to the said plaintiffs' cause of action." This demurrer was sustained, and, the defendant having elected to stand on his answer, judgment was rendered for such relief as was prayed in plaintiffs' petition, and appointing referees to make partition accordingly. These referees reported that partition could not be advantageously made of the property in kind, whereupon it was ordered sold, and that the proceeds of the sale should be divided between the parties plaintiff of one part, and the defendant of the other part. The defendant Joseph L. Shellenberger, by his guardian *ad litem*, as plaintiff in error, then brought the case to this court for a review of the ruling on the aforesaid demurrer and the judgment which logically followed it. In the answer it was alleged, as will be noticed by

reference to the quotation just made, that plaintiffs, well knowing the facts, and to secure payment of their fees as attorneys at law in the defense of said Leander Shellenberger, received the conveyance by virtue of which they claim to be vested with the title to one half of the property in question. This averment, admitted as it is by the demurrer, does away with the argument attempted as respecting the rights of bona fide purchasers. Under the circumstances charged, and admitted to be true, for the purposes of the demurrer, the defendants in error are vested with no higher or better rights than could be asserted by Leander Shellenberger in his own behalf. The naked question presented is whether or not the murder of an intestate by one to whom ordinarily, as heir, the property would have descended, formed an exception to the statutory rules of inheritance.

strument for fraud. *Barnard v. Flinn*, 8 Ind. 204; *Leahy v. Leahy*, 11 Mo. App. 413.

In cases of fraud equity should relieve even against the words of the statute. *Montacute v. Maxwell*, 1 P. Wms. 618, 1 Strange, 236; *Maxwell v. Mountacute*, Prec. in Ch. 526.

The statute of frauds was never intended to prevent a court of equity from giving relief in a case of plain, clear, and deliberate fraud. *Haigh v. Kaye*, L. R. 7 Ch. 469, 41 L. J. Ch. 567, 26 L. T. N. S. 675, 20 Week. Rep. 597.

The statute of frauds was never designed to aid a person in the perpetration of fraud. *Turner v. Johnson*, 35 Mo. 431.

#### a. Rule of construction.

It may be necessary to consider one statute on any subject as part of the whole law, statute and common, on that subject, as it is necessary to consider one section or word of the statute a part of that statute. The statute of frauds severed from all other laws, written and unwritten, and taken in its literal sense, would leave the people remediless in a great number of cases of fraud for which ample remedies are provided by the statute of equity jurisdiction. *Hitchins v. Pettingill*, 58 N. H. 386.

There can be no relief if the statute has positively said so. On the other hand, if that is not expressly declared, or the relief clearly excluded by the policy of the act, the equitable jurisdiction upon fraud exists. The court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud, even though the statute declared that in case these circumstances do not exist the agreement should be absolutely void. *Mestaer v. Gillespie*, 11 Ves. Jr. 627.

#### b. Prevention of reduction to writing.

If the execution of the writing is prevented by the unfair practices of one of the parties he cannot insist that it is not in writing as a defense to an action on it. *Lester v. Foxcroft*, Colles, P. C. 108.

In *Whitchurch v. Bevis*, 2 Bro. Ch. 564, the lord chancellor said that he agreed that if one interposes the medium of fraud by which an agreement is prevented from being put into writing, the cause is taken out of the statute of frauds.

Where a marriage agreement was fraudulently recovered from the beneficiary to whom it had been delivered and while out of his possession the marriage was consummated, it was re-established because of the fraud. *Mallet v. Halfpenny*, 1 Eq. Cas. Abr. 20, pl. 6, 2 Vern. 373. And in *Bowdes v. Amhurst*, Prec. in Ch. 404, that case is referred to and the court states that it was insisted by defend-

ant that the master of the rolls should observe the statute, and he said: "I do, I do."

Fraudulent omission to sign the marriage settlement is ground for relief. *Dundas v. Dutens*, 1 Ves. Jr. 106.

Whenever a case is infected with fraud, the court will not suffer the statute to protect it so that any one should run away with a benefit not intended. *Beech v. Kennegal*, 1 Ves. Sr. 123, 1 Wils. 227.

Equity will not permit the statute of frauds to be set up as a defense by a party infected with fraud. *Arnold v. Cord*, 16 Ind. 177.

An acknowledged exception to the statute is where the agreement is intended to be reduced to writing but is prevented by the fraud of one of the parties. *Finnucane v. Kearney*, 1 Freem. Ch. (Misc.) 65.

Although in another Mississippi case, *Box v. Stanford*, 13 Smedes & M. 93, 51 Am. Dec. 142, the court refused to interfere in case of the fraudulent evasion of an agreement to put the contract in writing on the ground that it could engraft no exception on the statute.

But in the latter case there was nothing to show that refusing to carry out the agreement would amount to a fraud, and there are many cases which hold that mere refusal to comply with an agreement to put a contract in writing is not fraud.

#### c. Fraudulent omission of part of the agreement.

Some of the cases hold that fraudulent omission of part of the contract will authorize relief.

Where the deed is fraudulently made so as to omit a portion of the land bargained for, relief may be granted. *McDonald v. Yungbluth*, 46 Fed. Rep. 536.

One who puts the contract in writing and fraudulently leaves out a part of the agreement will not be permitted to benefit by the omission. *Joynes v. Statham*, 3 Atk. 330.

A decree may be made compelling the inclusion in a deed of land which has been fraudulently omitted therefrom. *Beardley v. Duntley*, 60 N. Y. 580.

A deed may be reformed for fraud. *Worley v. Tuggle*, 4 Bush, 133; *Murray v. Dake*, 45 Cal. 643.

The authorities do not all sustain the rule as broadly as the above cases. But none of the cases refuse to apply the maxim when it becomes applicable.

The difference of opinion upon this question goes no further than that some of the courts insist that to entitle the defrauded person to relief there must be some evidence that he has changed his possession in consequence of the fraud. *Glass v. Hulbert*, 109 Mass. 24, 3 Am. Rep. 413. But this does not at all deny the proposition that the statute



The opinion hereinbefore filed affirmed this proposition. Its correctness will now receive consideration.

Section 80, chap. 23, Comp. Stat., provides that "when any person shall die seised of any lands, tenements, or hereditaments, or of any rights thereto, or entitled to any interest therein in fee simple or for the life of another, not having lawfully devised the same, they shall descend subject to his debts in the manner following: . . . Second. If he shall have no issue his estate shall descend to his widow during her natural lifetime, and after her decease, to his father; and if he shall have no issue, nor widow, his estate shall descend to his father." This statute has regulated the descent of real property in this state at least since 1866, for it is found in the Revised Statutes of that date. In the former opinion, Cobb, *Ch. J.*, said:

cannot be used to enable one to take advantage of his own wrong.

#### d. Preventing a will.

It has been uniformly held that one who by promises prevents the making of a will will not be permitted to take advantage of the omission.

In this connection attention is called to the enforcement by equity of trusts *ex maleficio*, notwithstanding the statute. Upon this subject see the authorities collected in the note to *Brown v. Doane* (Ga.) 11 L. R. A. 381.

Where a dying man was prevented from republishing his will by reason of the fraud and violence of the heir-at-law, the heir was not permitted to defeat a bill for the establishment of the will by stating that the will was not republished as required by the statute. *Dixon v. Olmuis*, 1 Cox, Eq. 414.

In a case where one to whom a dying person gave property upon the other's promise to do certain things with certain other property, and the one making the promise refused to perform it but filed a bill to get possession of the property given him, the court said: The defense may be said to be one arising from the fraud and imposition of the plaintiff and has nothing in the world to do with the statute of frauds and perjuries. *Walker v. Walker*, 2 Ark. 98.

A son procured his mother to prevail upon his father to revoke his will which made the mother executrix, and execute another making the son executor, upon the promise that he would hold in trust for the mother. The court, notwithstanding the statute of frauds, decreed a trust in favor of the mother. *Thynn v. Thynn*, 1 Vern. 296.

A promise to prevent the making of a will, will be enforced. *Sellack v. Harris*, 5 Vin. Abr. 31, p. 321, 2 Eq. Cas. Abr. Cas. 11, p. 44; *Oldham v. Litchfield*, 2 Vern. 506, 2 Freem. 284.

There is a case in Ohio in which much of the reasoning is opposed to the principle underlying the authorities cited above.

In *Kent v. Mahaffey*, 10 Ohio St. 304, a blind testator called for his will which was brought to him by the beneficiary. Instructions were given for its destruction and the beneficiary pretending to comply with them fraudulently substituted for the will a paper which he threw into the fire and misled the testator into the belief that the will was destroyed. The court in accord with a class of cases to that effect, held that the will could not be considered as having been destroyed, and then held that the beneficiary guilty of the fraud could not be held to be a trustee for the heirs-at-law. There is some discussion as to the effect of the beneficiary's fraud, but the question does not seem

"The principle of these cases [*Mutual L. Ins. Co. of New York v. Armstrong*, 117 U. S. 599, 29 L. ed. 1000, and *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340], especially that of *Riggs v. Palmer*, is applicable to the case at bar; their analogies are immediate and certain." As these two cases seem to have specially influenced the court in arriving at its former conclusion, a brief consideration and analysis of them will not be foreign to our purpose. *Mutual L. Ins. Co. of New York v. Armstrong* was an action brought by the administratrix of the estate of John M. Armstrong, deceased, upon a life insurance policy issued to said intestate. This policy was what is known as an endowment policy; that is, a policy payable to the assured if he live a designated time, but to some other person named if the assured should die before the expiration of that time. It was pay-

to have been squarely presented or discussed as to whether or not the beneficiary could not have been prevented from taking any benefit under the will, and the will have been left to stand as though the beneficiary had died prior to the death of the testator.

#### e. The rule at law.

Before the passage of the statute of frauds of course there was nothing to prevent the enforcement of a parol promise at law.

In *Rockwood's Case*, Cro. Eliz. 164, and *Dutton v. Pool*, 1 Vent. 318, assumpsit was held to lie in case one who had promised a dying person to pay certain annuities refused to do so.

After the passage of that act relief against fraud seems to have been uniformly afforded but application for it has usually been had to equity. Under the modern procedure it would seem that the relief might be granted in any case if the pleadings were in proper form. However, in some actions at law the fraud has been made a ground for relief.

In *Flagler v. Pleias*, 3 Rawle, 345, parol evidence was admitted in support of an action of ejectment to recover land which was fraudulently omitted from the deed, and of which the grantor had subsequently taken possession.

Where the title to certain lands was procured by fraud an action of assumpsit was sustained to recover the purchase price. *Ayers v. Slifer*, 89 Ind. 433.

In an action of ejectment to recover possession of land in the possession of a woman to whom her husband had promised to convey it in consideration of the marriage, by his son to whom the father had conveyed it in fraud of the rights of the wife, the court held that the wife should be permitted to succeed on her cross-complaint to have the property conveyed to her on the ground that where a fraudulent contrivance induces an irretrievable change of possession, equity will enforce the agreement. *Peek v. Peek*, 1 L. R. A. 185, 77 Cal. 106.

#### Statute providing for discharge in bankruptcy.

In a case where a debtor changed his name and then procured a discharge in bankruptcy without the knowledge of his creditor, who, after discovering the fraud, brought an action to reach property which was alleged to have been fraudulently conveyed to the debtor's wife, and the defendants pleaded the discharge, the court said: "It certainly could not have been the intention of the bankruptcy act that whatever fraud or artifice the bankrupt might resort to for the purpose of keeping knowledge of the proceedings from a particular creditor, or preventing him from opposing

able (subject to certain conditions) to the assured, or his assigns, on December 8, 1897, or, if he should die before that time, to his legal representatives. Within six weeks after the issue of the policy the assured was murdered, and suspicion fell upon one Hunter, who held an assignment of the aforesaid policy, and who had been very officious in procuring it to be issued to Armstrong. Upon a trial duly had, Hunter was convicted of the aforesaid murder, and was accordingly hanged. The company set up several defenses to the action, one of which was that the policy was obtained by Hunter with the intent to cheat and defraud the company by compassing the death of the assured by felonious means, and collecting the amount of the insurance,—a design which he attempted to carry out by causing the death of the assured. *Mr. Justice Field*, in delivering the opinion of the court, discussed the right of the company to show that Hunter had in like

manner procured to be issued other policies of insurance in the same manner as he had procured the issue of the policy upon which a recovery was sought. No other discussion, except, incidentally, of the assignability of the policy, is to be found in the opinion of *Justice Field*, though in closing it he said: "But independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of the party whose life he had feloniously taken; as well might he recover insurance money on a building which he had willfully fired." No representative of Hunter was a party to the suit, and the language quoted was, therefore, in so far as it referred to the rights of Hunter, mere *obiter dictum*.

them, the discharge should nevertheless be valid as to such creditor." It was argued that because the case was not provided for by the provisions of the bankrupt act no redress could be had, but the court said the more rational construction of the act is that the particular matters provided for by the act, and which go to annul the discharge *in toto*, should be litigated in the United States courts, and that the principles which prevailed before the passage of the act giving creditors protection in the courts in which the protection was claimed, against a discharge which the defendant ought not in law or morals to be permitted to set up against their particular claim, are not abrogated so long as their enforcement by the state courts does not interfere with the jurisdiction which has been specially reserved over certain classes of frauds; nor with the power of those courts to adjudge a discharge void as to all creditors. *Poillon v. Lawrence*, 77 N. Y. 208.

A discharge in bankruptcy obtained in proceedings of which a creditor was fraudulently deprived of notice, is not binding upon him. *Batchelder v. Low*, 43 Vt. 662, 5 Am. Rep. 811.

#### *Statutes imposing liability for negligence.*

Most of the cases in which liability is imposed for neglect of some imposed duty have turned more upon the particular language of the statute than upon the general principle. But as soon as the alleged contributory negligence approached nearly to positive wrong on the part of defendant the court speedily refused to permit plaintiff to obtain any advantage or if the language of the statute was thought to prevent such ruling the statute was held void as in the case of statutes imposing absolute liability for stock killed. See note to *Matthews v. St. Louis & S. F. R. Co. ante*, 161.

In *Kroy v. Chicago, R. I. & P. R. Co.*, 82 Iowa, 300, the court in discussing the effect of a statute making railroad companies liable for injuries caused by its servants said: "It is scarcely necessary to allude to the elemental doctrine that one cannot recover for an injury which is the proximate result of his own failure to exercise ordinary care," and held that because of that doctrine there could be no recovery in that case although plaintiff was within the language of the statute.

An agent of a coal miner whose duty is to see that the provisions of a statute as to placing safety catches on machinery are complied with, which statute makes the company liable for injuries caused by absence of such catches cannot recover damages against the company for injuries caused

to himself by reason of the absence of such catches. *Beaucoup Coal Co. v. Cooper*, 12 Ill. App. 373.

The provisions of the code that a railroad company shall be liable for all damages sustained by any person and caused by the locomotive of the company, when a bell is not sounded or a whistle blown as directed by the statute, does not abrogate the doctrine of contributory negligence. *Meeks v. Southern Pac. R. Co.*, 52 Cal. 604.

In *McKelvy v. Burlington, C. R. & N. R. Co.*, 54 Iowa, 455, the court says: "Under a statute requiring a railroad company to do certain things, and providing that if injury occurs by reason of failure to do them the company shall be liable, and that proof of such failure shall be sufficient to warrant a recovery, there surely can be no recovery if a person intentionally drove off from a bank which the statute required the company to protect, and was killed."

It is not the intention of a statute making mining companies liable for injuries resulting from their failure to take certain precautions to avoid injuries, nor the policy of the law, to exempt any one from the direct and immediate consequences of his own carelessness. *Spiva v. Osage Coal & Min. Co.*, 53 Mo. 68.

A statute making the owner of a threshing machine liable for injuries caused by failure to have certain parts of the machinery boxed, does not prevent the defense of contributory negligence. *Reynolds v. Hindman*, 32 Iowa, 148.

A statute making a railroad company liable for injuries caused by its negligence does not preclude the defense of contributory negligence. *Whittier v. Chicago, M. & St. P. R. Co.*, 24 Minn. 304.

Contributory negligence is a defense to an action for injuries occurring, where the railroad company has not maintained a statutory fence. *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665.

A statute making railroad companies liable for injuries resulting from their failure to give signals at street crossings does not prevent the defense of contributory negligence. *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 65.

A statute making a railroad company liable for injuries caused by failing to give signals upon approaching a street crossing does not apply, if there was contributory negligence on the part of the injured person. *Horn v. Baltimore & O. R. Co.*, 54 Fed. Rep. 301.

In some of the cases the language of the statute is held to preclude the defense of contributory negligence.

The Tennessee statute making railroad com-

It may be that our statement, that the language above quoted was the only language which bore on the proposition which we have under consideration, should in a slight degree be qualified. That it may be literally exact, a quotation will be made of expressions used argumentatively by *Justice Field* in his discussion of the admissibility of the evidence of the contemporaneous conduct of Hunter, to which reference has heretofore been made. He said: "The assignment conveying to Hunter the whole interest of the assured, his representative, alone, would have a valid claim under it, if the policy were not void in its inception. Proof therefore, that he caused the death of the assured by felonious means must necessarily have defeated a recovery, and the court erred in refusing to admit testimony tending to prove that such was the fact." The language of

*Justice Field* first above quoted, standing alone, is inapplicable to the facts stated in his opinion. From the statement of the case which he was discussing, considered in connection with the quotation from his opinion last made, it is evident that both his quotations had reference to the admissibility of proffered evidence of like contemporaneous conduct of Hunter. From his opinion, as an entirety, it is evident that proof of this conduct was deemed admissible because of the relationship of Hunter to the policy, independently of the assignment thereof to him. If, as it was claimed, the evidence showed that Hunter acted as the agent of the assured, or in the interest of the assured, in obtaining the issue of the policy in question, his own fraudulent conduct was rightfully considered in determining the validity of such policy as forming a basis for a recovery, no

panies liable for damages done by failure to observe statutory precautions to avoid injury is held to be penal, and to exclude the question of contributory negligence, on the ground that it expressly states when the liability shall exist and when it shall not. *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 671; *Nashville & C. R. Co. v. Smith*, 6 Heisk. 174; *Hill v. Louisville & N. R. Co.* 9 Heisk. 323; *Chattanooga R. Co. v. Walker*, 11 Heisk. 333; *Nashville & C. R. Co. v. Nowlin*, 1 Lea. 523; *Nashville & C. R. Co. v. Smith*, 9 Lea. 474; *Patton v. East Tennessee, V. & G. R. Co.* 12 L. R. A. 184, 89 Tenn. 370; *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 23, although the negligence of the injured person is held by the court in those cases to be a ground of reduction of damages, and it may be such as to make them nominal. *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 603, 61 Fed. Rep. 605.

Contributory negligence of a passenger is not a defense to the statute making a railroad company guilty of negligence, by reason of which is lost the life of a passenger or of any other person being in the exercise of due diligence, liable for such loss. *Merrill v. Eastern R. Co.* 139 Mass. 232; *Com. v. Boeton & L. R. Co.* 134 Mass. 213; *McKimble v. Boston & M. Railroad*, 139 Mass. 542.

The absolute liability imposed on a railroad company for setting out fire cannot be defeated by a mere passive contributory negligence of plaintiff. *West v. Chicago & N. W. R. Co.* 77 Iowa, 554; *Engle v. Chicago, M. & St. P. R. Co.* 77 Iowa, 661.

The question of contributory negligence does not arise in an action under the statute to recover for stock killed by reason of failure to fence. *Chicago & E. R. Co. v. Brannegan*, 5 Ind. App. 540.

#### *Statutes giving dower.*

A widow who induces a third person to purchase her deceased husband's lands with the assurance that her claim for dower is extinguished, and who then receives and uses her share of the purchase money, will not be permitted afterwards to claim her dower as against the purchaser. *Wood v. Seely*, 32 N. Y. 108.

Fraud will estop a widow from claiming her dower. *Dougrey v. Topping*, 4 Paige, 94, 3 L. ed. 367; *Smiley v. Wright*, 2 Ohio, 506; *Ellis v. Diddy*, 1 Ind. 561; *Connolly v. Branstler*, 3 Bush, 702, 96 Am. Dec. 278.

#### *Estoppel generally.*

A large part of the doctrine of estoppel *in pais* is founded upon this principle. And whenever the facts have called for the application the courts do not seem to have hesitated to apply the principle of estoppel against taking advantage of a statute.

In a Minnesota case in which one about to sell

property had pointed out the division lines to the intending purchaser, and many years afterward he attempted to assert title beyond the line then pointed out, the court said the statute of frauds has not abrogated the doctrine of estoppel *in pais* as applied to purchasers of real estate. *Bell v. Goodnature*, 50 Minn. 417.

So it has been held that there may be an estoppel to set up the statute of limitations. *Bricker v. Lightner*, 40 Pa. 199.

But in a Mississippi case the court held that there can be no estoppel against setting up the statute of limitations. *Crane v. French*, 33 Miss. 529.

But that cannot be now regarded as true to the extent stated in view of the Mississippi decisions cited, *supra*.

#### *Nebraska decisions.*

In addition to the presumption against repeal of the common law there is an additional rule, to be noticed in connection with the case of *SHIELLENBERGER V. RANSOM*. Chapter 15 of the Revised Statutes of Nebraska provides that so much of the common law as is applicable and not inconsistent with any law passed or to be passed by the legislature is adopted and declared to be law. That practically made the maxim, no one shall take advantage of his own wrong, statutory law in Nebraska, and the question then arises whether or not a statute providing that if a person shall die leaving neither issue nor widow his estate shall descend to his father is so inconsistent with the maxim as to repeal it or prevent its taking effect. The two are certainly not inconsistent within the rule governing the repeal of statutes. See note to *State v. Massey* (N. C.) 4 L. R. A. 808.

The rule as to concealment delaying the running of the statute of limitations was recognized by the Nebraska court in *Campbell v. Roe*, 33 Neb. 345.

And in *Burlington & M. R. R. Co. v. Webb*, 18 Neb. 215, 53 Am. Rep. 809, the court construed the railroad fence law as making the company liable for any and all damages which should be done to animals on the track by reason of such failure, and that it precluded the defense of mere contributory negligence, but the court said: "It may be said that this construction of the act would render the railroad company liable for injury to stock when the owner had driven them and left them upon the road. But when you consider the purpose of the act, and give it a reasonable construction, which such statutes require, no such conclusion necessarily follows. The maxim that 'no injustice is done to the consenting person, that is by a proceeding to which he assents' would then apply.

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matter though the action had been brought by the representative of the assured. As the language quoted was pertinent to the issues presented, and the rights of the parties depended on other theory, it must be assumed that upon this theory alone the case was decided. While this view renders the quoted language applicable to matters under discussion, it in equal degree renders it foreign to the facts of the case at bar. This court was, therefore, mistaken in assuming that the analogies of the case of *Mutual L. Ins. Co. of New York v. Armstrong*, *supra*, were, as applied to the case at bar, "immediate and certain."

The majority opinion in *Riggs v. Palmer*, *supra*, was, however, that upon which the former conclusion of this court was specially based. In the statement of that case it was said that "this action was brought to have the will of Francis B. Palmer, so far as it devises and bequeaths property to Elmer E. Palmer, canceled and annulled." The facts involved, as given by Earle, J., in delivering the majority opinion, were as follows: "On the 18th day of August, 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant, Elmer E. Palmer, subject to the support of Susan Palmer, his mother; and that he gave over to the two daughters, subject to the support of Mrs. Palmer, in case Elmer should survive him and die under age, unmarried and without any issue. The testator, at the date of his will, owned a farm and considerable personal property; he was a widower, and thereafter, in March, 1882, he was married to Mrs. Breese, with whom, before his marriage, he entered into an antenuptial contract, in which it was agreed that, in lieu of dower and all other claims upon his estate, in case she survived him, she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was sixteen years old. He knew of the provisions made in his favor in the will, and that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment of possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, Can he have it?" Much of the opinion of Judge Earle was devoted to a defense of what he calls "rational interpretation." Quoting from Rutherford's Institutes (page 420), he said: "When we make use of 'rational interpretations,' sometimes we restrain the meaning of the writer so as to take in less, and sometimes we enlarge its meaning so as to take in more than his words express." In the former opinion filed in this case, there is quoted approvingly from the aforesaid majority opinion, delivered by Judge Earle, this language: "It is a familiar canon of construction that a thing which

is within the intention of the makers of the statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." The language just quoted was originally used with reference to the construction of a will, but was by Cobb, *Ch. J.*, applied to our statute of descent. For this reason, it will hereinafter be considered as applied to statutory construction. The conclusion reached by the reasoning of Judge Earle in *Riggs v. Palmer*, as well as that in this case, was based very largely on that species of judicial legislation above characterized as rational construction. If courts can thus enlarge statutory enactments by construction, it may be that the references, in the majority opinion in *Riggs v. Palmer*, to the provisions of the civil law, were very apt as illustrating how, by rational interpretation, our statutes should be made to read. This reference to the civil law was as follows: "Under the civil law, evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. Dom. Civ. Law, pt. 2, bk. 1, title 1, § 3; Code Napoleon, § 727; Mackeldy, Roman Law, 530-550. In the Civil Code of Lower Canada, the provisions on the subject in the Code Napoleon have been substantially copied." If our statutes of descent contained the above provisions, there would be no difficulty in sustaining the conclusion reached in the former opinion. It is because of their absence that the difficulty arises. The necessity of resorting to what is denominated "rational interpretation" is a confession that our statute in that respect falls short of what it is deemed proper it should have provided. Indeed, there are expressions in the former opinion which in terms very nearly confess that the result reached was by judicial legislation. An instance of this is found in the following quotation therefrom: "I quite agree with the court of appeals that, had it been in the minds of the framers of our statute of descent that a case like this would arise under it, they would have so framed the law that its letter would have left no hope for the obtaining of an inheritance by such means." Similar illustrations and applications of the principle of rational interpretation to those made use of by the writer of the majority opinion in *Riggs v. Palmer* will be found referred to in Sedgwick on the Construction of Statutory and Constitutional Law, at the beginning of the sixth chapter. They are commented on in this language: "These and similar discussions have amused the fancy and exhausted the arguments of text-writers. I cannot, however, consider them of much value for the student of jurisprudence. Ours is eminently a practical science. It is only by an intimate acquaintance with its application to the affairs of life, as they actually occur, that we can acquire that sagacity requisite to decide new and doubtful cases. Arbitrary formulae, metaphysical subtleties, fanciful hypotheses,

aid us but little in our work." Later on in the same chapter this author says: "We may, therefore, affirm, as a general truth, that independently of constitutional questions, and independently of those doctrines of liberal and strict construction which really, as I have said, vest a sort of legislative power in the judge, the object, and the only object, of judicial investigation, in regard to the construction of doubtful provisions of statute law, is to ascertain the intention of the legislature which framed the statute. This rule, though often asserted, has been in practice frequently lost sight of; but there is abundant authority to sustain it. 'The only rule,' says Lord Chief Justice Tindal, 'for the construction of acts of parliament, is that they should be construed according to the intent of the parliament which passed the act;' citing *Dukedom of Sussex*, 8 Jur. 795. The rule is, as we shall constantly see, cardinal and universal that, if the statute is plain and unambiguous, there is no room for construction or interpretation. The legislature has spoken; their intention is free from doubt, and their will must be obeyed. 'It may be proper,' it has been said in Kentucky, 'in giving a construction to a statute, to look to the effects and consequences when its provisions are ambiguous, or the legislative intention is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action;' citing *Bosley v. Mattingly*, 14 B. Mon. 89. So, too, it is said, by the supreme court U. S.: 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction;' citing *United States v. Fisher*, 6 U. S. 2 Cranch, 358-399, 2 L. ed. 304-317; *Case v. Wildridge*, 4 Ind. 51." *Gantt, J.*, delivering the opinion of the court in *Hurford v. Omaha City*, 4 Neb. 352, said: "It is said that 'no principle is more firmly established, or rests on a more secure foundation, than the rule which declares, when a law is plain and unambiguous, whether it be expressed in general or limited terms, that the legislature shall be intended to mean what they have plainly expressed;' and, again, that the intention of the legislature should control absolutely the action of the judiciary. 'Where that intention is clearly ascertained, the courts have no other duty to perform than to execute the legislative will, without any regard to their own views as to the wisdom or justice of the particular enactment. *Sedgwick Stat. & Const. L. 325.*' In our statute of descent there is neither ambiguity, nor room for construction. The intention of the legislature is free from doubt. The question is not what the framers of our statute of descent would have done, had it been in their minds that a case like this would arise, but what in fact they did, without perhaps anticipating the possibility of its existence. This is determined, not by hypothetical resort to conjecture as to their meaning, but by a con-

struction of the language used. The majority opinion in *Riggs v. Palmer*, as well as the opinion already filed in this case, seems to have been prompted largely by the horror and repulsion with which it may justly be supposed the framers of our statute would have viewed the crime and its consequences. This is no justification to this court for assuming to supply legislation, the necessity for which has been suggested by subsequent events, but which did not occur to the minds of those legislators by whom our statute of descent was framed. Neither the limitations of the civil law nor the promptings of humanity can be read into a statute from which, without question, they are absent, no matter how desirable the result to be attained may be. The legislature of this state, in 1873, adopted chapter 21, Comp. Stat., providing for compensation for the widow and next of kin of a person whose death is caused by the wrongful act of another, even when such wrongful act amounts to a felony. This created a right of action which but for the statute would have had no existence. The facts of the case at bar may impress upon some future legislature the necessity of an amendment of our law of descent; from that source alone can such an amendment come. Originally, it is probable that the necessity for the Act of 1873 was suggested by a case of hardship. The case at bar may prompt other legislation with respect to our statute of descent.

As the case of *Riggs v. Palmer* afforded the precedent which strongly influenced this court in reaching the conclusion heretofore announced, it will be profitable, as illustrating the dangers attending the use of case law, to call attention to a portion of the opinion delivered by Judge Earle, and to his misplaced reliance upon *Mutual L. Ins. Co. of New York v. Armstrong*, *supra*, of which an analysis has hereinbefore been given. He said: "Besides, all laws, as well as all contracts, may be controlled in their operation, and effect by general fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of *Mutual L. Ins. Co. of New York v. Armstrong*, *supra*. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. *Mr. Justice Field*, writing the opinion, said: 'Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money

upon a building that he had willfully fired.' " It is apparent, from this quotation, that the author of the opinion assumed that the action in the case of *Mutual L. Ins. Co. of New York v. Armstrong*, *supra*, was brought by the representative of Hunter, and not by the representative of the assured. This misapprehension of the real interests in controversy, and which were really adjudicated in that case, influenced the majority of the court of appeals of New York, and, by the super-added force thereby given it, this court was also led into error by the majority opinion in *Riggs v. Palmer*. From the application of an improper rule for the construction of statutes, and from the evident misconception of the points decided in *Mutual L. Ins. Co. of New York v. Armstrong*, *supra*, we are led to believe that a rehearing was very properly granted in this case, and that it should be determined independently of the controlling force which at first was accorded to the cases cited, as supporting the views already announced in the opinion heretofore filed. Reference has heretofore been confined to the majority opinion in *Riggs v. Palmer*, *supra*. Two of the seven judges constituting that court dissented. Gray, J., wrote the dissenting opinion, in which he said: "I cannot find any support for the argument that the respondent's succession to the property should be avoided because of his criminal act, when the laws are silent. Public policy does not demand it, for the demands of public policy are satisfied by the proper execution of the laws and the punishment of the crime. There has been no convention between the testator and his legatee, nor is there any such contractual element in such a disposition of property by a testator as to impose or imply conditions in the legatee. The appellants' argument practically amounts to this: that, as the legatee has been guilty of a crime, by the commission of which he is placed in a position to sooner receive the benefits of the testamentary provision, his rights to the property should be forfeited, and he should be divested of his estate. To allow their argument to prevail would involve the diversion by the court of the testator's estate into the hands of persons whom, possibly enough, for all we know, the testator might not have chosen or desired as its recipients. Practically, the court is asked to make another will for the testator. The laws do not warrant this judicial action, and mere presumption would not be strong enough to sustain it." This language commends itself as more nearly correct in principle, as applied to the case at bar, than to the case in which it was used, for in the latter it applied to the result effected by a will duly executed and probated; in the case at bar there is presented for determination the effect of a statute under and by virtue of which there is vested a certain estate, independently of every other consideration than the death of the ancestor. The force of this distinction is the more apparent when we recall the fact that the case of *Riggs v. Palmer* was brought to have the will of the testator canceled and annulled in so far as it devised and bequeathed property to the testator's

murderer. Under such circumstances, it might be very plausibly urged that, if the testator had understood that his murder had been contemplated by his legatee, to prevent the possibility of a revocation of the bequest to him, such revocation would have speedily followed, and upon this assumption the court might have been asked, with a show of propriety, to declare the revocation which, but for the wrongful act of the legatee, would have deprived him of the bequest in his favor. It is not to be understood that we undertake to determine this either way. What we mean is merely to illustrate the fact that, in the case of *Riggs v. Palmer*, the question of properly inferable unconsummated intention might have been plausibly urged, while in the case at bar there is no room even for plausibility.

The case of *Owens v. Owens*, 100 N. C. 240, was where a widow was convicted of being accessory before the fact for the murder of her husband. She afterwards brought suit to have her dower assigned in the real property of which her husband died seised. As applicable to the facts of the case at bar, we quote from the opinion delivered in that case as follows: "The natural feeling inspired by her proved co-operation in the unnatural and wicked act of taking her husband's life, and thus availing herself of the generous provision of the law that secures her surviving, a home for life, is repugnant to a claim preferred under such circumstances of perfidy to the marital relations. In the absence of authority, the well-instructed and able judge who tried the case ruled against the allowance of dower, as it would in fact be to 'reward crime' by conferring benefits that result from, and are procured by, its commission. We feel ourselves unable to concur in this conclusion, for the reason that, while the law gives the dower and makes it paramount to the claims of creditors even, there is no provision for its forfeiture for crime, however heinous it may be, and even when the husband is the victim. The only statutory provision which, for criminal misbehavior, bars an action prosecuted for the recovery of dower, is where she shall commit adultery, and shall not be living with her husband at his death. . . . As there is no other act of the wife which, by statute known to us, works a forfeiture, we do not see how any legal obstacle can be in the way of her getting what the law in unqualified terms gives her." These conclusions have the countenance of other courts of more limited jurisdiction than those whose views have been given, but whose powers of discernment should not therefore be underestimated. In the circuit court of Preble county, O., the case of *Deem v. Milliken* was determined, and is found reported in 27 Ohio L. J. 156, and 6 Ohio C. Ct. Rep. 857 *et seq.* The opinion of the three judges comprising that court was delivered by Shauk, J. The defendants in error, by their answers and cross-petitions, alleged, in the court of common pleas, that Caroline Sharkey died intestate January 11, 1889, seised in fee of certain real estate, leaving surviving her a son, Elmer L. Sharkey, her sole heir-at-law; that there-

after Elmer executed to the defendants in error several mortgages to secure the payment of certain promissory notes. Their cross-petition contained appropriate averments as to the execution of the notes and mortgages, and for the assertion of a lien upon said real estate by virtue thereof. Answering this cross-petition, the plaintiffs in error, who are brothers and sisters of said Caroline Sharkey, deceased, admitted that said Elmer L. Sharkey was the son and only child of said Caroline Sharkey; that she died intestate; and alleged that on or about the 11th day of January, 1899, the said Elmer L. Sharkey murdered his mother for the purpose of succeeding to her title to the real estate, and that by due process of law he had been hanged on December 19, 1899; wherefore, the plaintiffs in error alleged that said real estate did not descend to said Elmer L. Sharkey. In the court of common pleas demurrers to these answers were sustained, and distribution was ordered in favor of the mortgagees. In the opinion delivered in the circuit court on error, the following apt and forcible language occurs: "The statute of descents neither recognizes a mischief nor provides a remedy. It is a legislative declaration of a rule of public policy. With respect to remedial statutes, the rule quoted has frequent and salutary operation. The mischief and the remedy indicate the intention of the legislature, and guide the court in giving it effect. But the rule affords no warrant for adding an important exception to a statute which, in clear language, defines a rule of public policy. Even in the consideration of remedial statutes, courts should be guided by the maxim '*indecus animi sermo*,' and the interpretation should be consistent with the language employed. Knowledge of the settled maxims and principles of statutory interpretation is imputed to the legislature. To the end that there may be certainty and

uniformity in legal administration, it must be assumed that statutes are enacted with a view to their interpretation according to such maxims and principles. When they are regarded, the legislative intent is ascertained. When they are ignored, interpretation becomes legislation in disguise. The well-considered cases warrant the pertinent conclusion that when the legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent. *Hadden v. Barney*, 72 U. S. 5 Wall. 107, 18 L. ed. 518; *Hyatt v. Taylor*, 42 N. Y. 258; *Re Powers*, 25 Vt. 261; *State v. Liedtke*, 9 Neb. 468; *Mint & F. Ft. Road Co. v. Woodhull*, 25 Mich. 99, 12 Am. Rep. 233; *Jewell v. Weed*, 18 Minn. 273 (Gil. 247); *Woodbury v. Berry*, 18 Ohio St. 456; *Bruner v. Briggs*, 39 Ohio St. 478; *Kent v. Mahaffey*, 10 Ohio St. 204. The decision in *Riggs v. Palmer* is the manifest assertion of a wisdom believed to be superior to that of the legislature upon a question of policy. Chief Justice Redfield, in *Re Powers*, observes: 'It is scarcely necessary, we trust, at this late day, to say that the judicial tribunals of the state have no concern with the policy of legislation.' "

It is unnecessary to enlarge upon this subject. We cannot, however, forbear observing that the title vested in Leander Shellenberger by operation of law, and was dependent upon no condition, not even his acceptance. Upon the death of Maggie Shellenberger, the title vested in her father, *eo instanti*. The language of section 30, chapter 28, Comp. Stat., is comprehensive and free from ambiguity, and we have been able to find no justification for interference with it.

The former opinion filed in this case is disapproved, and the judgment of the District Court is affirmed.

## LOUISIANA SUPREME COURT.

### RE SUCCESSION OF Pierre LANAUX.

Joseph R. HYMEL *et al.*, *Appts.*

(46 La. Ann. —.)

#### \*1. A debtor who deposits with a third party pledges for his creditor, presum-

\*Headnotes by MCENERY, J.

NOTE.—How far may pledge be effectual of which the pledgeor's agent is made depositary.

The authorities seem to agree unanimously that the validity of a pledge is not affected by the fact that an agent of the pledgeor is made the custodian of the property if the parties agree to such cause and he is in fact placed in possession.

In *Weems v. Delta Moss Co.*, 33 La. Ann. 973, it appeared that the custodian of the pledge selected by the parties was an employé of the pledgeor, and the court in upholding the pledge said the objection that the custodian of the property pledged was an employé of the pledgeor has no force and cannot destroy the effect of the delivery made to the pledgee.

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ably purchased with trust funds, and who informs the creditor of the deposit, who accepts the third party as a depositary, loses control and possession of said pledge. The depositary holds the pledge for the benefit of the pledgee. That the third party is the clerk of the pledgeor does not destroy the effect of the pledge.

#### \*2. A deposit of money lost or misappropriated by an insolvent depositary does not give the depositor a general privilege on the es-

The lien may be perfected by placing the property in a separate room of the pledgeor's factory in charge of an employé of the pledgeor, to remain there until the property which consisted of goods in process of manufacture was completed and ready for the market. *Sumner v. Hamlet*, 12 Pick. 76.

The fact that the custodian selected for keeping the property is an employé of the pledgeor, and that he permits the pledgeor to use the property at times under his supervision, does not defeat the validity of the pledge. *Jaquet v. His Creditors*, 38 La. Ann. 863.

In *Combs v. Tuchelt*, 24 Minn. 423, the pledged property was delivered into the possession of an

tate of the depositary for the return of the money.

*On Rehearing.*

\*3. **Delivery of the property pledged to the creditor**, or to the third person to hold possession for the creditor, is indispensable to perfect the contract of pledge; and, when delivered to the third person, he must, of course, know of the trust, and accept the obligation it imposes. *Rev. Civ. Code, arts. 3133, 3152, 3162; Code Nap. art. 2076; 28 Laurent, Droit Civil, p. 162, para. 484, 470, 471, 484; 8 Mourlin, Examen du Code Nap. p. 452, par. 1218; 7 Bouilleux, Commentaire du Gage (3d Series) p. 129; Jones, Pledges, §§ 23, 27, 28, et seq.*

4. **Hence, no pledge is accomplished by the debtor executing his note in favor of his creditor**; attaching bonds and certificates of stock to secure its payment; placing note and securities, in a package marked with the creditor's name, in the box of the debtor, in bank; the debtor at the same time instructing his clerk having the key of the bank box to deliver the package on the request of the creditor, and although the instructions are communicated to the creditor, and all is done in pursuance of a pledge promised the creditor, but no delivery ever having been made, and, when the debtor dies, the securities remaining in his bank box, deposited and held as his property. *Ibid.*

5. **In such case the clerk of the debtor, because he receives the instructions of his employer to deliver the securities and communicates such instructions to the creditor, does not become "the third person agreed upon" to take possession of the securities for the creditor**, required by the code when the pledge is proposed to be perfected by that method of delivery. Least of all can we hold that by such instructions, and their communication, is any shadow of possession passed to the clerk, of securities in his employer's bank box, never taken from it until his death, when his executor takes charge of box and contents. *Ibid.*

6. **Instructions of an employer to his**

\* Rehearing headnotes by MILLER, J.

employé of the pledgeor, and the court held that the pledge was valid, but there is no discussion of the effect of making the pledgeor's agent the depositary.

In *Boynton v. Payrow*, 67 Me. 587, a good pledge was held to have been created by the delivery of a savings bank book to the pledgeor's mother, to be delivered to the pledgee.

In *McCready v. Haslock*, 3 Tenn. Ch. 13, the property belonged to John W. Morton, was sold by him to Pulliam & Co. who retained him as clerk in the store. Subsequently to secure a debt of Pulliam & Co. and Morton the property was pledged to persons who placed it in possession of John W. Morton, Jr., and the pledge was upheld. But the relation of the depositary to the concern does not appear further than is shown by his name.

But in *Dirigo Tool Co. v. Woodruff*, 41 N. J. Eq. 386, the attempted pledge was of the machinery and tools of a manufacturing establishment, and the superintendent of the establishment was left in possession as the agent of the pledgee. Shortly afterwards he stated to one contemplating a loan upon a chattel mortgage of the same property that there was no lien upon it and the pledgee was held bound by his statements and the mortgagee was given priority over the pledgee.

So in *D'Meza's Succession*, 26 La. Ann. 85, the attempt was made to enforce a pledge of a policy of

clerk, with reference to the delivery of the employer's securities to one of his creditors, and communicated to the creditor, whatever their force in the life of the employer, certainly cease to have any effect when the death of the employer occurs, no delivery having ever been made.

7. **Death of the debtor fixes the rights of his creditors as they exist at that moment**, and a proposed pledge, not perfected by delivery when the debtor's death occurs, confers no rights.

(*Watkins and McEnergy, JJ., dissent from propositions 3-7.*)

(March 12, 1894.)

**A** PPEAL by claimants from a decree of the Civil District Court for the Parish of Orleans sustaining oppositions to the provisional account of the executor which allowed the claims. *Affirmed.*

The facts are stated in the opinions.

*Mr. Albert Voorhies* for appellants, Joseph R. Hymel, O. Hymel's Succession, and Mrs. F. E. Tassin.

*Mr. Felix P. Poche* also for appellant, Mrs. Tassin.

*Mr. Charles F. Claiborne* for appellants, Denis Lanaux and the executor.

*Messrs. Semmes & Legendre* for appellant, Estate of Seraphin Hymel.

*Mr. James McConnell* for appellee, State National Bank.

*Mr. E. Howard McCaleb* for appellees, People's National Bank, New Orleans National Bank, and George Dionne.

*Messrs. Beattie & Beattie* also for appellee, Dionne.

*Messrs. Jonas, Farrar & Kruttschnitt* for appellees, Glover & Odendahl.

*Messrs. William S. Benedict and Robert G. Dugne* for appellees, Joseph Walton & Co. and Moran & Wood.

*Mr. John B. Fisher* for appellee, People's Slaughter House Co.

insurance, on the ground that it had been placed in the possession of the pledgeor's bookkeeper for the pledgee, but was not sustained, on the ground that the contention that the policy was placed in the possession of the bookkeeper for the pledgee was not borne out by the facts, the court stating that the bookkeeper had never been instructed to deliver the policy to the pledgee.

And in *Citizens' Bank of Louisiana v. Janin*, 48 La. Ann. —, it was held that possession by a lessee of the pledgeor was not sufficient to validate the pledge, although the pledgeor had agreed to lease for the benefit of the pledgee, and the lessee had been informed of the agreement and agreed to recognize the pledgee's rights, if there was no agreement between the pledgeor and pledgee that the tenant should hold the property as a third person for the benefit of the pledgee.

In *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779, the depositary agreed upon by the parties was the firm of which the president of the pledgeor bank was a member, but instead of his taken possession of the pledge he left it in possession of a clerk of the bank for the purpose of facilitating collections. The court does not discuss the question whether or not the president of the bank would be a lawful depositary, but rather assumed that fact, and then held that he did not have sufficient possession to constitute the pledge valid.

H. P. F.



McEnery, J., delivered the opinion of the court:

Pierre Lanaux, commission merchant and factor, died in the city of New Orleans September 6, 1892. He was the agent for Mrs. E. Tassin, Octave Hymel, deceased, and J. R. and Seraphin Hymel. These parties intrusted their funds to Lanaux for investment, without specifying and directing the mode of investment. These funds were never, except in case of Mrs. Tassin, loaned to Lanaux; and he was never authorized to use them for his own purposes, or in his business. The mandate, as shown by the witnesses and the correspondence between the parties, was to invest their funds. They were deposited by them with Lanaux for this purpose, and none other. On the accounts current furnished these several parties, it was noted that the funds had been invested, without saying in what particular manner. A short time before his death, Lanaux, for the amounts which he had for investment for these parties, made up separate packages in separate envelopes, in which were placed his individual notes for the amount due each, with bonds and certificates of stock, with the usual blank power of attorney to transfer attached to them. On each envelope or package was indorsed the name of the party to whom it belonged. They were placed in a bank box, and this box, with the key, was placed in the actual corporal possession of De Jaham, his clerk. This box was, according to Lanaux's instructions, placed in the branch depository of the State National Bank for security and safekeeping, through the intervention of George Lanaux, who received the box from De Jaham. De Jaham was instructed and directed by Lanaux to deliver on demand these packages to the persons to whom they were addressed. He had exclusive control of the box containing these pledges, and says he would have delivered them to the parties on demand. It is evident from the testimony of De Jaham and George Lanaux that De Jaham's possession of the box was full and complete, and adverse to that of Lanaux. Mrs. Tassin, who had instructed Lanaux in the same manner as the Hymels as to the investment of her money, subsequently met Lanaux, to whom she loaned her money on the faith of the securities set apart for her, with the understanding that De Jaham was to be the depository of the pledges. De Jaham, after receiving these pledges, informed Mrs. Tassin of his possession of the same for her benefit; and she accepted De Jaham as the depository then, as she had previously signified her assent to do so, when she had the conversation with Lanaux which resulted in the lending of the money. This statement of the facts in relation to Mrs. Tassin brings her case directly under the textual provisions of article 8162 of the Revised Civil Code, and the interpretation placed upon the same by this court. *Peters v. Pacific Guano Co.* 43 La. Ann. 694; *Jaquet v. His Creditors*, 88 La. Ann. 668; *Weems v. Delta Moss Co.* 88 La. Ann. 973; *Conger v. New Orleans*, 82 La. Ann. 1250. The fact that De Jaham was the clerk of Lanaux could not affect his capacity to act as a third party chosen by the parties to be the

detaiiner of the thing pledged. There was no inconsistency in the two relations. Having accepted the trust, so far as it was concerned, he was a stranger to Lanaux, and in no way bound, by his private relations to him, to violate his obligation as a fiduciary, and to surrender the pledge to him; and he so regarded it, as he says he would have delivered the packages, on demand, to the parties for whom they were intended. Seraphin Hymel, J. R. Hymel, and Octave Hymel were informed of the investment of their funds, either by Lanaux or De Jaham, although the testimony does not show that they were informed particularly as to the mode of investment. It is a fair inference, however, that they were informed by Lanaux and De Jaham, when they spoke to those parties, whom they had visited for the purpose of informing them as to the fulfillment of the trust imposed by them upon Lanaux. This is corroborated by the blank power of attorney which Seraphin Hymel refused to sign, the object of which was to remove and to deposit bonds, bills, stocks, notes, etc. Taking all the evidence together, the impression made upon the mind is that the Hymels had knowledge of the pledging of these bonds, stocks, etc., for them, and that they accepted De Jaham as the custodian. Seraphin Hymel's reason for refusing to sign the power of attorney was that he thought his funds safely invested. This power of attorney was admitted in evidence, over the objection of the opponents; but it was admissible to show, in part, that Seraphin Hymel knew that his funds had been invested in the manner shown by the inventory and the account, and the disposition of his funds, and that he accepted De Jaham as the third party agreed on between the parties to detain the pledge. We see no good reason why the debtor cannot place the thing pledged in the hands of a third party, and inform the creditor of the fact, when, if he accepts the third party, the pledge becomes perfected. Such seems to be the doctrine indicated in *Peters v. Pacific Guano Co.* 43 La. Ann. 694. The succession of Lanaux could have no greater rights than the decedent. If he had lived, would not the pledgees have had the right to claim the things pledged to them in the hands of De Jaham? If a demand had been made upon De Jaham for the pledges, he could not have set up title in Lanaux, and Lanaux certainly was estopped from claiming the pledges. In fact, he had completely divested himself of possession of the notes, bonds, and certificates of stock after De Jaham had accepted the pledges from him, and had been accepted as the detaiiner of the pledges by the pledgees. Any attempt of Lanaux to dispose of the things pledged, in the hands of De Jaham, could have been successfully resisted by the pledgees.

And another view of the case is also fatal to the demand of opponents. Conceding that there was no valid pledge of the property, the relations between Lanaux and the Hymels were not those of debtor and creditor. They never authorized Lanaux to use for his own purpose, or in his business, their funds. Their instruction to him, who was their serv-

ant and agent, was to invest these funds. They were informed that they had been invested, and it was so noted on the accounts current furnished the Hymels. Lanaux invested these funds in property of which he was the owner, and placed the same in the hands of his clerk, to be delivered on demand. The Hymels, on his death, found in his succession the property destined by Lanaux for them. This property was presumably purchased with their funds, and separated from Lanaux's property, and became their property. *Beatty v. McCleod*, 11 La. Ann. 76. It is the law that the Hymels, in order to secure the identical fund in the insolvent succession, must separate the fund from the mass of the succession, and distinguish it. But it is also the law, where trust funds have been specifically invested in property which can be identified, the property must respond to the trust fund, and stand in its stead. The Hymels therefore have the right to claim the specific property purchased with their funds by their servant and agent. *Ibid*.

It is contended by opponents that the notes were null and void because signed and indorsed by De Jaham, and that he had no written authority to sign and indorse them. The mandate to sign and indorse a promissory note must be express and special, but it need not be in writing. *Boyd v. Chaffe*, 21 La. Ann. 476. De Jaham's authority to sign and indorse the notes was express and special, although not in writing. To perfect the pledge, the delivery of the bonds, notes, etc., was sufficient. *Ribet v. Bataille*, 35 La. Ann. 1171; Rev. Civ. Code, art. 2158.

On October 8, 1891, S. Hymel deposited with Lanaux \$23,000. This deposit was for the purpose of meeting current expenses of his plantation. This sum is placed on the account as an ordinary debt. It is claimed by Hymel that his was a trust fund, and that the executor must turn it over to Hymel's representatives before making a distribution of Lanaux's assets among his creditors. The fund has not been identified, nor has it been traced in its conversion into other property. The depositor has no general privilege on the property of the agent. *Lanoux v. Dumartre*, 25 La. Ann. 478; *Stone's Succession*, 31 La. Ann. 314. It must therefore be rated as an ordinary debt against the succession fund.

The opposition to the claim of the Planters' Fertilizing Company is not well founded. The proof is insufficient to sustain it. The district judge was of this opinion, and we see no reason to disturb his ruling.

Walton & Co. and Moran & Wood's claim for a privilege for coal furnished the plantation was properly allowed, restricted as it was to coal furnished for making the crop of sugar on the several plantations.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to reverse that part of the decree sustaining the oppositions to the claims of Seraphin Hymel, Octave Hymel, Joseph R. Hymel, Mrs. F. E. Tassin, to be paid, by preference and privilege, out of certain notes and bonds, shares of stock, etc., pledged to them, and mentioned in the inventory and on the account of the executor; and it is now ordered that

the opposition to the same be dismissed, and said claims be recognized as placed on the account. *In all other respects the judgment is affirmed*; the succession to pay all costs.

A rehearing was subsequently granted after which on June 9, 1894, *Miller, J.*, on behalf of the court delivered the following opinion:

The question in this case is whether the appellants, the successions of Seraphin Hymel, of Octave Hymel, Joseph R. Hymel, Mrs. Florian E. Tassin, and Denis Lanaux, are pledge creditors of the late Pierre Lanaux. The account of the executor of the deceased recognized the pledges, and from the judgment of the lower court maintaining the oppositions of ordinary creditors of the deceased, and adjudging that the appellants were not pledge creditors, they prosecute this appeal. The case has been elaborately argued in this court, both on the original trial and on the rehearing, and has engaged our serious attention. The full argument in this court has served to eliminate from consideration a mass of testimony contained in the voluminous record, well calculated to cloud the issue and mislead the court.

At the outset, it may be stated, we regard the debts of the creditors asserting the pledges as established. The pecuniary condition of Pierre Lanaux is unimportant, as this is not the revocatory action. It is of no consequence in this discussion that Pierre Lanaux, the deceased factor, had annually, for years, balances in his hands derived from the sale of the crops of the asserted pledge creditors,—was accustomed to invest for them their balances,—and all evidence tending to show that the asserted pledges were such investments has no bearing on the controversy, the creditors claiming as pledgees, not as owners, for whom the securities had been bought by their agent. The claim of ownership, and at the same time as creditors entitled to the bonds as pledgees, would be inconsistent, besides admitting of no support under the facts; and the creditors properly elected, in the lower court, to stand on their asserted pledges.

The controversy is between the creditors asserting these pledges on a large amount of the securities of the debtor, and the mass of the creditors interested in disputing the pledges, so as to secure the applications of all the debtor's assets to the payment of his debts. The requisites of the pledge are well defined. The agreement consummated by delivery of the property pledged to the creditor, or the possession of the property by a third person, agreed on to hold for the creditor, are the essentials. There is no substantial difference between our code and the general commercial law on the subject, and in one of the recent text-books the articles of our code are incorporated as expressing the commercial law. In this case there is no pretense of any delivery to the creditors. The claim of the asserted pledge creditors is that the securities were placed in the possession of a third person to hold for them. Rev. Civ. Code, arts. 3133, 3152, 3162; Code Napoleon, art. 2076; Jones, Pledges, §§ 23, 27, 28, *et seq.*; 28 Laurent, Droit Civil, p. 163,

para. 464, 470, 471, 484; 7 Boilleux, *Commentaire du Gage*, p. 129. The pledges are asserted to have been made in August, 1892. Pierre Lanaux, the debtor, died in September, about a month after. There was no intercourse between the debtor and Denis Lanaux, one of the alleged creditors, having any reference to the pledge claimed for him. We draw the conclusion from the record that there was none with Seraphin Hymel, another alleged pledge creditor, leaving out of view the hearsay testimony of statements from him that his balance in the hands of the deceased factor was safe, or had been invested. With two other of the creditors claiming as pledgees, Octave Hymel and Joseph R. Hymel, there appears to have been intercourse prior to the time of the asserted pledges, from which these creditors derived the understanding, and were assured by the deceased factor, their balances in his hands would be or were invested, and their securities placed in the safe at the New Orleans Insurance Company, in the vault of the branch depository of the State National Bank, in this city. The deceased factor was president of both institutions. With Mrs. Tassin, another of these creditors, the communications of the deceased factor were of a more special character. Her balance in his hands in July, 1892, was large, and she was solicitous to have it secured; *i. e.* invested in state bonds. He submitted to her his plan, thus: He would make his note for \$40,000; secure it by a pledge of state bonds and other securities; place note and securities in the hands of George De Jaham, his clerk; instruct him to put the note and securities in a bank box, in the safe of the New Orleans Insurance Company, in the vault of the branch bank, to which George Lanaux, the secretary, had sole access; at the same time he would instruct him to hold the box subject to the order of De Jaham, having the key of the box, and who would be directed to deliver the note and securities on her request. To this plan Mrs. Tassin assented.

With this review of the relations and intercourse of the deceased factor with his creditors, the next phase of this controversy is the method of the execution of the asserted pledges. On the 8d of August, 1892, Mr. Lanaux directed his clerk, Mr. De Jaham, to make five notes (one for Mrs. Tassin, for her balance, \$40,000; one for \$31,000, in favor of Octave Hymel; one for \$27,500, in the favor of Seraphin Hymel; one in favor of J. R. Hymel, for \$25,000; and another, for \$10,000, in favor of Denis Lanaux); to attach to each note securities deemed adequate to secure it; to place notes and securities in five packages, each marked as the property of the creditor for whom the contents were intended; and to put the sealed packages in a bank box, for which, Pierre Lanaux told his clerk, George Lanaux would call. All this was done, and De Jaham, the clerk, was instructed to deliver the packages to the creditors. On the day previous, George Lanaux had been requested by Pierre Lanaux to put a bank box in the safe of the insurance company, adding that De Jaham would give the box. On the day following the making up

the packages, and placing them in the box, it was taken from Pierre Lanaux's office by De Jaham and George Lanaux, and deposited in the safe of the insurance company, in the vault of the branch bank. De Jaham had the key of the box; George Lanaux, the combination to open the safe. Nothing was said by Pierre Lanaux or by De Jaham to George Lanaux in reference to the box, save the request from Pierre Lanaux to deposit it, and of course there was no syllable of reference to its contents. It bore the name of the deceased factor, and contained, besides the packages, his will, appointing Denis Lanaux his executor. Not a single security was ever delivered from the box. It was untouched from the time it was placed in the safe, at Pierre Lanaux's request, until his death, when it was opened, under the order of the court, to search for his will and inventory his property. The claims of the creditors asserting pledges on the contents of the box on the theory that the securities in their debtor's bank box ought to be deemed, not in his possession, but in that of these creditors, through a third person supposed to hold for them, are fortified, it is urged, by the direction of Pierre Lanaux to his clerk to deliver the packages, and by the fact that the directions, at the request of Pierre Lanaux, were communicated by his clerk to the creditors, or some of them. The testimony on this branch of the case appears to be about this: The information was given to Octave Hymel and Joseph R. Hymel that their funds in the hands of the deceased factor had been invested for them,—were in the safe of the insurance company,—and, to use the language of the witness, they ratified the investments. The testimony of De Jaham on this point is in some degree conflicting,—apt to occur in the testimony of any witness subjected to protracted examination and cross-examination as to details. But giving effect to all his testimony, and that of others, it is our conclusion his communication to Joseph R. and Octave Hymel may be epitomized in the reference by him to the investments being in the safe of the company. To Mrs. Tassin the communication of De Jaham was, in effect, that all had been done with reference to the pledge as proposed to her by Pierre Lanaux,—that is, the execution of the note; placing the note and securities in the package marked for her, the packages in the box, the box in the safe of the company in the bank's vault; his instructions to deliver to her. And De Jaham also stated that he and George Lanaux had accepted the commission confided to them by the deceased. This last statement conveyed the inference of the witness; but the fact is that George Lanaux, entirely ignorant of the contents of the box, had no such commission, and never even heard of it.

It is substantially on this state of facts this court is called on to sustain pledges of securities in the debtor's bank box never taken from it till his death, and then by his executor. It is urged on us that the facts bring the asserted pledges within the essentials so plainly expressed in the code,—that no pledge exists without actual delivery to the creditor, or to a third person for him. The symbol of the

pledge, in the Roman law, is the fist of the creditor closed on the pledge, denoting that actual possession which all recognize as linked to the pledge, and without which none can exist. We are responding to the case of the creditors, to hold that these securities in Pierre Lanaux's box, in bank, directed to be delivered, but never taken from it, are notwithstanding to be deemed, not in his possession, but in that of some third person for the creditors. If we are to reach any such conclusion, it must be on some theory of constructive possession not capable of easy appreciation. We can hardly conceive, even on this theory urged on us, of constructive possession or constructive holding, how the case of the Hymels and Denis Lanaux can be supported. The intercourse with Octave and Joseph R. Hymel with the deceased factor, and subsequently, after his death, with De Jaham, that can be deemed to have the faintest relation to these securities, has been stated. It will not be pretended, in that intercourse, any one was agreed upon or suggested to take possession of the securities for them. Still less can it be maintained that there was ever the shade of any such possession, unless packages in Lanaux's box are to be deemed not in his, but in the possession of some other. With respect to Denis Lanaux and Seraphin Hymel, there was no intercourse with reference to the box or its contents. A day or two after the death of Mr. Pierre Lanaux, De Jaham spoke to Denis Lanaux of a letter in the box for him. That was all he ever heard of the box until the opening under the order of the court disclosed the package marked with his name. With Seraphin Hymel, all intercourse or knowledge of box or contents is a blank. The claims of these—the Hymels and Denis Lanaux—may at once be laid aside. There is no pretense of the delivery to them of the asserted pledges. It would do violence to the record, were we to maintain that there was ever the selection of any third person to hold the securities for them, and still greater violence if we held there was the shadow of any such possession.

Is the case of Mrs. Tassin any stronger? The actual custody of the box containing the securities when Lanaux died is susceptible of no dispute. Whether George Lanaux who received it from Pierre Lanaux, or the company, or the bank in whose vault the box was placed, is deemed custodian, is immaterial. Could the possession of any one of these be deemed that of Mrs. Tassin? Neither George Lanaux nor the company nor the bank had the slightest intimation of her now asserted interest in the contents of the box. With the fact that must be conceded,—that the box was thus received and thus held,—it is plain that no other relation or ownership or accountability grew out of the deposit of the box, other than that arising daily when the customer sends his box to the bank. It must be apparent, then, that George Lanaux held that box for Pierre Lanaux, and in no sense for Mrs. Tassin, whose asserted pledge rests on the theory of her possession, actual or constructive, of the securities in that box, claimed by her. The fact that George Lanaux

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received the box from, and held it for, Pierre Lanaux, must be accepted, and exert its influence in the solution of the vital issue as to the possession of these securities. Whatever qualifications may be claimed to arise from the previous negotiation between Mr. Lanaux and Mrs. Tassin in reference to the asserted pledge, or from the fact that subsequent to the negotiation he placed the package of securities bearing her name in the box, or from the additional circumstances that the clerk of the debtor, with the key of the box, had his instructions—never fulfilled—to deliver to her the package, and that the instruction, at the request of the debtor, had been communicated to her, still, whatever the force, if any, of these qualifications, or of any other the record exhibits, the unalterable fact remains that when the death of the debtor occurred, which fixes the rights of all creditors as they exist at that moment, the securities now claimed to have been in the possession of a third person, agreed on to hold for the creditor asserting the pledge were in the debtor's bank box deposited as his property. There is, on this branch of the case, another impressive feature. When Pierre Lanaux unfolded his plan to secure Mrs. Tassin, the payment of the large balance in his hands, along with the placing the note in her favor, with the package of securities bearing her name, in the box, and along with the instructions for delivery to his clerk, and the deposit of the box, it was part of that plan that George Lanaux, receiving the box, was to be instructed to hold the box subject to the order of the clerk. If these instructions had been given, and accepted (as doubtless they would have been) by George Lanaux, the case of Mrs. Tassin would, at least in this respect, have represented a different aspect. There would have been the basis for the argument, to whatever extent it might avail, that the box was held for De Jaham along with his mandate of delivery to Mrs. Tassin. But the deceased factor—sick when the proposed pledge was discussed, and attempted to be carried into effect, and unfitted for business—failed to bear in mind the precaution devised by him for the protection of the creditor. Death closed his lips without any instructions to George Lanaux in respect to the box. The record then places George Lanaux before the court as holding the box for him whose name it bore, and from whom it came. It cannot, therefore, for one moment, be contended that he bore the slightest relation to Mrs. Tassin. When the pledge is consummated by delivery to a third person to hold for the creditor, it is the natural result that a liability at once arises between the third person thus selected and the creditor. No such liability, in this case, existed. Laurent thus puts it: "*L'article 8076 admet que le créancier gagiste est mis en possession lorsque le gage a été remis à un tiers convenu entre les parties. Il faut donc une convention qui établisse un lien entre le tiers et le créancier gagiste de sorte que le créancier possède par l'intermédiaire du tiers.*" 28 Laurent, Droit Civil, p. 484. This case can be supported on no theory that George Lanaux held for the

creditor, of whose asserted interest he was ignorant, and to whom he sustained no relation of trust or liability.

It is insisted, however, that this court, in solving issue of the possession of these securities claimed by Mrs. Tassin as pledged to her, shall hold for naught that they were in the debtor's box, deposited and held for him, and never taken from it, except by his executor, when the debtor's death occurred. It is claimed that the pledge and possession of Mrs. Tassin are to be supported on the theory that George De Jaham had been selected to hold possession of the pledges for her, and actually had that possession. Her whole case rests on that theory. Is it to be maintained that De Jaham ever was selected to take the securities into his possession, or that he ever had the vestige of any such possession? All must realize the exaction of the code that actual delivery of the pledge must be made to the creditor, or possession delivered to a third person chosen by debtor and creditor to hold for the creditor. What the code means by this selection of a third person to hold for the creditor, and by his possession of the pledge, requires no comment. Was De Jaham ever clothed with any such agency, or vested with any such possession? De Jaham's whole function with respect to the securities was derived from the order of his employer. That was to place the package of securities in his employer's bank box, and deliver the package on the call of the creditor. That order certainly did not authorize the clerk to take the securities into his possession, to hold them for the creditor. Nothing of the kind was contemplated. If the creditor had called, she doubtless would have obtained the securities, and thus obtained the possession essential to perfect the pledge. No such call was made, and the securities remained in the debtor's bank box, undelivered. The clerk never conceived he had any authority to remove the securities from the bank box. When the creditor demanded the securities after the debtor's death, the clerk declined, stating his authority ceased with the death; adding, however, the creditor's right would ultimately be secured. His refusal without any qualification, in our opinion, defined his power, because death revokes all unexecuted orders of the principal. There was then no agreement whatever that the securities claimed as pledged to Mrs. Tassin should be put in possession of the clerk as a third person to hold for Mrs. Tassin. Nor does it in the least affect the question that the clerk communicated the order of his employer to deliver to her, nor that she signified her assent. No license of construction enables us to transform an order of the employer to his clerk for the delivery, if called for, of securities from the employer's box in bank, into a mandate that the clerk shall remove the securities, and take them into possession to hold for the creditor. Least of all can we hold the clerk ever had that possession. Placed in the debtor's bank box, deposited and held as his property, the securities remained untouched until his death, and then were removed only by the executor to inventory the debtor's property.

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There was clearly no delivery of the securities; none to the creditor; none to a third person to hold for her. The pledge was inchoate,—a delivery proposed, but never accomplished. The case is of the class of pledges proposed, but not perfected; and nothing is better settled than that inchoate or executory contracts of pledge, not perfected by delivery, confer no rights, as against other creditors. The death of the debtor fixes the rights of the creditors as they exist at that moment. The same rule is enforced when the debtor makes a surrender of his property to his creditors. Civ. Code. No delivery had been made when that death occurred; none after was possible. Rev. Civ. Code, arts. 8188, 8152, 8162, 8182, 8183, 8185; *Buard v. Lemae*, 12 Rob. (La.) 243; *Boycie v. Escoffie*, 2 La. Ann. 872; *Slidell v. Pritchard*, 5 Rob. (La.) 101; *Martin v. Williams*, 3 La. Ann. 582. See the cases collected in 1 Hen. Dig. p. 686, No. 7; 2 Hen. Dig. p. 1504, No. 1. The creditor's case lacks the life of the pledge in a controversy with creditors, *i. e.* delivery.

In a commercial community, especially, it is of importance the law of pledge should be clearly understood, and that requisites of common acceptance should not be made uncertain. The creditor's case exacts, we think, that the tests of our law shall be displaced. The case may receive appropriate illustration by supposing that precisely such a pledge as is claimed here for Mrs. Tassin was proposed to any bank or business man. The proposition would be: The execution of the borrower's note, with securities attached; the note and securities placed in a package marked with the lender's name; the package placed in the debtor's bank box; the box deposited in bank by the debtor; his clerk instructed to deliver the package on the call of the creditor; and the creditor notified when all this is done; and of the instructions given the clerk. Does any one suppose that a dollar could be obtained on any such so-called pledge of securities to be kept in the debtor's bank box, supplemented by his directions to his clerk for delivery to the creditor? Would any one suppose that, unless that delivery was obtained, there would be any pledge, as against other creditors of the debtor. On the contrary, the prompt answer, at any bank, to any such proposition, would be that putting securities in the debtor's bank box, with all the formalities and instructions indicated, was neither delivery to the creditor, nor to a third person to hold for him, and hence there was no pledge. If a pledge, dependent, as it is, on delivery to the creditor, or the third person to hold for him, can be accomplished in the mode we are asked to recognize in this case, *i. e.* of securities never out of the debtor's bank box from the time he placed them in it until his executor took charge of them, there would be no limit to the pledges the debtor might make of the same property. To each lender the debtor might tender the security of his own bank box, with directions to his clerk of delivery to the creditors. The delivery obtained by any of these, relying on this bank-box pledge, would demonstrate that all the others had no pledge. This

theory that pledges can be made without the complete dispossession of the debtor, and that the pledge may be consummated by marking the creditor's name on the packages of securities in the debtor's bank box, supplemented by his unexecuted order for delivery, given to his clerk and communicated to the creditor, finds its answer in our code, in the text-books, and adjudicated cases. That answer is: The pledge requires possession in the creditor. Without that possession the pledge is inchoate or executory, only as between the debtor and the asserted pledge creditors, but gives no right whatever as against other creditors. Boilleux thus puts it: "*Une apprehension manuelle est de l'essence du contrat de gage; on conçoit que le législateur ait dû subordonner les droits du créancier à cette condition, puisqu'il ne s'agit pas d'un privilège proprement dit, c'est-à-dire d'un droit attaché à la qualité de la créance; mais d'une préférence fondée sur la possession; et le débiteur ne se dessaisissant pas le gage ne serait pas qu'une source de fraudes, rien ne l'empêcherait pas de conférer successivement à plusieurs personnes des droits sur la chose.*" 7 Boilleux, 129. This commentator on the Napoleon Code is felicitous in his development of the policy to guard against fraud that requires the complete dispossession of the debtor of the pledged property, but all the text-books insist on that dispossession. See, in addition to the authorities cited, Story, Bailm. § 299; *Casey v. Cavarcoc*, 96 U. S. 467, 24 L. ed. 779; Story, Ag. §§ 867 et seq.

Adhering, as we think, to the text and spirit of the code, it is our conclusion the pledge claimed for Mrs. Tassin was never perfected. There was neither delivery to her, nor possession for her in a third person. The bonds and securities claimed as pledged to her, never delivered, but in the debtor's possession at his death, are to be deemed the common pledge of all his creditors. Rev. Civ. Code, art. 8188.

*It is therefore ordered, adjudged, and decreed that our former judgment be avoided and set aside; and it is now ordered, adjudged, and decreed that the judgment of the lower court be affirmed with costs.*

**Watkins, J.**, dissenting. Filed July 6, 1894:

With respect to the claim of the opponent Mrs. Tassin, the question is whether the possession of De Jaham was such that the privilege had struck the collaterals that were attached to the note of Pierre Lanaux so effectually as to have consecrated their proceeds to its payment, had said collaterals been seized and sold by any other creditor of Lanaux. The contention of Mrs. Tassin's counsel is: That at the request of Pierre Lanaux it was agreed between him and Mrs. Tassin that she should loan Lanaux the sum of \$40,000 out of her funds then in his hands, on his demand note, to be secured by a pledge of Louisiana state consols and New Orleans Insurance Association stock, as collateral security. That it was further agreed between said parties that the pledge was to be arranged in the following manner, namely: The note, together with the securities, were

to be placed in the possession of George De Jaham, who was to put them in a bank box, which was to be placed on deposit by De Jaham in an iron safe of the New Orleans Insurance Association, at the time in the branch depository of the State National Bank, and in the custody and under the control of the secretary of the insurance association, who alone possessed the combination of the vault and safe. That the secretary of the insurance association was instructed to deliver the box containing the securities to De Jaham, on his demand; the latter having instructions from Pierre Lanaux to deliver the note and pledged securities to Mrs. Tassin, on her demand. That on the 3d of August, 1892, the note and act of pledge were executed, and they, together with the accompanying securities, were placed in the box, and the box was placed in the safe of the insurance association, where it remained uninterruptedly until after Lanaux's death. That on the 7th of August following the date of the selection of the securities, and in pursuance of the previous agreement of Mrs. Tassin and Pierre Lanaux, and by direction of Pierre Lanaux, De Jaham visited Mrs. Tassin, at her plantation, in the parish of St. John, and explained to her all that he had done,—describing the note which he had executed for Lanaux to her order, with the designated securities attached,—and that Mrs. Tassin expressed herself satisfied that he had carried out the agreement, and approved of what he had done. That, immediately after the death of Pierre Lanaux, Mrs. Tassin called on De Jaham, and, in person demanded the note and securities; but he declined because, in his opinion, the death of Lanaux had terminated his authority in the premises.

The facts bearing on the foregoing propositions are detailed substantially by two or three of the witnesses, and they may be fairly summarized as follows, viz.: Mrs. Tassin states that she had three separate and distinct interviews with Pierre Lanaux on the subject of her business, then in his hands, viz. on the 11th of June, 1892, on the 21st and again on the 25th of July, 1892. In the first interview she gave him instructions to invest for her, in state bonds, the balance of \$45,917.26 then remaining in his hands to her credit, in the second, she agreed to loan him \$40,000 on his demand note, secured by a pledge of state bonds on the par value of \$35,000, and in stock of the New Orleans Insurance Association sufficient in amount to cover the balance of \$5,000; in the third, there was a repetition of the second, the details thereof being reiterated. She states that Pierre Lanaux's proposition was to place his demand note for \$40,000, with the aforesaid securities attached, in the hands of George De Jaham, which he would instruct him to place in a bank box in the safe of the New Orleans Insurance Association, to which George Lanaux, secretary of the company, had exclusive access, and that at the same time he would instruct the secretary to hold the box subject to the order of De Jaham, who was to be authorized to deliver said note and securities on her demand. That in the last interview with Pierre Lanaux the latter inquired of her, to know if

she perfectly understood all the instructions she had previously given her, and that she replied in the affirmative. Mr. George De Jaham makes the following statement, viz.: "Mr. Lanaux gave me instructions before leaving,—that is to say, a few days before, on the 2d of August, he told me to make a note for Mrs. Tassin; to place \$40,000 for Mrs. Tassin, or \$35,000, in Louisiana state bonds, and to complete the balance of the pledge with New Orleans Insurance Association stock." Again he states: "On the 3d of August, Mr. Lanaux told me that he had given instructions to Mr. George Lanaux to call upon me for a certain box, in which I was to place the pledges for Mrs. Tassin and [others]. . . . Mr. Pierre Lanaux called at the office [on] the 3d, at about 2 P. M. He asked me if I had executed his orders. I told him, 'Yes.' I went to the bank, and got the box. I brought it into the office, opened it in his presence, exhibiting to him the notes for all these different parties, made packages before him, and replaced them in the box. That was on the 3d of August." Again he says: "Mr. Lanaux's instructions were to deliver to the parties whose names were on those packages, at their request." He states that on the 4th of August, at about 11 or 12 o'clock M., he telephoned George Lanaux, secretary of the insurance association, that he was ready to deliver to him the box, and he came and met him, and that they went together, and placed the box in his safe, in the vault of the insurance association. He further states that he retained the key to the bank box, which continuously remained in the safe until after the death of Pierre Lanaux, and was then delivered to him by George Lanaux, and he opened it in his presence. He was asked the question whether he would have delivered the packages to the parties named, if they had demanded them; and his answer was that he would, as Mr. Lanaux had instructed him to deliver the packages to the parties named on the back of the different envelopes, upon their demand. He concludes his answer by making this statement: "His instructions were to put them in the box, as stated yesterday, subject to their demand." This witness further states that he went to "Mrs. Tassin's house on the 7th of August, 1892, . . . and told [her] that Mr. Lanaux had placed, *i. e.* invested for her, \$40,000, on his note, secured by \$35,000 of Louisiana fours, and 520 shares of New Orleans Insurance Association, as he had promised her. Mr. Lanaux had told me to go there. Q. Did he instruct you to go there and inform her? A. Yes. Q. After you related to her (Mrs. Tassin) what occurred on the 3d day of August, did she say anything? A. Well, she said it was all right, according to what Mr. Lanaux had promised her." The witness again states that, after Mr. Lanaux's death. Mrs. Tassin called on him for the note and the securities, but he declined to deliver them, because, in his opinion, his authority from Pierre Lanaux ceased at his death. Counsel for the executor said, interrogatively: "And therefore you knew that when he died you would have no power over it, for the reason that it (the box) must be opened in his estate?" But his answer was: "No,

I did not think it belonged, even after his death, to his estate." Q. The instructions of Mr. Pierre Lanaux were up to the time of his death? A. He did not specify up to the time of his death. The words were: 'You will deliver these packages to the parties whose names are on them, on their demand.' These were the only words he spoke to me in reference to these packages." The witness then repeats that the instruments or packages were thus made, and placed in a bank box, and the parties were duly notified of the fact of the pledges having been made; and their accounts current were duly credited with the proper amounts, corresponding with the amounts of the secured notes. Mr. George Lanaux states that on the 2d or 3d of August, 1892, Pierre Lanaux "crossed over from the State National Bank to the office of the New Orleans Insurance Association; came to [his] office, and said, 'George, can you put a bank box in the iron safe of your company?'" To which question the witness replied: "It depends on the size of the box. Our iron safe is pretty full." "Lanaux said: 'Try and put the box in the safe. George De Jaham will give you the box.' That was all P. Lanaux said to me in relation to the box. That was in the morning, between 10 and 11 o'clock. About 2 o'clock that same day, I telephoned to De Jaham, . . . asking him if P. Lanaux told him about a bank box which I was to put in the safe of the New Orleans Insurance Association. He said, 'Yes;' but he was not ready to put the box in the safe, but would telephone me. . . . The following day, De Jaham telephoned that he was ready to put the box in the safe of the company. I answered, to wait for me at Lanaux's office; that I was coming. Immediately, I left my office, and proceeded to Pierre Lanaux's office, on Conti [street], and, together, accompanied by De Jaham, took the bank box from the desk in P. Lanaux's office, and went to the branch depository of the State National Bank, corner of Royal and Conti streets, and, having assistance of employés of the bank, we went into the vault where our safe is. I opened the safe, and, after having moved certain securities from one shelf to another, we succeeded in putting in the bank box. . . . There is no key to the safe. There is a combination. I had the combination. I was the only person who had the combination." On being asked if he knew anything of the contents of the box, he said he did not. He further states: "On the 6th of September I delivered the box to George De Jaham, who called for it. I had received it from George De Jaham. . . . He returned it to me in the course of five minutes." This witness again says: "I surrendered the box to De Jaham, having received it from him. I did not know whose agent he was, or considered himself to be. That I cannot answer. De Jaham will answer that. You cannot expect me to answer for De Jaham." Mr. Denis Lanaux states that the first time he "saw this tin box was on the 6th of September, . . . with De Jaham and George Lanaux. I had been informed by De Jaham that he had a box, which box was in the safe of the New Orleans Insurance Association,

which was in the vault of the branch depository of the State National Bank,"—informing witness of the contents. He said that "George Lanaux opened the vault, and De Jaham opened the bank box. We found packages,—one marked 'Property of Mrs. Tassin,' etc. He again said, "De Jaham told me he had the bank box," and, being asked when he was so informed by De Jaham, replied that "it was on the 4th or 5th of September, . . . two or three days before Lanaux died."

On this evidence, there can be no doubt of the following facts being fully established, viz.: (1) That there was an agreement between Pierre Lanaux and Mrs. Tassin that certain specified collaterals were to be attached to his demand note for \$40,000 in her favor, as security therefor. (2) That the note was accordingly executed, and the aforesaid collaterals were thereto attached, and that same were placed in an envelope, indorsed, "Property of Mrs. F. E. Tassin," and that this envelope was deposited in a bank box, that was locked, and deposited in a safe in the vault of the New Orleans Insurance Association. (3) That De Jaham was proposed by Pierre Lanaux as the person who was to carry the agreement between himself and Mrs. Tassin into effect, and that Mrs. Tassin was so informed, and unequivocally accepted the proposition. (4) That Pierre Lanaux gave De Jaham instructions in exact conformity with the aforesaid agreement; that, in pursuance of said instructions, De Jaham accepted the trust, and made and executed in favor of Mrs. Tassin a demand note for \$40,000, and signed *per pro* Lanaux, and to that note attached the specified collaterals, and placed them in a bank box, and locked the box, and deposited it in the iron safe of the New Orleans Insurance Association, retaining the key in his possession. (5) That, in pursuance of the instruction of Pierre Lanaux, De Jaham visited Mrs. Tassin, at her plantation, in the parish of St. John, for the express purpose of reporting to her, carefully and succinctly, all he had done, as Mr. Lanaux had promised her he would, and which, she acknowledged to De Jaham, had been done according to their agreement. (6) That De Jaham, assisted by George Lanaux, secretary of the insurance association, and other bank employes, placed the bank box containing the securities specified in the safe of the insurance association, in the vault of the company; De Jaham retaining the key of the box, and George Lanaux keeping the combination of the safe. (7) That the box thus remained on deposit, and was not touched by any one, until after the death of Lanaux, when George Lanaux opened the safe, and permitted De Jaham to remove the bank box. (8) That on the 7th of September, 1892,—the next day after the death of Pierre Lanaux,—Mrs. Tassin called upon De Jaham for the delivery to her of the note and the pledged securities; but her request was declined, on account of Pierre Lanaux's death, De Jaham explaining that she would receive them in a few days. (9) That, on the following day, De Jaham, accompanied by Denis Lanaux, visited the branch depository of the State

National Bank, and called upon George Lanaux, secretary of the New Orleans Insurance Association, for the delivery of the bank box; that the secretary at once opened the vault and safe of the insurance association, and delivered the bank box to De Jaham; and that De Jaham procured the key, opened the box, and he and Denis Lanaux examined the packages therein deposited, whereupon the bank box, with the pledged securities, was returned to the custody of the insurance association.

Recurring to the query propounded, it appears that, in the light of the evidence detailed, it must receive an affirmative reply,—that the possession of De Jaham was such that Mrs. Tassin's privilege had so effectually struck the collaterals that she would have been entitled to the proceeds if any other creditor of Lanaux had seized and sent them to sale. Or, in other words, Pierre Lanaux absolutely lost or discontinued control over the pledged collaterals from the moment the bank box containing them had been, by De Jaham, deposited in the iron safe of the New Orleans Insurance Association. After that date the custody of De Jaham was exclusively for the account of Mrs. Tassin, to whom he was directed by Pierre Lanaux to deliver upon her demand. With Pierre Lanaux's knowledge, and by his direction, the collaterals indicated by him, and agreed upon by him and Mrs. Tassin, were segregated from his other assets, were attached to his demand note in her favor, and placed in an envelope, and marked, "Property of Mrs. F. E. Tassin," and by De Jaham deposited in a bank box, of which he possessed the key. With the assistance of the secretary of the insurance association, and others of its employes, the bank box containing the pledged securities was removed from the desk of Pierre Lanaux, and deposited in an iron safe in the vault of the insurance association, of which its secretary alone possessed the combination, thus completely severing Pierre Lanaux's control and dominion over the box and its contents. And when De Jaham called on Mrs. Tassin, and informed her of all that had been done, "as he [Pierre Lanaux] had promised her," and Mrs. Tassin expressed her approbation of the acts he had performed, "as Mr. Lanaux had promised her," the vinculum of the contract was completed, and henceforth De Jaham was exclusively her agent. That De Jaham so understood the position is fully attested by his statements, to the effect (1) that Mr. Lanaux's instructions to him were for him to deliver the pledged collaterals to the parties whose names were indorsed on the respective packages, at their request; (2) that the instructions of Pierre Lanaux were not up to the time of his death, but that he was to deliver upon the demand of the pledgees; (3) that he (De Jaham) informed Mr. Denis Lanaux, two or three days prior to the death of Pierre Lanaux, that he held a box in the safe of the New Orleans Insurance Association, containing pledged securities; (4) that, immediately after the death of Pierre Lanaux, De Jaham visited the vault of the insurance association in company with Denis Lanaux and the sec-



retary of the insurance company, opened the vault and the safe, and delivered the box containing the securities into the hands of De Jaham, and he unlocked it in the presence of the secretary and Denis Lanaux, and thereupon he and Denis Lanaux examined the securities that were found in the box, and, among the number, the package indorsed, "Property of Mrs. F. E. Tassin;"

(5) that after their examination was completed the packages were returned to their places, Mr. De Jaham locked the box, and returned it to the custody of the secretary of the insurance association, and he, in turn, placed the box in the iron safe, and closed it, as well as the vault, he alone possessing the combinations. What more could have been done, or what additional formality could have been observed, to have perfected the delivery of pledged collaterals to a third person agreed upon by the parties? The text of the law is, "It is essential to the contract of pledge that the creditor be put in possession of the thing given him in pledge," etc. Rev. Civ. Code, art. 3152. But there is an express qualification placed upon this article, in these words, viz.: "In no case does this privilege [Rev. Civ. Code, art. 3157] subsist on the pledge, except when the thing pledged, if it be a corporeal movable, or the evidence of a credit, if it be a note or other instrument under private signature, has been actually put and remained in the possession of the debtor, or of a third person agreed upon by the parties." Id. art. 3162. Was not De Jaham the third person agreed upon by the parties? Was not his selection duly notified to him? Did he not carry out his instructions to the letter, in the preparation of the note and pledge, and in giving to Mrs. Tassin information of his having performed all the acts that Pierre Lanaux had promised her should be performed? Did not Mrs. Tassin specifically approve and accept same, and subsequently call on De Jaham for the note and pledged collaterals, in keeping with Lanaux's directions to deliver to her order? And, finally, did not De Jaham declare to Denis Lanaux, before Pierre Lanaux's death, that he held possession of the pledged collaterals, and, after Lanaux's death, did not the secretary of the insurance association deliver them to him? And can it be doubted, in view of the act of the secretary in surrendering the actual possession of well-nigh \$150,000 of state bonds into the power of De Jaham, two or three days after the death of Pierre Lanaux, that De Jaham had a right of custody and control, entirely independent of Lanaux? There can be no other solution of the question. What is the answer to the foregoing proposition? That of the district judge was, as appears from his reasons for judgment, that the instructions of Lanaux to De Jaham "were those of an employer to his clerk;" that Lanaux "said nothing about the bank box, or of De Jaham's holding it, or the securities it contained, as the agent for any one, or as a party agreed upon, with whom the box and securities were to be deposited, nor did he, at the time, instruct De Jaham to notify the pledgees that the securities had been placed in the box,"

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subject to their demand. But De Jaham testifies that he did so, at some time not mentioned in the testimony."

It is evident that the judge *a quo* was under a misapprehension of the facts adduced in evidence on all of the foregoing propositions. Pierre Lanaux being dead, his lips are sealed, and cannot speak, but De Jaham's testimony is clear and unmistakable. He says (using his own words): "His instructions were to put it in the box, as I stated yesterday, subject to their demand." Again: "He did not specify, up to the time of his death. His words were, 'You will deliver these packages to the parties whose names are on them, on their demand.'" Again: "I went to Mrs. Tassin's house on the 7th of August, 1892, . . . and told her that Mr. Lanaux had placed—invested for her—\$40,000, on his note, secured by \$35,000 of Louisiana fours, and 520 shares of the New Orleans Insurance Association, as he had promised her. Mr. Lanaux had told me to go. Q. Did he instruct you to go there and inform her? A. Yes. Q. After you related to her [Mrs. Tassin] what occurred on the 3d of August, did she say anything? A. Well, she said that it was all right, according to what Mr. Lanaux had promised her." From the foregoing it is perfectly evident that De Jaham had been made acquainted with "what Mr. Lanaux had promised Mrs. Tassin" and that one of the things he had promised her was that De Jaham was to deliver the securities to her, on her demand. It is equally evident that he did inform Mrs. Tassin that he had deposited Lanaux's note and the securities he had specified in their previous agreement, which he would deliver on her demand, and that she expressed herself satisfied that he had done all that Lanaux had promised her. It is likewise evident that the dates, places, and circumstances are all precisely detailed, with perfect accuracy.

That De Jaham was at the time the clerk of Pierre Lanaux is a matter of no consequence. The following queries have been propounded, the trend of which is to show that De Jaham acted in the capacity of Lanaux's clerk throughout all these transactions, and that consequently the bonds were at all times in Lanaux's possession, being in his bank box. The two must be taken together, as one is but the counterpart of the other: "(1) Can this court hold, as a proper interpretation of the law of pledge, that a debtor putting bonds in a package marked with the debtor's name, instructing his clerk to deliver,—the creditor apprised in advance that instructions will be given, and notified afterwards by the clerk,—consummates the pledge, although the instructions were not fulfilled, and the bonds always remained in the debtor's box? (2) Would any bank take such a pledge, i. e. lend money on the debtor's bonds, in his bank box, and on his direction to his clerk to deliver, or would the bank have any pledge unless the clerk delivered?" Both of these questions may be answered in the negative without in any manner affecting the claim of Mrs. Tassin.

If it be conceded that De Jaham was acting as Lanaux's clerk, in the transaction with

Mrs. Tassin, and that the collaterals remained in Lanaux's custody all the while, of course there was no pledge. But De Jaham was the third person agreed upon between Pierre Lanaux and Mrs. Tassin to hold the collaterals for the latter, and, though the box may have been the property of Pierre Lanaux, it was removed from his possession before the collaterals were placed in it; and, when the collaterals were deposited in the box, De Jaham locked it, and thereafter retained the key. Then De Jaham, assisted by the secretary and his employés, put the box in the safe of the insurance association, to which the secretary alone possessed the combination. No one had access to the box, but De Jaham; and the secretary gave him access to it after the death of Pierre Lanaux, he being accompanied by Denis Lanaux. And while it is true that De Jaham was the clerk of Pierre Lanaux, within the scope of the latter's business, he was at the same time the third person agreed upon by him and Mrs. Tassin to hold the securities for the latter. There is no incompatibility between the two positions. This was distinctly held in *Weems v. Delta Moss Co.*, 83 La. Ann. 974; this court declaring that "the objection that the two custodians of the property pledged were employés of the company has no force, and cannot destroy the effect of delivery to Reichard." Consequently, this is not the case supposed, of collaterals being in a debtor's bank box, who had given his clerk instructions to deliver, which instructions he had not fulfilled; but it proceeds on the theory that De Jaham was the third person agreed upon by the parties, and that he had possession, with instructions to deliver to Mrs. Tassin on her demand, within the plain and evident meaning of the Code. But a further proof of Pierre Lanaux's lack of possession and control of the collaterals is furnished by the procurator that was annexed thereto, authorizing the pledgees (not De Jaham) to sell the collaterals. Such a mandate to the pledgee is an adjunct of the pledge, and inseparable from it. Such a mandate, in its nature, is irrevocable. *Journal du Palais*, 12 and 19, of 1827. And in *Renshaw v. His Creditors*, 40 La. Ann. 87, this court said: "The same principle applies in every case where the mandate is granted as a condition of the contract, or as a means of executing it. In such case the mandate, forming an element of a synallagmatic contract, is impressed with the qualities of such a contract, and is irrevocable. *Journal du Palais*, 7th July, 1837." And the court further observes: "It is plain that the powers of attorney, here involved, belonged to the class which has been described, forming important adjuncts to the contracts of pledge, themselves, and stipulated, in the interest of the mandatories, that the mandator had no power to revoke them, and hence they are equally irrevocable," etc. *Renshaw v. His Creditors*, *supra*. After its execution, Pierre Lanaux had no more power to revoke this mandate to the pledgee, to sell, than he had to revoke the note he had executed. When executed, and delivered into the hands of the depositary agreed upon between himself and Mrs. Tas-

sin, the mandate became irrevocable, in so far as he was concerned.

The only question for consideration is whether the agreement between pledgor and pledgee, and the possession of the third person agreed upon, was binding on Lanaux's creditors, or, in other words, whether Mrs. Tassin's privilege could be enforced on the proceeds of the securities pledged, in case they had seized and sold them, as they evidently had the right to do. *Auvé v. Variol*, 81 La. Ann. 865. If the pledge in favor of Mrs. Tassin was in keeping with the code, it was evidently binding on the creditors of Lanaux; and, as the code authorized that a contract of pledge may be effected by delivery of possession of the thing pledged to a third person agreed upon by the parties, the only question in this case is whether De Jaham had an effectual possession of the bonds. The only figure that the secretary of the insurance association cuts in the transaction is that, being the custodian of the company's vault where the bank box was deposited, his custody proved the possession of De Jaham, and disproved the possession of Pierre Lanaux. If so, the code declares that the privilege of the pledgee does subsist on the thing given in pledge (1) when "it has been actually put and remains in the possession of the creditor;" (2) or when "it has been put and remains in the possession of a third person agreed upon between the parties." Rev. Civ. Code, 3163. The latter character of pledge has been frequently and recently recognized and enforced by this court, on evidence far less clear and cogent than that which is afforded by this record. In *Conger v. New Orleans*, 83 La. Ann. 1250, a case is presented of a demand for 28 year bonds of the city of New Orleans, which the city had pledged, retaining the bonds in her own possession,—she being the debtor,—and this court said: "Possession, though essential to the validity of the pledge, need not be always in the creditor. It is sufficient that the thing pledged be in one occupying, *ad hoc*, the position of a trustee. The debtor himself may in some cases be considered as such trustee, and be given possession of the thing by him pledged, provided his tenure be precarious, and clearly for the account of the creditor. The Louisiana doctrine is in perfect accord with the common, Roman, and French laws. See Rev. Civ. Code, 3163; Code Napoleon, 2076, and various cited authorities,—particularly, Pothier, Pandects; Bell's Comm.; Troplong, Nantissement; Dalloz, Répertoire; and Duranton. The authority of the *Conger Case* has been followed and approved by this court in many subsequent and well considered cases. In *Weems v. Delta Moss Co.*, 83 La. Ann. 973, a case is stated of a pledge having been made of the building and factory of the company, and of its various movable effects, enumerated in the act of pledge, which was entered into between the president of the company and the creditor, appointing one of the company's employés as custodian; and that pledge was maintained against the creditors of the company, after it became insolvent, on the authority of the *Conger Case*. In *Jaquet v. His*

*Creditors*, 33 La. Ann. 863, a case is stated of a pledge having been executed of certain machinery used for the manufacture of tobacco, consisting of boilers, engines, cutters, etc., which was agreed to by the parties, who selected a third person as custodian,—the act of pledge stipulating a right of sale in the pledgee. Same was maintained against the creditors of the partnership after the surrender of the pledgeors, on the authority of the *Conger and Jacquet Cases*. In *Woodward v. American Exposition R. Co.*, 39 La. Ann. 566, a controversy is stated between the plaintiff, asserting a privilege resulting from a pledge of certain iron rails and other appurtenances used in the construction of a railroad, and which had been secured by an act of pledge of the railroad and all of its appurtenances, by placing same in the custody of a third person named; the plaintiff's privilege being resisted by an intervener claiming a privilege upon certain lumber he had sold the company for the purpose of building bridges, etc. The demand of the intervener was rejected, and that of the plaintiff was sustained; his privilege as pledgee of the railroad, in its entirety, being sustained, as upon personal property, on the authority of the *Conger, Weems, and Jacquet Cases*. In *Levy v. Ford*, 41 La. Ann. 873, a case is stated of a pledge of a mortgage note for \$7,000, for the security of two different claims of two different creditors; a third person holding possession as the mutual mandatory of the pledgeor and the two pledgees, they each having a limited interest in the pledged collateral. This pledge was maintained as against a competing mortgage creditor of the pledgeor. *Peters v. Pacific Guano Co.*, 42 La. Ann. 690, presents the case of the agents of a company engaged in the manufacture of guano giving in pledge, to two lenders of money in Boston, on a cargo of guano, a bill of lading for the goods in transit to the consignee thereof at New Orleans, one of the pledgees holding for the two. This court not only maintained the pledge with respect to the people in Boston, but held, also, that it extended to the consignees of the agents in New Orleans, as well as to the New Orleans bank, to whom he assigned it for another and independent loan, all without the specific knowledge of the guano company, the agent's authority being purely derivative. On the authority of the foregoing well-considered cases, interpreting the provision of the code which declares that a privilege subsists on the thing given in pledge "if it has been put and remained in the hands of a third person agreed upon" (Rev. Civ. Code, 3162), the jurisprudence of this court may be considered thoroughly settled as to the question that is controverted in this case, not only with regard to the parties, *inter se*, but with regard to creditors, privileged as well as ordinary, even in insolvencies and successions.

As opposed to the foregoing decisions, the opposing creditors cite and rely on *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779, which is a Louisiana case, and is predicated on Louisiana decisions and precepts of the civil law,—as stating a different rule. In that

decision a case is stated of a New Orleans bank offering to make a pledge of collaterals as security to the *Société de Crédit Mobilier*, of Paris, France, for proposed acceptances; the bonds and notes to be placed on deposit with a third person named and agreed upon between the bank and the society, said third person becoming guarantor of the bank. The question raised in that case was whether "there was such a delivery and retention of possession of the collateral securities as to constitute a valid pledge by the law of Louisiana;" and, making answer to that query, the court said: "Clearly, they were never out of the possession of the officers of the bank, and were never out of the bank, for a single moment, but were always subject to its disposal, in any manner whatever, whether by collection, renewal, substitution, or exchange; and collections, when made, were for the account of the bank." In support of this opinion the court refers to only two decisions of this court as bearing on the question at issue, and those decisions were rendered in *Geddes v. Bennett*, 6 La. Ann. 516, and *D'Meza's Succession*, 26 La. Ann. 35. In those cases the pledges were not sustained. In the former case is stated of certain barrels of whiskey being the object of the pledge, the creditor permitting the pledgeor to remove them to his own premises, on his simple receipt,—he subsequently making sale of them to another. In a suit of the pledgee against the purchaser, the sale was maintained. That case has not the least applicability. In my conception, to the *Cavaroc Case*, nor to the instant one, for the reason that it was not the case of a thing being given in pledge by placing it in the hands of a third person agreed on. In the latter case, certain creditors of the deceased, having made advances on the faith of an insurance policy, which he had left in the hands of his bookkeeper, with instructions to deliver, the right of pledge was denied on the ground that the creditors did not have the possession requisite to constitute a pledge; this court holding "that the policy was never beyond the control of D'Meza, and that Myers & Levy [creditors] never had the requisite possession thereof. The book-keeper never held the policy as agent or trustee for Myers & Levy. Although informed of his employer's intention in regard to one of the policies, he was never intrusted to deliver to Myers & Levy, or any one else. There was therefore no delivery of the policy to Myers & Levy, although the deceased intended to do so. Consequently, they never held it as a pledge, as collateral security for their accommodation indorsements." Our italics. It is evident, upon simple perusal of that paragraph of the opinion, that it was a case of alleged possession, by the creditor, of the collaterals, and not that of a third person agreed upon by the creditor and debtor. The two cases are exactly parallel, and, in my opinion, not in line with the *Cavaroc Case*. In that case the court made an extensive examination and collation of cases, and, in its summary, gives a very clear and comprehensive definition of the character of possession that is necessary to

complete a pledge in the hands of a third person agreed on. "The difference," says the court, "ordinarily recognized between a mortgage [*i. e.* at common law] and a pledge is that title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the essence of a pledge (Pothier, Nantissement); and, if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual. It may be constructive, as where the keys of a warehouse containing the goods pledged are delivered, or a bill of lading is assigned. In such case the act done will be considered as a token standing for the actual delivery of the goods. It places the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. In such case there is a union of two distinct forms of security,—the pledge and mortgage; mortgage by virtue of the title, and a pledge by virtue of the possession. This advantage exists when notes and bills are transferred to a creditor by way of collateral security. The possession gives them the character of a pledge. The indorsement, if payable to order, and their delivery, if payable to bearer, gives him the title also, which is something more than a pledge. This double title existed in *White v. Platt*, 5 Denio, 269, and *Clark v. Iselin*, 88 U. S. 21 Wall. 380, 22 L. ed. 568. Hence, the actual possession of the securities by the creditor was a matter of less importance in those cases." So, in the instant case the collaterals being of the class of commercial paper that is payable to bearer, and which consequently passes a complete title by mere delivery, De Jaham had title as well as possession,—his possession being evidenced by his possession of the key to the box in which the securities were kept, and to which no one else had access, and upon which the opponents acquired no right during Pierre Lanaux's lifetime. But, even if it is considered doubtful whether De Jaham held possession, independently of Lanaux, for the account of Mrs. Tassin, the court, in the *Cavaroc Case*, cited various cases in which precedents are given of privileges having been recognized, as against creditors, even when the pledgeor retained precarious possession of the thing pledged,—as intimated in the *Conger Case*. A case in point is that of *Clark v. Iselin*, *supra*, in which the court held that the pledge was not vitiated by the pledgee returning the collaterals pledged, to the pledgeor, for collection; also, the case of *White v. Platt*, *supra*, to same effect,—the court holding that in such case the pledgeor acts as the servant or agent of the pledgee, and the character of the security is not changed. A strong case of the kind is cited from the Massachusetts court (*Macomber v. Parker*, 14 Pick. 497), of a pledge having been maintained through the precarious possession of the pledgeor. The pledgeor was the proprietor of a brickyard, and the pledgee advanced the money requisite for the manufacture of bricks; the contract being that the bricks, as fast as made, should be pledged as security for the advances thus made, but

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the pledgeor was to retain the bricks in his charge, and sell them at retail, and deposit the proceeds in bank, to the credit of the pledgees. Before sale, the bricks in the yard of the pledgeor were attached for a debt; but the pledge was maintained, the court employing this language, *viz.*: "To say that the limited authority to sell the bricks by retail, in small sums, on account of the plaintiffs, was a waiver of their possession of the residue that remained in the kilns in their yard, would be clearly against the intent and meaning of the parties, unreasonable, and unwarranted by the evidence. The special authority given by the plaintiffs to the [brickmaker] was to clothe him with the character of an agent to a limited extent only, and no remission to him, in his character of pledgeor, of the plaintiffs' right to retain the bricks according to agreement." The creditor's attachment was dissolved, and the pledge maintained. An example of this kind is furnished by Troplong, in treating of article 2076 of the Code Napoleon,—of which article 3162 of our Code is but a repetition,—of a merchant in Bremen having pledged 60,000 bottles of Burgundy wine to a merchant of Baden, as security for a debt; the wine having been delivered to an agent of the pledgee, it having been agreed that the pledgeor should give it necessary attention and care. It so happened that the agent of the pledgee occasionally left the key of the vault in the possession of the pledgeor, and on one occasion the latter removed some of the bottles of wine to his own premises; and subsequently to his surrender in insolvency the syndic insisted that the pledge was null and void on that account,—the debtor and pledgeor not having been dispossessed of the wine. But the validity of the pledge was maintained, as against the creditors of the pledgeor in insolvency. Troplong, Nantissement, No. 311. A like interpretation is given of the Code Napoleon by other French commentators. 32 Dalloz, Répertoire, p. 455; 18 Duranton, No. 525 *et seq.* The court, in the *Cavaroc Case*, citing two leading state decisions, expresses the further opinion on this question, and says: "So, when the debtor is employed in the creditor's service, his temporary use of the pledged article in the creditor's business does not effect a restoration of the possession of the debtor. This is in accordance with the common and the civil law. *Reeves v. Copper*, 5 Bing. N. C. 136, was a case of this kind. A sea captain pledged his chronometer for a debt. He was afterwards employed by the pledgee as master of one of his ships, and the chronometer was placed in his charge, to be used on the voyage. It was held that the pledge was not lost. He recovered the chronometer, as against a person to whom the master had pledged it a second time. In *Hayes v. Riddle*, 1 Sandf. 248, the plaintiff delivered to the defendant, at his request, a convertible bond of the New York & Erie Railroad Company, which had been pledged by the latter to the former, in order to get it exchanged for stock of the same company, which was returned, and substituted for the bond in pledge. The defendant never returned either the bond or the stock.

The plaintiff brought action in trover against him for the bond, and recovered its value, being less than the debt for which it was pledged. *Judge Story* is in perfect accord with the views entertained by the supreme court, and, in the course of an elaborate discussion of the question, says: "As possession is necessary to complete the title by pledge, so, by the common law, the positive loss or delivering back of the possession of the thing, with the consent of the pledgee, terminates his title. However, if the thing is delivered back to its owner for a temporary purpose only, and it is agreed to be redelivered by him, the pledgee may recover it against the owner, if he refuses to restore it, after the purpose is fulfilled. So, if it be delivered back to the owner in a new character, as, for example, as special bailee or agent. In such a case the pledgee will still be entitled to the pledge, not only as against the owner, but also as against third persons, for under such circumstances the possession is perfectly consistent with the existence of the original rights of the pledgee." *Story, Bailm.* § 290, citing various authorities.

In consideration of the authorities I have cited, I think it can be safely affirmed that the pledge in favor of Mrs. Tassin was good and valid—First, because the bonds were held by a third person agreed upon, with instructions to deliver on demand of the pledgee; second, because they were deposited in a vault over which the debtor had no control, and in a bank box, of which the third person agreed upon had the key; third, because the pledgeor had executed a power of attorney authorizing the pledgee to sell the thing pledged; fourth, because the debtor had credited his books with the amount of the pledged collaterals, and also the creditor's account; fifth, because the third person claimed possession just before the pledgeor's death, and was allowed to have access to the pledged collaterals after his death, the safe and vault being voluntarily opened by the secretary of the insurance association, and the box containing the securities unlocked by the third party in the presence of others and the secretary. And finally, if it be considered that the bonds were, after their deposit, in any manner, in the possession or under the control of Pierre Lanaux, through De Jaham, it was only a precarious possession, for the account of Mrs. Tassin, and which cannot be successfully opposed by the creditors of Lanaux, as against Mrs. Tassin. As the case herein presented justifies and establishes the sufficiency and completeness of Mrs. Tassin's pledge, our original opinion should, to that extent, be maintained; but as the proof fails, in my opinion, to show that the Hymels participated in the agreement selecting De Jaham as a third person to take and hold the collaterals specified, this contract of pledge, as to them, is lacking a vital element to give it force and efficacy, as to third persons and creditors of Pierre Lanaux, though it was perfectly good and valid as between the parties. The code requires that there must be an actual delivery to the creditor or pledgee of the thing pledged. This is an essential to the completion of the pledge. It is the 25 L. R. A.

test of its efficacy. But the code states, as an exception to this general rule, that if the thing be placed and remain in the hands of a third person, who is agreed upon by the parties, the privilege of the pledgee attaches to the thing pledged; and, having failed to participate in the agreement selecting De Jaham as custodian of the assets placed for the several accounts of the Hymels, their pledges were incomplete, and they acquired no lien or privilege on said assets. And in this respect the opposition of creditors must be maintained, and to that extent our former opinion and decree should be amended; and, as thus amended, affirmed.

**McEnery, J.**, concurs in this opinion with respect to the claim of Mrs. Tassin, but dissents from the views expressed as to other parties, maintaining the correctness of the original opinion of the court, in its entirety.

STATE of Louisiana, *Appt.*,

*v.*  
**E. R. TAYLOR.**

(46 La. Ann. —.)

**\*1. The defendant was indicted for forgery.** He signed the name of a number of drawers to a note, and signed an addendum to the note that he was their authorized agent. In a prosecution for forgery the defendant cannot be convicted of having falsely assumed to act as agent.

**2. The instrument appears on its face to have been executed by an authorized agent, the defendant.** An apparent agent is not guilty of forgery, though he had no authority in fact.

(July —, 1894.)

**A** PPEAL by the State from a judgment of the District Court for the Parish of Natchitoches, quashing an indictment charging defendant with forgery. *Affirmed.*

The facts are stated in the opinion.

*Mr. E. B. Dubuissou, Dist. Atty.*, for the State.

No appearance for appellee.

**Breaux, J.**, delivered the opinion of the court:

The defendant was indicted for forgery. The note he is charged with having forged reads:

"69.28. On or by the 16th day of November next, we, or either of us, promise to pay J. P. Readhiner or bearer the sum of sixty-nine 88-100 dollars, for value received of him, bearing 8% from date till paid. This Feb. 3, 1890. Henry Weber. Boston Thomas. Taylor Mason Ray. Nat. Beavers, Jr. Nat. Beav-

\*Headnotes by **BREAUX, J.**

**NOTE.**—For definition of forgery, see *note to State v. Wheeler* (Or.) 10 L. R. A. 779.

As to how far wrongfully assuming authority to sign as agent constitutes forgery, see subd. 2, a, in *note to People v. Munroe* (Cal.) 24 L. R. A. 87.

ers, Sr. Anderson Farley. Joe Farley, Jr. E. R. Taylor. J. R. Weaver.

"I was authorized to sign the above names of the order. E. R. Taylor."

He moved to quash the indictment on the ground that the facts charged do not constitute the crime of forgery. This motion was sustained by the district court. From the order quashing the indictment the state appealed. Without brief or oral argument the appeal was submitted for decision.

The defendant is charged with having made an instrument purporting to be a note signed by a number of persons. The facts, as charged, are that he executed an instrument purporting on its face to be executed by him as agent. Assuming that the facts are correctly charged, forgery is not the crime the defendant has committed. Forgery is defined as the making or altering of a writing so as to make the alteration purport to be the act of another person. This definition does not embrace the making of a note per procuration of the party whom he intends to represent. The false assumption of authority is not the forgery denounced by the statute, and falsely assuming to act as agent of the maker of the instrument does not make the alteration purport to be the act of another. It is his own unauthorized and wrongful act, and not the fraudulently falsifying of another's name, as in forgery. It was not a false making of another's signature. It did not purport to be the signatures of the drawers personally, but their signatures as written by the defendant acting as an agent. He did not personate others, and fraudulently write their names, but stated on the face of the instrument that he was an authorized agent. This did not constitute forgery, though he may have had no authority in fact. The agency expressed takes the instrument out of the category of false making in the sense of forgery.

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Mr. Wharton, in his work on Criminal Law [8th ed.] (vol. 1, p. 668), says that to sign the name of another without authority is forgery when similitude is attempted. There was no attempt made to imitate the signatures of the drawers, or to impose by attempting to create the impression that they had signed. To constitute the offense, there must be some attempt made to imitate a genuine instrument, and the writing falsely made must purport to be the writing of another. These elements of forgery are not proved by the instrument copied in the indictment. From 2 Archbold, Crim. Pr. & Pl. 819, we quote, as pertinent: "If a man draw, accept, or indorse a bill of exchange in the name of another, without his authority, it is forgery. But if he sign it with his own name, per procuration of the party whom he intends to represent, it is no forgery; it is no false making of the instrument, but merely false assumption of authority." Mr. Bishop, in his Criminal Law (vol 2, p. 582), is equally as clear and positive that "indorse a bill of exchange under a false assumption of authority to indorse it per procuration is not forgery, there being no false making." The crime charged was false making and forgery. In fine, we are persuaded, after an examination of a number of authorities, that an instrument which shows on its face that the person signed as agent of the drawer of a note cannot be the subject of forgery. The act has not one of the essentials of the crime of forgery,—a false making of an instrument apparently genuine. The falsehood, if there is falsehood, is in the agency,—in assuming to act as agent,—and not in forging an instrument.

*It is therefore ordered, adjudged, and decreed that the judgment appealed from quashing the indictment be affirmed, the indictment being invalid and void.*

## CALIFORNIA SUPREME COURT (In Banc).

Re B. R. FOSS.

(.....Cal.....)

1. The existence of a treaty which provides for extradition for certain crimes does not deprive either nation of the power and right to exercise its own discretion to surrender criminals in cases not coming within the terms of the treaty.
2. The surrender as an act of comity by a foreign nation of a fugitive whose crime is not one for which the treaty required his surrender does not violate any right secured to him by the treaty, or entitle him to his discharge on habeas corpus.
3. The discharge of a person who has been surrendered by a foreign nation in extradition proceedings on setting aside the indictment against him does not prevent his arrest on a subsequent complaint for the same offense.

(May 2, 1894.)

**PETITION** for a writ of habeas corpus to procure the discharge of petitioner from the custody of the sheriff of Plumas County to which he had been committed under a charge

of embezzlement after having been extradited from the Hawaiian Islands. *Petition remanded.* The facts are sufficiently stated in the opinion.

*Mr. C. E. McLaughlin*, for petitioner:

A treaty concluded between any foreign country and the United States is "the supreme law of the land."

U. S. Const. art. 6; *United States v. Watts*, 8 Sawy. 871.

The offense of embezzlement or embezzlement of public moneys is not enumerated among the offenses for which extradition may be had in the treaty between the Hawaiian Islands and the United States.

Treaty with Hawaiian Islands, §14; 7 Am. & Eng. Encyclop. Law, 7, p. 606; 3 Moore, Extradition, p. 1102.

When a treaty has been entered into, naming certain crimes as the ones for which extradition may be had, this must be regarded as declaring that only such offenses as are named in the treaty are extraditable. There is no authority to demand for any other.

1 Moore, Extradition, p. 5; 7 Am. & Eng. Encyclop. Law, p. 617; Whart. Cr. Pl. & Pr. § 47; *United States v. Watts*, 8 Sawy. 872;

**NOTE.**—Effect upon prisoner's rights of necessity of amendment of charge upon which he was extradited.

The old view of this subject seems to have been that it was immaterial what changes were necessary in the indictment. When once the pursuing government had acquired possession of the person of the fugitive it could proceed to try and convict him of any offense which he could be proven to have committed. The position of the United States government upon the question is well shown in a controversy which it had with Great Britain over a fugitive whose surrender it had demanded from that government.

In Winslow's Case, the fullest statement of which is to be found in 2 Wharton's International Law Dig. 759, upon an application for extradition to Great Britain, that country insisted upon the right to exact a stipulation as a condition of the surrender of the criminal that he should not be tried for any offense committed prior to his surrender, other than the extradition crimes proved by the facts upon which the surrender would be granted. The United States government took the position that such a requirement was not within the terms of the treaty between the United States and Great Britain, and stated that it should regard the provisions of the treaty as abrogated if such stipulation was insisted upon. The secretary of state cited the opinions of numerous authorities to the effect that where a criminal was in good faith demanded for one offense within the treaty and surrendered therefor, there was no agreement, understanding, or practice so far as the two countries in question were concerned that he might not be placed on trial for another offense with which he was charged in addition to the extradition crime. The English courts discharged Winslow from custody, and the president of the United States sent a message to congress announcing that the provisions of the treaty between the two countries upon the subject of extradition must be considered as having been abrogated by such action. Great Britain subsequently withdrew from its position, as it said temporarily until a new treaty could be negotiated, 25 L. R. A.

and rearrested and surrendered such of the criminals who had been discharged pending the correspondence as were still within its jurisdiction.

The above position was in accordance with decisions of courts in the United States which were called upon to pass upon the question.

Thus in *United States v. Caldwell*, 8 Blatchf. 121, a plea to an indictment for bribing an officer of the United States which set up that defendant was brought into the jurisdiction under extradition proceedings in which he was charged with forgery, was held bad, and a similar ruling was made in *United States v. Lawrence*, 13 Blatchf. 235, where one indicted for forgery attempted to defeat the jurisdiction, on the ground that the forgery for which he was placed on trial was not the one for which he was indicted.

So in the court of appeals of New York it was held that the prisoner may be detained even for the purpose of a civil suit. *Adrian v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317, rev'g the reasoning in the lower courts as reported in 1 Hun, 689, and 45 How. Pr. 301.

One who after escaping from prison where he was confined under conviction for burglary, if extradited for robbery and assault with intent to commit murder, may be held on his former conviction, although the extradition charges against him are ignored by the grand jury. *Re Miller*, 23 Fed. Rep. 32.

So the attorney-general has held that fugitives when surrendered to justice without more being said, are surrendered thereto generally, absolutely and simply. 15 Ops. Atty-Gen. 500.

The jurisdiction of the courts is not restricted to the extradition crime. 15 Ops. Atty-Gen. 514.

But when the question came before the supreme court of the United States it was held that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in the treaty and for the offense with which he is charged in the proceedings for his extradition until a reasonable time and opportunity have been given him after his release or trial upon

*United States v. Rauscher*, 119 U. S. 407, 30 L. ed 425.

A person brought from a foreign country can only be tried for an extraditable offense.

*People v. Gray*, 66 Cal. 274; *Blandford v. State*, 10 Tex. App. 627; *Spear, Extradition*, §§ 602-604; *Ex parte Hibbs*, 26 Fed. Rep. 421; *United States v. Watts*, 8 Sawy. 370; *United States v. Rauscher*, *supra*; *Ex parte Coy*, 32 Fed. Rep. 911; *Com. v. Hawes*, 13 Bush, 697, 26 Am. Rep. 242; *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431; 1 Moore, *Extradition*, p. 191.

A right of person or property secured or recognized by treaty may be set up as a defense to a prosecution in disregard of either with the same force and effect as if the right was secured by an act of congress.

*Ex parte Hibbs*, and *United States v. Rauscher*, *supra*.

A person extradited cannot waive his rights or privileges of exception under the provisions of the treaty.

*Ex parte Coy*, 32 Fed. Rep. 911; 2 Moore, *Extradition*, p. 251.

Under the implied restrictions contained in the Hawaiian treaty as well as under the express provision of said treaty and the rights guaranteed thereunder, the compulsory method used by both countries through the authorities of each to procure his return to California

was in violation of the rights of the petitioner as a citizen of the Hawaiian Islands, and the treaty being as it is not only an international law but the supreme law of the United States its protection was his, and the demand of the governor, the request of the United States minister, his arrest in the Hawaiian Islands, his delivery to John S. Bransford, and his return to California through such legal compulsion used and against which he could not rebel, were each and all acts in violation of a right of person secured and recognized by the treaty and a direct violation by Minister Willis and Governor Markham of a law of the United States. The right of one government to demand and receive from another the custody of an offender who has sought an asylum upon its soil depends upon the existence of treaty stipulations between them, and in all cases is derived from and is measured and restricted by the provisions express or implied of the treaty.

*United States v. Watts*, 8 Sawy. 378.

It is impossible to conceive of the exercise of jurisdiction for any other purpose than that mentioned in the treaty and ascertained by the proceedings under which the party was extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition.

*United States v. Rauscher*, 119 U. S. 407,

such charge, to return to the country from which asylum he had been forcibly taken under such proceedings. *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425.

In the *Rauscher* Case, the defendant was extradited under a charge of murder and was placed on trial under an indictment for an assault and unlawfully inflicting upon a seaman cruel and unusual punishment contrary to the provisions of a statute of the United States. It was insisted that the evidence upon which he was convicted of the charge for which he was indicted was the same as that upon which the magistrate acted in surrendering him and that therefore it was proper to try him for the lower offense. The court in answer to this contention said: "It may be very true that evidence which satisfied that officer that the prisoner was guilty of the crime of murder would also establish that he had inflicted cruel and unusual punishment on the person for whose murder he was charged; but as the treaty only justified his delivery on the ground that he was proved to be guilty of murder, before the committing magistrate, it does not follow at all that such magistrate would have delivered him on a charge founded on precisely the same evidence, of inflicting cruel and unusual punishment, an offense for which the treaty made no provision, and which was of a very unimportant character when compared with that of murder. If the party could be convicted on an indictment for inflicting cruel and unusual punishment where the grand jury would not have found an indictment for murder, the treaty could always be evaded by making a demand on account of the higher offense defined in the treaty, and then only seeking a trial and conviction for the minor offense not found in the treaty. We do not think the circumstance that the same evidence might be sufficient to convict for the minor offense which was produced before the committing magistrate to support the graver charge justifies this departure from the principles of the treaty."

The *Rauscher* Case is regarded in England as settling the law, here, to the effect that the extradited person cannot be tried for an offense other than 25 L. R. A.

that mentioned in the extradition proceedings. *Re Woodhall*, *London Times*, May 10, 1888; 1 Moore, *Extradition*, § 166. And the charge for which the prisoner in the *Woodhall* Case was surrendered having failed, she was discharged and returned to England, although the attempt was made to hold her on another charge. 1 Moore, *Extradition*, § 167.

The *Rauscher* Case is in accord with some decisions which had been previously rendered in this country, and of course it has furnished the rule since.

The trial is limited to the offense charged in the extradition proceedings. *Com. v. Hawes*, 13 Bush, 697, 26 Am. Rep. 242; *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431; *Blandford v. State*, 10 Tex. App. 627.

A defendant cannot be extradited for the murder of one person and tried for the murder of another. *Ex parte Coy*, 32 Fed. Rep. 911.

There can be no trial for other than an extradition crime. *United States v. Watts*, 8 Sawy. 370.

A prisoner will not be surrendered upon a charge of murder, if the evidence shows only manslaughter. *Re Kelley*, 2 Low. Dec. 339.

One extradited for forgery under the treaty between the United States and Great Britain cannot be tried for uttering forged instruments. *Ex parte Hibbs*, 26 Fed. Rep. 421.

But in another case, *Re Adutt*, 55 Fed. Rep. 376, in which there was a request for one upon the ground that he had committed forgery, and the evidence showed that he had uttered forged instruments, the court held that forgery includes uttering forged instruments and that the prisoner was not, therefore, entitled to his discharge.

After the decision of the *Rauscher* Case, the question arose whether or not a conviction could be had of a lower offense included in the offense charged in the extradition proceedings.

A letter by Mr. Bayard, Secretary of State, dated May 23, 1885, expresses the opinion that a conviction may be had of a lower offense which is included in the one for which the extradition is obtained, although the lower offense would not of itself be sufficient to procure the extradition.



421, 80 L. ed. 425, 429; 1 Moore, Extradition, p. 288.

The principle that an extradited fugitive from justice can be tried only for the crimes named in the treaty between the extradition countries does not apply where a party was forcibly taken from a foreign country and not under an extradition warrant.

*Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706; *United States v. Rauscher*, 119 U. S. 486, 80 L. ed. 434.

It appears in the petition that the only evidence of a charge and the only charge considered was the indictment. The whole matter was probably governed by the McCarthy Case in which the Hawaiian government stated that an indictment would be accepted by them as proof of a charge.

Moore, Extradition, pp. 760-762.

This was the precedent upon which they acted and upon which they accepted the request of Minister Willis as made for the government of the United States, a similar request having been made in that case. This was the charge upon which B. R. Foss was extradited. A charge "must be in the form of an indictment found or affidavit made before a magistrate," and in cases of extradition "a copy of such indictment or affidavit certified as au-

thentic, etc.," shall be produced as evidence that the charge has been made in proper manner.

*Spear*, Extradition, p. 281.

Upon that particular charge and upon that alone the foreign government extradited petitioner. He came before the court in which such indictment was found and filed, and upon a hearing the court set the indictment aside, thus establishing by its order in the premises that no such charge existed, or had ever existed, and the prisoner was thereupon by an order of the court to that effect released and went on his way.

Thus the Hawaiian government had been deceived, and it seems to us the whole proceedings had were as naught in any court. As no valid charge existed when the demand was made the demand was unauthorized and void.

The evidence upon which the extradition warrant was based having fallen and the defendant having been released, he could not be subjected to further restraint "until a reasonable time had been given him after his release on that particular charge in which to return to the country from which he was extradited."

7 Am. & Eng. Encyclop. Law, p. 617; *United States v. Rauscher*, 119 U. S. 427, 80 L. ed. 433; *Ex parte Hibbs*, 28 Fed. Rep. 421.

But the supreme court of New York at special term has decided that one extradited for assault with intent to kill cannot be convicted of an assault in the second degree. *People v. Hannan*, 9 Misc. 600,—and such decision would seem to be the only one possible in view of the *Rauscher* Case, and the court's statement of its effect in *Ker v. Illinois*, 119 U. S. 426, 80 L. ed. 421, that the accused should be tried for no other offense than the one for which he was delivered under the extradition proceedings.

That leaves as the sole question for consideration, How far must the indictment as first drawn be technically accurate? *Ex parte Foss*, appears to be the pioneer case upon this question, although in a Texas case the court had held that the fact that the indictment is different from the charge made before the magistrate, is immaterial if it corresponds with that made in the extradition papers. *Kelly v. State*, 18 Tex. App. 153.

And in *People v. Gray*, 66 Cal. 274, the court concedes that the defendant can only be tried for the offense for which he was extradited; but holds that it is sufficient if the offense charged is the same as that for which he is put on trial, although the terms of the charge in the extradition paper may have been different from those in the information presented at the trial.

#### *The Canadian cases.*

The Canadian cases seem to agree with the rule as maintained by the United States in its controversy with Great Britain in the Winslow Case.

In *Rosenbaum's Case*, 18 L. C. Jur. 633, 2 Whart. International Law Dig. 773, 1 Moore, Extradition, § 422, the Supreme Court of Canada refused to interfere with the rendition of a prisoner, on the ground that the laws of the United States, from which country the request came, did not prohibit the trial of such prisoner for offenses other than those for which he was extradited. The court says: "I am not aware that it has been laid down in England that a man once within the jurisdiction of English courts can set up the form of his arrest or the mode by which he came into custody as a reason for a discharge when accused of crime."

In *Paxton's Case*, 10 L. C. Jur. 212, 11 L. C. Jur. 25 L. R. A.

332, the prisoner was extradited for forgery and was tried and found guilty of uttering a forged promissory note.

In *Reg. v. Van Aerman*, 4 U. C. C. P. 233, 2 Whart. International Law Dig. 764, the defendant was surrendered by the United States to Canada on the charge of forgery, and application was made for his release on the ground that his offense was obtaining money under false pretenses, and the court in denying the motion said that while disposed to regard the offense as forgery, yet being in custody he was liable to prosecution for any offense which the facts would support.

In *Re Burley*, 1 L. J. N. S. 34, 2 Whart. International Law Dig. 765, the prisoner was extradited on the charge of robbery and tried on assault with intent to kill.

In *Reg. v. Cunningham*, Cassell's Dig. 1885-86, p. 107, a prisoner extradited for forgery was convicted for uttering a forged order for payment of money. The question of the right to try the prisoner upon such charge was raised at the trial and discussed to some extent, but as the court of appeals held that the proof did not support the indictment and discharged the prisoner, the question was not authoritatively passed upon.

In *Reg. v. Waddell*, 25 N. B. Rep. 93, the court was equally divided upon the question whether or not one who being in prison under charge of arson, escaped and was extradited for that offense, could be placed upon trial for the prison breach.

#### *The English rule.*

In one case for which the British government disclaimed responsibility in the controversy over Winslow the rule claimed by the United States seems to have been followed.

In *Re Heilbronn*, 2 Whart. International Law Dig. 764, there was an extradition for forgery, upon which charge there was an acquittal, and then the prisoner was tried and convicted of larceny.

But the English statute provides that the prisoner can be tried for only the charge on which he was extradited. See *Bouvier's Case*, 37 L. T. N. S. 844, 43 L. J. Q. B. 17.

H. P. F.

To obtain the surrender of a man on one charge and then to put him on trial for another, is a gross abuse of the constitutional compact.

The fugitive surrendered to one charge is exempt from prosecution upon any other. He is within the state by compulsion of law upon a single accusation. He has a right to have that disposed of, and then to depart in peace.

7 Am. & Eng. Encyclop. Law, p. 618.

Mr. H. S. Webb for respondent.

**DeHaven, J.**, delivered the opinion of the court:

The petitioner, Foss, was indicted by the grand jury of the county of Plumas for the crime of embezzlement. At the date of the finding of this indictment the petitioner was in Honolulu, and there remained until February, 1894, when, upon the request of the American minister, and upon "a requisition to that effect" from the governor of the state of California, he was surrendered by the provisional government of the Hawaiian Islands to the agent appointed by the governor to receive and convey him back to this state, there to be tried for the offense with which he was charged in the indictment referred to. The treaty between the United States and the government of the Hawaiian Islands in relation to the extradition of fugitives from the justice of either of such countries does not provide for the extradition of a person charged with the crime of embezzlement, and the warrant issued by the Hawaiian government for the arrest of the petitioner, and for his delivery to the agent appointed by the governor of this state to receive him into custody, does not refer to the treaty, but the proceedings preliminary to the issuance of such warrant were conducted in accordance with the rules prescribed by the treaty to effect the extradition of a person charged with either of the offenses for which extradition is there provided. The petitioner, upon his return to this state, was brought before the superior court of Plumas county, in which the said indictment against him was pending, and he then moved to set the indictment aside. The motion was granted, and he was discharged from custody, and within two hours thereafter a complaint was filed with a justice of the peace, charging him with the same embezzlement named in the indictment previously set aside, and he was again arrested, and, after examination, held to answer the charge before the superior court of Plumas county; and he is now in the custody of the sheriff of that county awaiting his trial.

The petitioner claims that his imprisonment under the circumstances here stated is illegal, and he seeks to be discharged therefrom under the writ of habeas corpus upon which he has been brought before this court. In support of this general contention he insists that his arrest in the foreign country, and enforced return to this state, and detention here for the purpose of being tried for the crime charged in the indictment, was and is in violation of his rights under the treaty between the United States and the government of the Hawaiian Islands. That treaty,

in article 14, provides: "The contracting parties mutually agree to surrender, upon official requisition to the authorities of each, all persons who being charged with the crimes of murder, piracy, arson, robbery, forgery or the utterance of forged paper, committed within the jurisdiction of either, shall be found within the territories of the other, provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial, if the crime had there been committed." 9 Stat. at L. p. 981. It is argued that the treaty, in thus enumerating the offenses for which fugitives who have sought an asylum in either country shall be delivered into the custody of the other upon demand of its government, in effect prohibits the surrender by either nation of a person charged with any other than one of the mentioned crimes; that the treaty is to be construed as containing an implied stipulation upon the part of the United States that a person committing any other crime against its laws than one of those named in the treaty, and who thereafter escapes to Hawaii, shall not be subject to arrest and return to the United States, there to be tried for such nonenumerated crime, even though the government of Hawaii should voluntarily surrender him for that purpose as a matter of comity. In our opinion, the language of this treaty will not bear such a construction. It is, of course, true that, when a treaty provides for the extradition of fugitives charged with particular crimes, the reciprocal duty of delivering up to the justice of the other persons charged with crime is confined to the particular cases for which the treaty has provided. *Com. v. Hayes*, 13 Bush, 708, 26 Am. Rep. 242; *United States v. Rauscher*, 119 U. S. 411, 412, 30 L. ed. 425. Thus in *Com. v. Hayes*, just cited, it is said: "The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil depends upon the existence of treaty stipulations between them, and in all cases is derived from and is measured and restricted by the provisions, express and implied, of the treaty." But, while this is so, the existence of a treaty which provides for extradition for certain crimes does not deprive either nation of the power and right to exercise its own discretion in cases not coming within the terms of the treaty. It is only to the extent that the treaty imposes an obligation to surrender persons charged with particular offenses that there is any restriction placed upon the sovereign right of the nation in which the fugitive is found to either permit or refuse to permit his arrest and return to the country from which he has fled. In other words, in relation to persons charged with offenses not named in the treaty, each government, as an incident of its sovereignty, may either grant or deny to the fugitive an asylum within its jurisdiction. This conclusion is so obviously correct that no extended argument is necessary to sustain it, and the principle is thus stated in section 269 of volume 2 of Wharton's International

**Law Digest:** "The rule, '*expressio unius est exclusio alterius*,' applies to extradition treaties, and under such treaties process can be sustained only for enumerated offenses. This, however, would not preclude in extraordinary cases, and an appeal, not on the basis of the treaty, but on the ground of comity, for surrender of a fugitive charged with a nonenumerated offense, when such offense is one which would justify such an extraordinary measure. . . . Thus, in 1796, the secretary of state [Mr. Pickering] 'expresses his concurrence with Mr. Liston [British minister at Washington] in the opinion that, while the reciprocal delivery of murderers and forgers is expressly stipulated in the twenty-seventh article of our treaty with Great Britain, the two governments are left at liberty to deliver other offenders, as propriety and mutual advantage shall direct. . . . The attorney-general has just called, and thinks the opinion expressed to be correct.' Mr. Pickering to the president June 8, 1796. MSS. Dom. Let. In a letter of same date to the governor of Vermont, Mr. Pickering says: 'The reciprocal delivery of murderers and forgers is positively stipulated by the twenty-seventh article of the treaty. The conduct of the two governments with respect to other offenders is left, as before the treaty, to their mutual discretion; but this discretion will doubtless advise the delivery of culprits for offenses which affect the great interests of society.' " The crime with which the petitioner is charged, not being an extraditable offense under the treaty between the United States and the government of the Hawaiian Islands, it must be presumed that the surrender of the petitioner was made by the latter in the exercise of its own sovereign discretion, and as an act of comity. This violated no right secured to the petitioner by the treaty referred to, as that treaty does not in terms or by necessary implication deny to that government the right to surrender, or deprive the United States of the right upon such surrender to receive into its custody fugitives charged with offenses not enumerated in the treaty. The cases of *United States v. Rauscher*, 119 U. S. 407, 80 L. ed. 425; *Com. v. Hawes*, 13 Bush, 697, 26 Am. Rep. 242; *United States v. Watts*, 8 Sawy. 370, 14 Fed. Rep. 180; *Ex parte Hibbs*, 26 Fed. Rep. 421,—cited and relied upon by petitioner, do not sustain his contention upon this point. Those cases simply declare that when a defendant has been surrendered in pursuance of a treaty for trial upon a specific charge named therein, he cannot be placed upon trial for any other than the particular offense named in the extradition proceeding. This rule is well settled, but it has no application whatever to the case presented by the petitioner here.

It is also contended in behalf of petitioner that he was only surrendered by the government of the Hawaiian Islands for trial upon the indictment referred to in the warrant issued by that government commanding his arrest and delivery into the custody of the agent authorized to convey him back to this state, and that, when this indictment was set

aside, he had fully met its accusation, and was entitled to a reasonable time within which to return to the foreign asylum, and that he cannot be lawfully detained here to answer the complaint upon which he is now held for trial before the superior court. If it should be conceded that a fugitive from justice, surrendered by a foreign government on grounds of comity, has the same right to his discharge upon habeas corpus, when imprisoned upon a different charge than that for which he was delivered up, as if he had been extradited under the provisions of a treaty, and arrested and detained for trial upon another offense than that named in the extradition proceedings, in violation of the implied provisions of the treaty, still we do not think the petitioner here would be entitled to a discharge upon the facts appearing in this record. The order setting aside the indictment did not operate as an acquittal of the petitioner for the offense therein charged, and is not a bar to his further prosecution for the same offense by indictment or information; and, as he is now held by virtue of an order of commitment based upon a complaint charging him with the identical offense named in the indictment set aside, and to answer which he was surrendered by the Hawaiian government for trial by the state, the petitioner should be remanded.

*Petitioner remanded.*

We concur: **Beatty, Ch. J.; Harrison, J.; Garoutte, J.**

**McFarland, J.**, dissenting:

I dissent. The petitioner, Foss, was indicted by the grand jury of Plumas county, in this state, for the crime of embezzlement. At the time of the indictment he was in the Hawaiian Islands. A requisition was made upon the government of the island for his extradition here to answer the charge preferred by said indictment, and under extradition proceedings he was returned to said Plumas county. He moved to set aside the indictment, and his motion was granted, and he was discharged from custody. Within two hours afterwards a complaint for embezzlement was made before a justice of the peace, and he was arrested upon a warrant issued by said justice. He now applies to this court under the proceeding of habeas corpus to be discharged. There is a treaty between the government of the Hawaiian Islands and the government of the United States for the return from one to the other country of persons charged with certain enumerated crimes; but the crime of embezzlement is not one of the crimes so enumerated. Said treaty is to be found in 7 Am. & Eng. Encyclop. Law, p. 606.

The first point made by petitioner is that he cannot be returned to this country and tried here for any crime not enumerated in the treaty. There are certain very strong authorities to sustain this point, particularly *Com. v. Hawes*, 13 Bush, 697, 26 Am. Rep. 242; *United States v. Watts*, 8 Sawy. 370, 14 Fed. Rep. 180; *Holmes' Case*, 39 U. S. 14 Pet. 593, 10 L. ed. 605; *United States v. Rauscher*, 119 U. S. 407, 80 L. ed. 425; *Spears*,

**Extradition**, pp. 205, 221, *et seq.* The questions raised by this point need not, however, be here passed upon definitely, because we think that the petitioner should be discharged upon the second point made by his counsel, to wit, that, the indictment upon which the extradition was secured having been set aside, and the petitioner entirely discharged, he cannot afterwards be held upon a complaint before a justice of the peace, without having been given reasonable time to return to the country from whence he was brought. The treaty above mentioned provides that a person charged with crime shall be extradited only "upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial if the crime had been committed there. It further provides that the person demanded shall be brought before a court of the country in which he is, "to the end that the evidence of criminality may be heard and considered;" and if, upon such hearing, the magistrate is satisfied that the evidence sustains the charge, he may issue a warrant for the surrender of the fugitive. Now, in the case at bar it appears that the judge at the Hawaiian Islands was presented with a certified copy of the indictment that had been found against the petitioner, with the affidavit of the foreman of the grand jury, and that he acted entirely upon the sufficiency of the evidence as afforded by said indictment. And the indictment upon which the authorities of the Hawaiian Islands acted, and which it may reasonably be supposed was considered as sufficient evidence for action there, having

been set aside and held invalid by the court in *Plumas county*, and the prisoner having been discharged under said indictment upon which the extradition papers were based, he could not be held upon a complaint before a magistrate and proceedings which were entirely unknown to the authorities of the Hawaiian Islands, and upon which their order for the arrest of the fugitive was not in any way based. As was said in *Com. v. Hawes*, *supra*: "By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding government to decide finally as to the propriety of the demand and as to the evidences of guilt is as plainly excluded as if that right had been denied by express language. It would scarcely be regarded an abuse of the rules of construction, from these manifest restrictions, unaided by extraneous considerations, to deduce the conclusion that it was not contemplated by the contracting parties that an extradited prisoner should, under any circumstances, be compelled to defend himself against a charge other than one upon which he is surrendered, much less against one for which his extradition could not be demanded." And I think the right under the treaty is one which the petitioner himself may assert. The petitioner, in my opinion, should be discharged from custody.

### VERMONT SUPREME COURT.

F. C. WHITING, *Appt.*,

v.

C. H. ADAMS.

(.....Vt.....)

1. **The mortgagee in a common-law mortgage covering both land and crops**, who, after filing a bill for foreclosure, seizes the crops and proceeds to sell them under the provisions of the law relating to the foreclosure of chattel mortgages, is guilty of conversion and must account for them at their market value.
2. **The value of the lumber at the place of disposal, without any allowance for expenditure in wrongfully cutting and removing standing timber from the premises**, is the measure of damages against a mortgagee in possession for thus wrongfully wasting the premises after he had received all that was due him on his mortgage by conversion of personal property.

(*Start, J., dissents.*)

(July 16, 1894.)

**A PPEAL** by complainant from a judgment of the Chancery Court for La Moille County directing complainant to account for certain property which he had taken in proceedings for the foreclosure of his mortgage. *Affirmed.*

Adams had been the owner of certain real estate for many years. He gave a mortgage on it to C. A. Ober. Ober foreclosed the mortgage and obtained the legal title. He conveyed this to H. A. Jackson, who had made an arrangement with Adams by which Adams was to repay him the amount paid to Ober, with a small advance thereon and to retain possession the payments to be made, a certain amount down and the remainder in designated annual payments. Jackson was to have a lien on the crops to secure each annual payment and Adams was to refrain from committing waste. After part of the purchase money had been repaid to Jackson, he assigned his rights under the contract to F. C. Whiting the complainant in this action. Adams being behind in one payment, Whiting filed a bill to foreclose the mortgage, took possession of the premises, sold some of the personal property,

**NOTE.**—The question of measure of damages for destruction of trees is fully treated in the note to *Bailey v. Chicago, M. & St. P. R. Co.* (8. Dak.) 19 L. R. A. 668, and authorities upon the question of 25 L. R. A.

the rights of a mortgagee in possession are collected in the note to *Cook v. Cooper* (Or.) 1 L. R. A. 273.

and cleared a wood-lot and carried away the wood. The facts having been brought to the attention of the chancellor, he rendered the following decree: "That the orator account to the defendant for the gross value of the timber cut on the mortgaged premises, found by the master to be the sum of \$816 20; for loss occasioned by cutting stumps too high \$12; for hay in bay \$137; and on scaffold \$18; for rent of premises to the date hereof \$21.33; and for corn as found by the master \$7.50; making in all the sum of \$1,012.08, with interest thereon from such times as the report shows interest should be cast, to the date hereof.

It is further ordered that the mortgage debt be treated as all due and payable at the date hereof, and the amount thereof at this date be ascertained and adjudged to be \$690.30, and enough of the said sum of \$1,012.08 is applied thereon to pay and extinguish the same and leave nothing due on the mortgage. A surplus is left in the hands of the orator belonging to the defendant, but it is considered that the defendant cannot have a decree for its payment, nor for the possession of the premises without a cross-bill. If no cross-bill is filed, let the original bill be dismissed with costs to the defendant and in any event, in view of the unnecessary and offensive conduct of the orator, let the defendant recover his costs."

Further facts appear in the opinion.

**Mr. B. A. Hunt**, for appellant:

The orator had a common-law chattel mortgage on the crops and caused the same to be foreclosed in method furnished for foreclosure of chattel mortgages, and the sale is conclusive and its proceeds are what should be accounted for and all evidence should have been excluded, as well as other evidence excepted to in said report.

*Taggart v. Packard*, 39 Vt. 628; *Collins v. Clement*, 54 Vt. 635; *White River Bank v. Downer*, 29 Vt. 332.

Orator should account for rents and profits, what he did receive or what he ought to receive, managing prudently. He should account for stumpage value received or what he ought to receive, managing the same prudently. The report shows nothing that he has actually received at time of hearing from anything except the sale, so if there is any doubt about the amount the court will balance interests by the rents in some cases.

*Wright v. Parker*, 2 Aik. 212.

If a mortgagor is not bound to pay expense of getting timber out, he should not have gross value of the same; and if he is entitled to gross value of the same, then he should pay this expense of getting it out.

2 Dan. Ch. Pr. pp. 1287, 1288; *Merriam v. Barton*, 14 Vt. 501; *Clark v. Smith*, 1 N. J. Eq. 121; *Morgan v. Walbridge*, 56 Vt. 405; *Morrison v. McLeod*, 87 N. C. 108, 2 Jones, Mortg. §§ 1128, 1125, 1127.

"The mortgagee is entitled to have his mortgage interest regarded as real estate, and himself the owner of the land, so far only as to protect his rights secured by the mortgage, and to give him all necessary and appropriate remedies for that purpose."

2 Waterman, Trespass, p. 176, and cases there cited.

25 L. R. A.

If the court is satisfied orator has proceeded properly, he should have his regular costs under foreclosure cases.

*Still v. Buzzell*, 60 Vt. 478.

**Mr. P. K. Gleed** also for appellant.

**Messrs. E. B. Sawyer and R. W. Hubbard**, for appellee:

The facts found by the report must stand unless fraud or corruption are shown, and specifically pointed out by the party attacking the report.

*Winship v. Waterman*, 56 Vt. 181; *Howard v. Scott*, 50 Vt. 48; *Re Merrill*, 54 Vt. 200; *Randall v. Randall*, 55 Vt. 214; *McDaniels v. Harbour*, 48 Vt. 460; *Rowan v. State Bank*, 45 Vt. 160; *Waterman v. Buck*, 58 Vt. 519.

The proceedings on sale of this property were wholly unauthorized in law or equity.

Such proceedings are only authorized by a regular chattel mortgage.

*Howard v. Witters*, 60 Vt. 578, and cases there cited.

When he had commenced his proceedings for strict foreclosure he had elected his highest remedy. Vermont is one of eight of the forty-four states of the Union where this method of foreclosure is recognized.

8 Am. & Eng. Encyclop. Law, p. 185, a.

When one enters under the license of the law, and abuses the license, he becomes a trespasser *ab initio*.

*Hubbell v. Wheeler*, 2 Aik. '359; *Stone v. Knapp*, 29 Vt. 501; *Stoughton v. Mott*, 25 Vt. 668.

The orator was liable to account for the gross value of the slaughtered timber.

*Wright v. Parker*, 2 Aik. 212; *Hunt v. Tyler*, 2 Aik. 233.

In this state the mortgagor is still treated as the owner of the premises after the condition is broken.

*Hooper v. Wilson*, 12 Vt. 695.

The mortgagor's equity of redemption is tantamount to a fee in law.

*Walker v. King*, 44 Vt. 601.

The mortgagee in possession becomes the trustee of the mortgagor—the quasi trustee, if our friends like the qualification.

10 Am. & Eng. Encyclop. Law, p. 4, title,

*Implied Trust*.

The cutting the trees was an abuse of the license given him by the law, and was waste.

*Hubbell v. Wheeler*, 2 Aik. 359; *Stoughton v. Mott*, 25 Vt. 669; *Hyde v. Cooper*, 26 Vt. 556; *Stone v. Knapp*, 29 Vt. 502; *Wood, Land. & T.* § 447, and cases cited.

In *Sanders v. Wilson*, 34 Vt. 818, the court remarked that "in all transactions between mortgagor and mortgagee equity is watchful of the interests of the mortgagor, as the weaker party and the one who deals at a disadvantage."

A mortgagee in possession must always account for the reasonable rents and profits without regard to net profits, and is always made accountable for waste.

*Boston Iron Co. v. King*, 2 Cush. 400; *Sanders v. Wilson*, *supra*; *Kellogg v. Rockwell*, 19 Conn. 446.

By taking possession he becomes quasi trustee and quasi owner, and is always chargeable with the profit a provident owner could have made.

*Shaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Rep. 211.

He will be held liable for negligence of his agents.

*Miller v. Lincoln*, 6 Gray, 556; *Richardson v. Wallis*, 5 Allen, 78; *Montague v. Boston & A. R. Co.* 124 Mass. 242.

The mortgagee is always held to strict account for using the premises in a way inconsistent with the legitimate purpose of security.

*Shaeffer v. Chambers*, *supra*; *Givens v. McCalmont*, 4 Waits, 460.

Where the estate is sufficient security, and the mortgagee cuts timber, he must account for and be charged with the gross receipts, and will be allowed nothing for the expense of working.

Boone, Mortg. § 169; Jones, Mortg. § 1125; *Millett v. Davey*, 81 Beav. 470; *Thornercroft v. Crockett*, 16 Sim. 445; Wood, Land. & T. § 182; *Shaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Rep. 211; *Blodgett v. Blodgett*, 48 Vt. 32; *Sanders v. Wilson*, 34 Vt. 318; *White v. Maynard*, 54 Vt. 575; *Still v. Buzzell*, 60 Vt. 478; *Sprague v. Smith*, 29 Vt. 421; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 484; *Lamphear v. Buckingham*, 38 Conn. 287.

**ROSS, Ch. J.**, delivered the opinion of the court:

This is a petition to foreclose in legal effect, a mortgage. The parties agree that they stand, in regard to the premises, in the relation of mortgagor and mortgagee. This admits that the defendant has an equity in all the property embraced in the contract sought to be foreclosed. The orator cannot rely upon any other rights than those of mortgagor, however absolute his paper title to the property. *Davis v. Hemenway*, 27 Vt. 639. The defendant had been in possession of the premises many years. He gave a mortgage on them, which was foreclosed and became absolute April 30, 1889. H. A. Jackson bought out the orator in the foreclosure proceedings, and on the same day bargained them to the defendant, upon his agreeing to pay \$1,180 therefor. This sum was to be paid on time, extending over several years. It is apparent that Jackson held the title to the premises as security for the payment of that sum. The defendant had remained in possession. By the contract he was still to remain in possession, carry on the premises without suffering or committing waste, and, if he cut any lumber, pay Jackson an agreed stumpage. Jackson also thereby retained a lien on all crops grown each year, until the payment for that year was fully made. The defendant paid to Jackson \$550 before November, 1892. He was then behind, in the payment of that year, \$150, and some interest. The orator purchased Jackson's interest in the premises, and took a deed thereof, agreeing to carry out Jackson's contract with the defendant. This was August 18, 1892. November 1, 1892, he brought this petition, which was served on the defendant November 24, 1892. Soon after the orator went to the premises, and found the house locked, and the defendant temporarily absent. He effected an entrance, removed all of the defendant's things, including his livestock, put in a tenant, forbade the defendant to enter, and caused his arrest for entering. He took pos-

session of the crops grown that year, which, at a fair valuation, were worth more than enough to pay all that was then due under the contract. The premises were ample security for all that was to become due under the contract. There was a timber lot on the premises. The orator soon entered upon that, and stripped it of everything that was valuable. Waiting thirty days after taking possession, the orator placed the land contract in the hands of a deputy sheriff, who proceeded to sell the crops grown on the premises, under the provisions of the statute for the foreclosure of a chattel mortgage.

The first question arising is whether this sale was authorized by law. The land contract in which the lien was reserved was not a chattel mortgage. It was not executed as required for a valid chattel mortgage. Rev. Laws, §§ 1966, 1967. If in other respects duly executed,—which we do not consider, nor determine,—it was not sworn to by the parties to it. The method of foreclosure pursued by the orator was a part of the act authorizing chattel mortgages, and applicable only to such mortgages as are executed in accordance with its provisions. *Longey v. Leach*, 57 Vt. 377; *Howard v. Witters*, 60 Vt. 578; *Stafford v. Adair*, 57 Vt. 63; *Calkins v. Clement*, 54 Vt. 635. Although the land contract does not run to Jackson and his assigns, yet the title to the premises was vested in him. Hence, the title to the emblements, or annual crops grown thereon, vested in him, except so far as they were released by the contract. By that the title to the yearly grown crops between the parties to that contract was held by Jackson as security until the payment of that year was made. *Paris v. Vail*, 18 Vt. 277; *Smith v. Atkins*, Id. 461; *Briggs v. Oaks*, 26 Vt. 138; *Briggs v. Bennett*, Id. 146; *Gray v. Stevens*, 28 Vt. 1, 65 Am. Dec. 216; *Esdon v. Colburn*, 28 Vt. 631; *Leland v. Sprague*, Id. 746; *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429; *Bellows v. Wells*, 36 Vt. 599; *Cooper v. Cole*, 38 Vt. 191. But the defendant, in legal effect, being a mortgagor in possession, the crops grown by him might possibly have been held, if attached by his creditors. *Cooper v. Cole*, *supra*. The land contract, between the parties, was a common-law mortgage of the yearly grown crops, to secure the payment agreed to be made that year. *Atwater v. Mower*, 10 Vt. 75; *Coty v. Barnes*, 20 Vt. 78; *Wood v. Dudley*, 8 Vt. 430; *Taggart v. Packard*, 39 Vt. 628; *Blodgett v. Blodgett*, 48 Vt. 32. Such mortgage can be foreclosed, or a bill brought to redeem the property, in the ordinary method of foreclosing mortgages. *Blodgett v. Blodgett*, *supra*. The orator—not at law, but in equity—succeeded to the rights of Jackson under the contract. He can maintain the bill, as originally brought, to foreclose the defendant's rights, not only in the land named in the contract, but also in the crops grown in the year 1892. The crops are the growth of the land, and held by the contract for payment of a part of the same debt for which the land is held. They are both held for the payment of the same claim. He cannot, in equity, be allowed to separate their foreclosure, thereby increasing the cost, and proceed against the

land for the payment of the debt by this bill, and at the same time take an independent proceeding, under the chattel-mortgage law, to obtain payment also from the crops. Proceedings prescribed by the chattel-mortgage law are adapted and intended for mortgages executed under the provisions of that law. *Calkins v. Clement, supra*. He did not attempt to sell the crops under a common-law mortgage. *Taggart v. Packard, supra*. By attempting to sell the crops in a method unauthorized, he converted them to his own use, and must account for them at their fair market value. The defendant's right to redeem equitably vested in the land and crops, taken as one security for the payment of that portion of the debt which was then overdue. He was under a duty to exercise this right with reference to both, and not with reference to the crops, separate from the land. Soon after bringing his bill, and therein acknowledging the equitable right of the defendant to redeem both the land and crops, the orator took possession, for condition broken, in a manner calculated, if not intended, to deprive the defendant of his right of redemption. He not only removed the defendant's household goods, but turned out his livestock, sold the hay in a manner unauthorized, but began at once to cut and remove all the timber suitable to be manufactured into lumber.

A mortgagee in possession is under a duty to use the premises and property like an ordinary, prudent owner. He is bound to make necessary repairs. He cannot improve the owner out of his equity, nor can he unnecessarily, when the security is ample, encroach upon the body of the property pledged. He is bound to derive a reasonable income from the use of the property, and apply it first to keeping the interest extinguished, and the surplus to the extinguishment of the principal. He can legally no more commit waste than can the mortgagor. He is chargeable for loss incurred by his willful default. He is not entitled to receive anything for his own personal services. Pom. Eq. Jur. §§ 1215-1217, and notes; *Barnett v. Nelson*, 54 Iowa, 41, 87 Am. Rep. 183; *Sanders v. Wilson*, 34 Vt. 318; *French v. Baron*, 2 Atk. 120; *Moore v. Cable*, 1 Johns. Ch. 885, 1 L. ed. 780, and note; *Benedict v. Gilman*, 4 Paige, 58, 3 L. ed. 340, and note; *Currier v. Webster*, 45 N. H. 226; 2 Jones, Mortg. §§ 1123, 1125. Section 1123 says he must account for waste committed by him while in possession. In section 1125 it is said: "If the property is otherwise sufficient, the mortgagee has no right to open and work mines, and, if he does so, will be charged with the gross receipts, without any allowance for the expense of working." Under the principle that he who seeks equity must do equity, every case is largely controlled by its own facts. From the facts reported, from the manner in which the orator took possession, in which he sold the personal property, and in which he stripped the premises of all the valuable lumber, when his security was ample, it is apparent that he purposely and intentionally disregarded the rights of the defendant, and intended to place him and the property in

such condition that he could not raise on the property the money required to redeem it. He thereby placed himself in the light of a willful trespasser. In such cases, at law, the jury may award exemplary or punitive damages. To allow him to take the property, in such cases, at its market value, would allow him to compel its sale at that value, however much to the inconvenience and against the will of the owner. The decisions on the subject of the rule of damages in such cases have not been in full accord, and it would be difficult to reconcile them. Many times evidently, the decision has been controlled by the form of action. *Foots v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151. For a full discussion of the question and review of the authorities, see *Baker v. Wheeler*, 8 Wend. 505, 24 Am. Dec. 66, and note; *Batchelder v. Kelly*, 10 N. H. 486, 84 Am. Dec. 174, and note; *Curtis v. Groat*, 6 Johns. 168, 5 Am. Dec. 204, and note; *Coal Creek Min. & Mfg. Co. v. Moses*, 15 Lea, 800, 54 Am. Rep. 415, and note; *Blain Aaron Coal Co. v. McCulloch*, 59 Md. 408, 48 Am. Rep. 560, and note. In *Bolles Wooden-Ware Co. v. United States*, 106 U. S. 432, 27 L. ed. 280, this question was considered. Judge Miller, who delivered the opinion of the court, commends the research of the plaintiff's counsel in placing before the court all the authorities, English and American. The English cases relate largely to mining coal. He quotes from the opinion of Lord Hartley, in the house of lords, in *Livingstone v. Rawyards Coal Co.*, L. R. 5 App. Cas. 83, as a statement of the English doctrine, as follows: "There is no doubt that if a man, furtively and in bad faith, robs his neighbor of his property, and, because it is under ground, is probably, for some little time, not detected, the court of equity in this country will struggle, or, I would rather say, will assert its authority, to punish fraud, by fixing the person with the value of the whole of the property he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement." But, "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him *in specie*." Judge Miller then says: "There seems to us no doubt that in the case of a willful trespass the rule as stated above is the law of damages, both in England and in this country, though in some of the state courts the milder rule has been applied, even to this class of cases. . . . On the other hand, the weight of authority in this country, as well as in England, favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition." *Winchester v. Craig*, 83

Mich. 205, contains a full examination of the authorities on the point." In that case, which was *trover*, for timber worth, when felled, \$60.71, but, when sold by the wrongdoer, worth \$850, the court applied the harsher rule to a bona fide purchaser from the tortfeasor, holding that such purchaser took only the rights of his vendor. We think this case states the result of the authorities here and in England on this point. In the case at bar this court is not trammelled by the form of the action. The only question is, In what sum shall the orator account for the lumber which he wrongfully stripped from the premises, when there was, if the personal property should be applied, nothing due on his equitable mortgage? When he took possession the condition of the mortgage was broken. This gave the orator the right to take peaceable possession of the premises, and the crops grown that year. His entry was not wrongful. But when he converted the personal property, on which he had a lien, he was, in equity, paid in full for all there was due him on the equitable mortgage.

The orator's counsel contends that the balance of the value of the personal property, above the amount due on the payment for the year 1892, was not sufficient to pay the costs of bringing the bill of foreclosure. But this is not certified to be the truth. There is no statement of the costs of bringing the bill. The court of chancery denied the orator any costs, on account of his "unnecessary and offensive conduct." Hence, while the orator's entry may have been lawful, so he would not be guilty of a forcible entry, he was, on the facts found, guilty of wrongfully wasting the premises, after he had, by conversion of the personal property, received enough to pay in full what was then due on his mortgage. It is true that equity never enforces forfeitures nor inflicts penalties or punitive damages. But the question is not one of enforcing penalties, nor of inflicting forfeitures or punitive damages. The defendant's rights in the lum-

ber continued while the orator was cutting and removing it to the place where he disposed of it. The question is whether the orator, under the circumstances, shall be allowed to deduct, from what the value of the lumber was at the place of disposal, what he had expended in cutting and removing it there. It is contended that the orator supposed he had the right to cut and remove the lumber. He was under no mistake as to the facts, and is presumed to know the law applicable thereto. He must therefore be held to have willfully, as well as wrongfully, cut and removed the timber. All his acts in so doing were done against the known will and protest of the defendant. As we have heretofore found, in equity the orator could charge nothing for his services in properly caring for the property while he was in possession. Much more, he should not be allowed for them in wrongfully stripping the premises of what would be most valuable and useful in aiding the defendant to raise on them the money required to redeem them. On the facts found, we do not think that the orator is entitled to an allowance for his expenditure in wrongfully cutting and removing all the standing lumber from the premises; thus leaving the sugar orchard unprotected from violent winds, which may greatly damage it, although, at the time of the leaving, no special damage had arisen from this cause. If the orator's acts could be fairly and reasonably justified, because consented to by the defendant, or because the security was insufficient, and must be immediately utilized to save the orator from loss, he should account for the lumber cut, at its stumpage value. *Sanders v. Wilson*, 34 Vt. 818. But neither the court of chancery nor this court can justify his acts. These views affirm the decree of the court of chancery. If the defendant should desire to move for leave to file a cross-bill, he can do so in the court of chancery.

*Decree affirmed and cause remanded.*  
*Start, J., dissents.*

## MICHIGAN SUPREME COURT.

Georgiana DOWNS, Admx., etc., of David  
Downs, Deceased, *Plff. in Err.*,

*v.*  
**HARPER HOSPITAL.**

(.....Mich. ....)

1. An injury to a inmate of a hospital for the insane, which is a purely eleemosynary institution, caused by the tortious or negligent acts of its managers or employes, will not create a liability against the institution for damages.
2. The fact that patients who are able to do so are required to pay for the privileges of a hospital will not of itself destroy its character as a charitable institution, or make it liable to such a patient for negligence or torts of its employes.

**NOTE.**—As to the liability of charitable institutions for negligence, see *note* to *Williamson v. Louisville Industrial School of Reform (Ky.)* 28 L. R. A. 200.

25 L. R. A.

(September 23, 1894.)

**E**RROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by the negligence of defendant's servants. *Affirmed.*

The facts were stated in the opinion:  
**Mr. James H. Pound**, for plaintiff in error:

The plaintiff had two theories upon the evidence, which entitled her to go to the jury:

1. The unquestioned contract which promised to give plaintiff's intestate good care, and keep him in a safe place, the defendant being apprised of his infirmity, for an agreed consideration of \$10 per week, then paid presently, which it is clear they did not do, to plaintiff's consequent damage, the value of her intestate's life.

2. Affirmative wrongdoing in after contract-



ing for a present consideration then paid to keep David Downs safely, they put him in an unsafe room from which he was enabled to escape, and after contracting to give said David Downs care, commensurate with his sickness, absolutely refusing and neglecting so to do, and putting him wrongfully into a room so insecurely fastened as to offer no real resistance to him in case of his being seized with a desire to injure himself; and also in putting him into an insecurely situated strong room.

Defendant is not an active living private charity at all.

The attorney-general would not have the power to control this trust. It is a corporation with vested rights and does not depend upon the will of the government alone.

*Atty-Gen. v. Federal Street Meeting House in Boston*, 3 Gray, 1; *Atty-Gen. v. Merrimack Mfg. Co.* 14 Gray, 586; Perry, Tr. § 732.

This is a private charity not a public one.

*Perry v. House of Refuge*, 63 Md. 22, 52 Am. Rep. 495.

Within a corporation's sphere of action it is liable for torts as well as infractions of contracts.

*Head v. Providence Ins. Co.* 6 U. S. 2 Cranch, 127, 2 L. ed. 229; *Rogers v. Burlington*, 70 U. S. 8 Wall. 669, 18 L. ed. 84.

*Messrs. Edwin F. Conely and Orla B. Taylor*, for defendant in error:

What should be the treatment of a patient in a hospital, what should be done to him, what should be done for him, and what should be done with him, are matters of judgment and discretion, and a case for the review by a petit jury of such judgment and discretion is not presented by showing merely that an error was made.

*VanDeusen v. Newcomer*, 40 Mich. 90.

The "strong room," so called, was simply a part of the hospital building or buildings as an entirety, and the defendant, whether a charity or not, discharged its duty of reasonable care and diligence by the employment of competent persons to execute the work.

*Hoar v. Merritt*, 62 Mich. 386.

The plaintiff is not entitled to indemnity for the alleged wrong out of the charity or trust fund.

*Feoffees of Heriots' Hospital v. Ross*, 12 Clark & F. 507; *McDonald v. Massachusetts General Hospital*, 120 Mass. 433, 21 Am. Rep. 529; *Bethlehem v. Perseverance F. Ins. Co.* 81 Pa. 445; *Boyd v. Insurance Patrol of Philadelphia*, 118 Pa. 269; *Harris v. Woman's Hospital*, 27 Abb. N. C. 37; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495.

**Grant, J.**, delivered the opinion of the court:

Plaintiff's decedent and husband became insane from disease, and, by advice of his physician, was conveyed to Harper Hospital. He was violent, and was confined in a room in the third story of the building, which was especially arranged for such patients, having a framework of iron over the windows. The deceased wrenched this iron framework off, jumped from the window, and was killed. Plaintiff brings this suit to recover damages for the benefit of herself and children, alleging negligence on the part of the defendant. 25 L. R. A.

Defendant is a body corporate organized under Act No. 242, Laws 1863, entitled "An Act for the incorporation of hospitals or asylums in cases where valuable grants or emoluments have been made to trustees for such purposes," and, at the time the alleged right of action is said to have accrued, was engaged in maintaining at Detroit the hospital commonly known as "Harper Hospital." In the declaration it is alleged that on or about January 26, 1890, Downs was ill, and was so disordered in mind from the effects of disease and pain that he became and was temporarily insane, violent, and dangerous, so that it became necessary to place him under restraint and skillful medical treatment to prevent him from harming himself and others, and to effect his cure; that the defendant, at the request of plaintiff, and well knowing Downs' mental and physical condition, received him into Harper Hospital as a patient, and, in consideration of the payment of \$2 per day, agreed to give Downs proper medical treatment, and to keep and restrain him so that he should suffer no bodily injury which he might inflict upon himself, and to have the room in which he was confined secure, with a proper and sufficient guard, framework, or other suitable protection over the window of such room, and so securely fastened that Downs, when confined in the room, would not be able to tear away the framework or grating over the window and throw himself therefrom, and to keep him properly handcuffed, so that he could not injure himself by tearing away the framework or bars over the window, or by throwing himself out of the window, and also to keep some suitable person constantly in attendance upon him. It is further alleged that the defendant, in disregard of its alleged duties and obligations, wrongfully, carelessly, and negligently failed to safely keep and care for and give medical attendance to Downs, and so keep and restrain him that his body should suffer no injury, and his life should be preserved from injury which he might produce by his own conduct and actions; that the defendant did not have the room where Downs was confined secure, and with a proper and sufficient guard, framework, or other suitable protection over the window, and so securely fastened that Downs, when confined in the room, could not tear away the framework or grating over the window, and throw himself therefrom; that the defendant did not keep Downs properly handcuffed, so that he could not do himself injury by tearing away the framework or bars and throwing himself out of the window, and did not keep some suitable person constantly in attendance upon him. It is further alleged that the defendant, well knowing Downs' mental and physical condition, and that he was temporarily insane, violent, and liable to injure himself and others, and to throw himself from the window of the room where he was confined, removed the handcuffs from Downs' wrists, placed him, alone and unattended, in the padded room of the hospital, where insane persons are usually placed, and did not have the grating or framework over the window of such room properly constructed or properly secured and fastened, and that such framework or grating was made and fastened in such an insecure, unsafe, care-

less, and negligent manner that Downs, while insane, pulled down the ironwork and grating from the window, and threw himself therefrom, falling a distance of about 85 feet to the pavement, thereby receiving such injuries as to cause his death on January 29, 1890. At the conclusion of the evidence the court directed a verdict for the defendant, for the reason that the defendant was a charity which could not be made liable for a tort.

The organization of the defendant had its origin in two deeds,—one executed February 8, 1859, by Walter Harper, and the other by Ann Martin, March 10, the same year. The lands therein described were conveyed to seven prominent citizens of Detroit in trust for the founding of a hospital. The purpose was stated in the deed by Mr. Harper to be "the institution, erection, and maintenance of a hospital in the city of Detroit, or in the immediate vicinity thereof, for the succor, care, and relief of such aged, sick, and poor persons who shall apply for the benefit of the same, and who shall seem to my trustees hereof to be proper subjects of such aid as their means will enable them to afford." The particular scheme for founding the hospital, and all the details, were left to be devised and controlled by the trustees. It also provided for organizing and permanently maintaining a school for the instruction of youth in the different arts and trades, after the manner of what is known in Prussia as the "Flintenbergschule." The deeds also provided that, if the legislature should enact a law enabling a corporation to be formed for the purposes named in them, the trustees might convey all the lands and funds to a corporation formed therefor. The trust was accepted by the trustees, and under the law above referred to the trustees conveyed the property to the defendant, a corporation, May 17, 1863. Other bequests have been made to the defendant for the same purpose, which in one year amounted to over \$100,000. The corporators receive no compensation or dividends. It is purely an eleemosynary institution, organized and maintained for no private gain, but for the proper care and medical treatment of the sick. Hospital physicians and attendants are, and of course must be, paid. The receipts have not always been sufficient to meet ordinary expenses, and one year a private citizen gave \$1,000 towards the deficiency. The law under which the defendant is organized recognizes it as a charity; exempts its property from taxation; provides that its funds shall be used faithfully and exclusively for the purposes of its organization, and that it may receive, by gift, grant, or devise, any property, but only for the purpose for which it is incorporated. It has no shares, and is not a stock corporation. If the contention of the learned counsel for the plaintiff be true, it follows that the charity or trust fund must be used to compensate injured parties for the negligence of the trustees, or architects and builders, upon whose judgment reliance is placed as to plans and strength of materials; of physicians employed to treat patients; and of nurses and attendants. In this way the trust fund might be entirely destroyed, and

diverted from the purpose for which the donor gave it. Charitable bequests cannot be thus thwarted by negligence for which the donor is in no manner responsible. If in the proper execution of the trust, a trustee or an employé commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employés, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.

The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations. The amounts thus received are not for private gain, but contribute to the more effectual accomplishment of the purpose for which the charity was founded. The wrongdoer, in a case of injury, but not the trust fund, must respond in damages. This proposition seems too clear to require argument or authority. It is not, however, inappropriate to remark that better facilities for the care, cure, and treatment of the sick, both of the poor, and of those who are able to pay, are secured by the establishment of hospitals like that of the defendant. These facilities are increased by the receipt of money from those who are able to pay in whole or in part for the benefits received. Several hospitals of this character exist in this state, founded by private munificence. Obviously, they would not have been founded if their donors had known, or ever supposed, that their charitable purposes might be thwarted by the verdicts of juries for the negligent acts of those who must necessarily be employed in the execution of the charity. The following authorities appear to sustain the above position: *Foote v. Heriot's Hospital*, 12 Clark & F. 507; *McDonald v. Massachusetts General Hospital*, 120 Mass. 482, 21 Am. Rep. 529; *Gooch v. Association for Relief for Aged Indigent Females*, 109 Mass. 558; *Perry v. House of Refuge*, 68 Md. 20, 53 Am. Rep. 495; *Union Pac. R. Co. v. Artist*, 9 C. C. A. 14, 60 Fed. Rep. 865, 23 L. R. A. 581.

In what we have said, we are not to be understood as intimating any opinion as to whether there is any liability of the trustees for the alleged defect in the construction of the room where the deceased was confined, or of those who were intrusted with his care and treatment. This question was not passed on by the court below, and we express no opinion upon it.

*The judgment is affirmed.*

Montgomery, J., did not sit; the other Justices concurred.

## VERMONT SUPREME COURT.

A. F. BULLARD

v.

George W. THORPE *et al.*

(.....Vt.....)

1. A writ of prohibition will issue against actions brought before a justice of the peace by splitting up an entire cause of action so as to make the amount claimed in each too small to permit an appeal, where relief has been denied by the justice leaving no other remedy.
2. An agreement of counsel that a justice of the peace is an aged man not to be affected to his disadvantage by the result of the proceeding will not prevent a writ of prohibition against unlawful proceedings in this court from issuing against him as well as the party and his counsel.

(August 14, 1894.)

**A**PPPLICATION for a writ of prohibition to prevent the prosecution of proceedings in trover to recover possession of property which had been pledged, the ground of relief being that one cause of action was split into several so as to keep it out of the jurisdiction of an appellate court. *Granted.*

The facts are stated in the opinion.

*Messrs. Dee & George* for petitioner.

*Mr. Myron Buck, contra.*

**Taft, J.**, delivered the opinion of the court:

This is the first instance in this state, within our knowledge, of a petition for a writ of prohibition. No mention is made of one in our reports, and it is first mentioned in legislation in the Revision of 1889, when the supreme court was given power to grant one. That provision still exists in Rev. Laws, § 782. The writ may issue if "necessary to the furtherance of justice and the regular execution of the laws." The proceedings to obtain one are regulated by Rev. Laws, chap. 74. The object of the writ in this jurisdiction can be accomplished generally by appeal, exception, or writ of error. One never issues if there is other adequate remedy. It is an ancient and valuable writ, the use of which in all proper cases should be upheld and encouraged, as it is important to the due and regular administration of justice that each tribunal should confine itself to the exercise of those powers with which, under the constitution and laws of the state, it has been intrusted. The writ is so ancient that forms of it are given in Glanville (Beames' Translation) pp. 56, 97, *et seq.*,—the first book of English law, written in 1189,—and mention is made of it in nearly all the treatises upon the common law, and the early reports. The object and scope of the writ is stated in 8 Blackstone's Commentaries, 112, as "a writ

directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court." The writ goes against "as well the party and his counsel as the judge himself." 5 Jacob, Law Dict. 1st Am. ed. 316. If a court has no jurisdiction of a cause, nor of a collateral matter incidental thereto, prohibition is an appropriate remedy, if the party aggrieved has no other relief. The remedy is a liberal one, and is not to be applied sparingly. It was so far extended that in Bracton's time (6 Bract. Twiss' ed. 245) it was said in case an inferior judiciary took jurisdiction of a matter rightfully, and a superior court had cognizance of the same matter, "the superior tribunal ought to be preferred to the inferior, and, if (the tenant) has shown to the superior court that he has been impleaded concerning the same thing in an inferior court a prohibition shall issue on the part of the king that proceedings shall not be taken on that plea in the inferior court." In *Quimbo Appo v. People*, 20 N. Y. 531, Selden, J., speaks of the "broad remedial nature" of the writ, and says that it "was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of this remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed."

The writ does not lie to prevent errors and irregularities in the proceedings if the matter adjudged is within the jurisdiction of the tribunal. *Taft v. Rayner*, 5 C. B. 162. It is no part of its office to prevent or correct errors in questions of which the court has cognizance. It is to prevent the unlawful assumption of jurisdiction, and it may be either jurisdiction of the entire subject-matter, or of something collateral or incidental thereto. It "lies to prevent the exercise of any unauthorized power in a cause of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction." One general ground of prohibition is that, though the subject-matter of suit is within the proper jurisdiction of an inferior tribunal, yet that in some collateral or incidental matter it is proceeding contrary to the common law or some statutory provision. Thus, it would seem, if we pursue these principles, that the courts have authority by this proceeding to supervise the execution of the laws, not merely by keeping inferior tribunals within their proper jurisdiction, but also by enforcing a correct execution of the laws, as well the common as the statute law. Jacob says: "Or if, in handling the matters clearly within their cognizance, they [the courts] transgress the bounds prescribed to them by the laws of England, . . . a prohibition will be

NOTE.—For a collection of authorities upon the question of the purpose and scope of the writ of prohibition, see notes to *Fleming v. Guthrie* (W. Va.) 8 L. R. A. 53, and *Walcott v. Wells* (Nev.) 9 L. R. A. 59.

25 L. R. A.

awarded." Upon the principal points above noted, the following cases may be referred to: 5 Jacob, Law Dict. 817; *Gould v. Gapper*, 5 East, 364; *Brymer v. Atkins*, 1 H. Bl. 164; *Darby v. Cosens*, 1 T. R. 552; *Leman v. Goultly*, 3 T. R. 8; *State v. Hopkins*, 1 Dud. L. 101; *State v. Hudnall*, 2 Nott & McC. 424; *State v. Ridgell*, 2 Rail. L. 560; *State v. Nathan*, 4 Rich. L. 513; *Ex parte Williams*, 4 Ark. 537, 88 Am. Dec. 46; *Quimbo Appo v. People*, 20 N. Y. 531; High, Extr. Leg. Rem. chap. 81.

It has been held that prohibition will not lie if the inferior court has prima facie jurisdiction; i. e. if, upon the face of the papers, the cause is within the cognizance. It was so held in *State v. Judge of Superior Dist. Ct.* 29 La. Ann. 360. This does not seem to be just, for a plaintiff thereby may be enabled to recover upon a claim that is without the jurisdiction of a court by framing his declaration showing a cause of action within it. We think the rule in such cases has been to grant such writs upon showing by evidence, *abundante* the record, that the court had no jurisdiction. In an anonymous case (1 P. Wms. 476) it is said: "A prohibition lies in chancery on affidavit that the matter is out of the jurisdiction; but no affidavit is necessary if, on the face of the declaration, the matter appears to be out of the jurisdiction." In a suit for tithes the tenant pleads that the party who sues is not incumbent, but that J. S. is. In this case it does not appear on the face of the papers that the court has no jurisdiction; "yet a prohibition must go, 'or else he [the tenant] shall be charged twice for his tithes.'" *Green v. Penliden*, Cro. Eliz. 228. These cases recognize the doctrine that prohibition may lie if the lack of jurisdiction does not appear upon the face of the paper. It is in cases in which there can be no appeal that a writ of prohibition is frequently applied for. Justices in a bastardy proceeding allowed an appeal to the general sessions. The latter court, denying the motion to dismiss the appeal, were proceeding to try the case when the alleged putative father applied to the supreme court for a mandamus to the sessions to vacate the order entertaining the appeal, or other remedy. The supreme court, holding that there was no appeal, said: "It is a case for a prohibition, instead of a mandamus. Let the order be made accordingly." *People v. Tompkins*, 19 Wend. 154. One had been tried, convicted, sentenced, and sentence executed. He was subsequently tried, convicted, and condemned to death, there being no appeal for the same offense. A prohibition was granted to restrain the execution, which was confirmed unanimously by the court of appeals. *Ex parte Brown*, 2 Bail. L. 823. A court entered judgment of death for an offense not capital. The error could not be corrected by appeal. The court held that, although the cause and person were within the jurisdiction of the court, it transgressed the bounds prescribed by law, and granted a prohibition. *State v. Ridgell*, Id. 560.

One can conceive of many instances in which the writ may be the only remedy. A justice of the peace takes cognizance of a

suit not appealable upon a claim of which he is the absolute owner. A person convicted of, and sentenced to be hung for murder, after he has been acquitted of the same offense, his exceptions having failed without his fault. An inferior court proceeds to execute a judgment, notwithstanding an appeal. What remedy is there in such cases save a writ of prohibition? The petitioner has established the substantial allegations of his petition. Stripped of its verbiage, the case is this: The petitionee Thorpe pawned to the petitioner nine items of personal property, valued at \$40, to secure the loan of about \$25. That the petitioner has sold, upon due notice, a part of the property, and received therefor about the sum of \$13; and that there still remains due him about as much more, which the petitionee Thorpe refuses to pay. That Thorpe, by his attorney, Buck, has begun a series of suits in trover for the items of the property so pawned, bringing a separate suit for each item, before the petitionee Greene, a justice of the peace, placing the *ad damnum* in the writ at \$20, so that no appeal to the county court can be had from the decision of said Justice Greene. Thus, the claim, which is an entire one, is split up, so that the justice can have final jurisdiction of the suits. That this is done to deprive the petitioner of his right of appeal, and the county court of its rightful appellate jurisdiction in the matters. That two suits have been brought for the first two items, and that one has been tried. That said justice, upon trial, refused the petitioner's plea and proof of the facts herein stated, and the petitioner is put to great and needless expense in procuring bail and defending said suits. It is clear from the proofs that there were but two contracts in respect to the pawned property, the two valises and contents being pledged subsequently to the pledge of the trunks and contents; but, by the arrangement at the time the valises were left in pledge, the whole property became pledged for all that was due the petitioner from Thorpe. Whether there was one contract or two is immaterial so far as this case is concerned, for the subject-matter of the two suits already brought against the petitioner was embraced in the first contract.

It is well settled, we think, without a contrary decision, that a person cannot split up an entire indivisible claim, so as to give a court jurisdiction, that it would not otherwise possess. If he do, prohibition shall go. If he can do so, a justice of the peace can be given cognizance of causes involving immense sums. *Girling v. Adams*, 2 Keb. 617; 19 Hen. VI. chap. 54; 1 Fitzh. Nat. Brev. 46; 2 Rolle, Abr. 280; *Keilway*, 106a; *Catchmade's Case*, 6 Mod. 91; *Hulson v. Lowry*, 2 Va. Cas. 42. It is often a difficult question to determine whether the transactions constitute an entire or a divisible contract, but we think if several items of property are pledged at one time, for one sum, and no reason exists for a demand of the several items at separate times, that it is one entire contract. In *Farrington v. Payne*, 15 Johns. 482, the defendant justified, under an attach-

ment of one bed and three quilts. The actions were trover,—one for the bed, and another for the quilts. The court said the taking “was one single, indivisible act, and the plaintiff ought not to be permitted to vex the defendants by splitting up his claim for damages into separate suits for each article so seized.” A claim for three barrels of potash was split up; a suit brought for the price of one, and another for the price of the other two; and the court says: “And yet the plaintiff has set up and divided his entire demand into separate suits, which of itself would be a fatal objection to the judgments.” *Smith v. Jones*, 15 Johns. 229. In *Willard v. Sperry*, 16 Johns. 121, one note for \$125 was split up into five parts, and as many suits brought; and: “Per Curiam. The judgment is erroneous. The note, forming one indivisible contract, cannot be the foundation of several suits. It is a usurpation of jurisdiction, and a justice might, if this be tolerated, take cognizance of contracts to any amount.” In *Colvin v. Corwin*, 15 Wend. 557, two actions were brought for lottery tickets, and the defendant admitted that the tickets were delivered to him by two different agents of the plaintiffs, at different places and at different times. A judgment in one suit was held a bar in the other, and it is said: “The justice of the case also accords with this disposition of it. The splitting up of small demands to multiply suits is strongly discountenanced by this court. It is unnecessary and oppressive.” This case was overruled in *Secor v. Sturges*, 16 N. Y. 548, in respect to the construction of the contract, but not the legal rule applicable to the contract if it was an entire one. But if a demand is split up, and judgment recovered for a part, the legal proposition that a judgment for a part of one entire demand is a conclusive bar to any other suit for another part of the same demand is everywhere inflexibly maintained. *Whitney v. Clarendon*, 18 Vt. 258; *Morey v. King*, 51 Vt. 388; *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79; *Smith v. Jones*, *Farrington v. Payne*, and *Willard v. Sperry*, *supra*; *Miller v. Overt*, 1 Wend. 487; *Colvin v. Corwin*, *supra*; *Bates v. Quattlebom*, 2 Nott & McC. 205; *Bennett v. Hood*, 1 Allen, 48, 79 Am. Dec. 705. If A., by one act, converts 1,000 bushels of wheat belonging to B., and valued at one dollar per bushel, can B. maintain an action of trover for each bushel? Would it not be an outrage to allow a separate action for each bushel? No appeal being allowed, is not prohibition the only remedy? It has been held in this state that a plaintiff may waive a part of a claim and recover; that he may demand less than in justice he is entitled to, and thereby confer jurisdiction upon a justice, though the case upon its merits would properly belong to a higher jurisdiction. *Stevens v. Pearson*, 5 Vt. 503; *Wightman v. Carlisle*, 14 Vt. 296; *Parkhurst v. Spalding*, 17 Vt. 527. This principle is not involved in the case at bar, for the petitioner Thorpe waives no part of his claim.

It is a common practice in this state to consolidate actions, pending in the same court, that might have been brought in one. It was an early doctrine of the common law that when several suits on separate contracts were brought, and only one was necessary, to award prohibition. In *Girling v. Aldas*, 2 Keb. 617, the contracts were several; and: “Per Curiam. A prohibition must be awarded. If the causes may be joined in one action, they must.” And a prohibition was awarded. “If there be several contracts between A. and B. at several times, for several sums, each sum under 40s. and they all amount to a sum sufficient to entitle the superior court, they shall be there put in suit, and not in a court which is not of record.” *Anonymous*, 1 Vent. 65; *Girling v. Alders*, Id. 78; *Clerk v. Andrews*, 1 Show. \*11. The fact that the court is not one of record we think immaterial upon the question of jurisdiction. The whole subject-matter of the pledge, or of the two pledges, conceding there were two, was within the jurisdiction of a justice of the peace; so the claim was not split up to give Justice Greene jurisdiction, but to give him final jurisdiction, thereby defrauding the county court of its rightful jurisdiction. The evil is the same whether the jurisdiction of which the county court is defrauded is original or appellate.

Reference is herein made to many principles governing the proceedings relating to prohibition, principally by way of illustration as the subject in this jurisdiction is comparatively new. The exact question presented and the one decided is this: We hold, if a person has an entire claim, he cannot split it up, and bring as many suits as there are parts, thus subjecting the defendant to as many suits as there are parts, and the resulting needless expense, without being, if the defendant has no other remedy, subject to prohibition. The petitioner sought for relief before Justice Greene, without avail, and he is entitled to a writ of prohibition, which must issue in the name of the state.

In the brief for defendants it is stated: “The justice, Henry C. Greene, an aged man, is, by agreement of counsel, not to be affected by the result in this case to his disadvantage.” If he is too old to be affected by the result of these proceedings, it is evident he is too aged to be administering the law, even in a justice’s court. The writ must issue against him as well as the party and his counsel.

What effect upon these proceedings the discontinuance of one of the suits may have we do not consider, for it is not shown that either suit has been ended. *It is ordered that a writ of prohibition issue* in the name of the state, signed by the clerk, directed to the petitioners, prohibiting them from proceeding any further in the actions mentioned, and set forth in said petition, and for the collection of the petitioner’s costs of this proceeding, as taxed by the clerk.

## WYOMING SUPREME COURT.

Oscar F. COWHICK, Admr., etc., of John Y. Cowhick, Deceased, *Plff. in Err.*,

John K. SHINGLE *et al.*

(.....Wyo.....)

**A partial payment by one of two parties jointly and severally liable upon a promissory note will not suspend the running of the statute of limitations in favor of the other.**

(September 21, 1894.)

**ERROR** to the District Court for Laramie County to review a judgment in favor of defendant Altman in an action brought to recover the amount alleged to be due on a joint and several promissory note to which Altman pleaded the statute of limitations. *Affirmed.*

Statement by **Clark, J.:**

The plaintiff in error was plaintiff below. The action was brought in the court below to recover upon a promissory note made by the defendants to plaintiff's intestate, and which is as follows:

"\$100.00. Cheyenne, Wyoming, January 3, 1888.

"One year after date, we jointly and severally promise to pay to the order of John Y. Cowhick one hundred dollars, at the First National Bank of Cheyenne, for value received, waiving benefit of stay and exemption laws, and appraisal on sale before execution, with interest at 1½ per cent per month from date until paid. If this note is not paid at maturity the undersigned agree to pay expenses of collection, including attorney's fees. John K. Shingle. H. Altman."

It is alleged in the petition of plaintiff "that the time within which said note was due and payable has long since elapsed, and yet said note has not been paid, nor any part thereof, except interest thereon from the date of said note up to and including the 1st day of June, A. D. 1890, which said interest from the date of said note up to and including said 1st day of June, A. D. 1890, was paid to said John Y. Cowhick by said John K. Shingle, without the knowledge or consent of Henry Altman, on said 1st day of June, A. D. 1890." The defendant Shingle made default. The defendant Altman interposed a general demurrer to the petition, and for ground thereof relies upon the statute of limitations, which demurrer was sustained by the court below. Plaintiff brings the case here, assigning as error (1) that the court erred in sustaining the demurrer of defendant Altman to plaintiff's petition; (2) that the court erred in rendering judgment in favor of defendant Altman. The cause of action upon the note accrued on the 7th day of January, A. D. 1889, and this action was commenced on the 2d day of February, A.

D. 1894,—more than five years after the cause of action accrued. The sections of the statute relied upon are the following of the Revised Statutes of 1897:

"Sec. 2368. Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action accrues.

"Sec. 2369. Within five years an action upon a specialty or any agreement, contract or promise in writing.

"Sec. 2381. When payment has been made upon any demand founded on contract or a written acknowledgment thereof, or promise to pay the same has been made and signed by the party to be charged an action may be brought thereon within the time herein limited, after such payment, acknowledgment, or promise."

The foregoing statutory provisions have been in force in this state since June 1, 1888. Prior to that time, and since March 1, 1874, the code provision in force here, which corresponds with section 2381, *supra*, was section 21, chapter 18, Comp. Laws 1876. We quote the latter section, as we shall have occasion hereinafter to refer to it. It was as follows: "Sec. 21. In any case founded on contract where any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim or any promise to pay the same shall have been made, an action may be brought on such case within the period prescribed for the same, after such payment, acknowledgment, or promise, but such acknowledgment or promise must be in writing, signed by the party to be charged thereby."

**Mr. R. W. Breckons** for plaintiff in error.

**Mr. H. Donzelman**, for defendant in error:

The common-law rule is that payment by one is not payment for all so as to suspend the running of the statute of limitations.

*Bell v. Morrison*, 26 U. S. 1 Pet. 367, 7 L. ed. 181; *Clarke v. Bradshaw*, 3 Esp. 155; *Brandram v. Wharton*, 1 Barn. & Ald. 463.

In most of the states the doctrine has been expressly repudiated; and in those few states in which *Whitcomb v. Whiting*, 2 Dougl. 628, was followed, the legislatures, like the law-making power of England, overturned the rule by express legislation.

Wood, *Limitations to Actions*, p. 606, § 285; *Dickerson v. Turner*, 19 Ind. 230; *Vander v. Lafavour*, 2 Blackf. 373; *Steele v. Souder*, 20 Kan. 39; *Keeter Bank v. Sullivan*, 6 N. H. 124; *Coleman v. Fobes*, 22 Pa. 156, 60 Am. Dec. 75; *Bush v. Stowell*, 71 Pa. 206, 10 Am. Rep. 694; *Van Kuren v. Parmelee*, 2 N. Y. 528, 51 Am. Dec. 323; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep. 663; *McMullen v. Rafferty*, 69 N. Y. 456; *Re Sander's Estate*, 4 Misc. 343.

**NOTE.**—The above opinion is a good presentation of the law upon this side of the interesting question of the effect of payment by one of several joint and several debtors upon the running of the statute of limitations. The condition of the decision 25 L. R. A.

ions upon the subject is well illustrated by the cases upon the effect of payment by one partner after dissolution of the firm, which are collected in the note to *Kerper v. Wood* (Ohio) 15 L. R. A. 68.

In Illinois, in the case of *Kallenbach v. Dickson*, 100 Ill. 427, the subject was reviewed at great length.

The court decided that the payment must be made by the party to be charged.

*Davis v. Mann*, 48 Ill. App. 301.

The Alabama courts are decisive on the subject.

*Louther v. Chappell*, 8 Ala. 353, 42 Am. Dec. 643; *Myatts v. Bell*, 41 Ala. 222. See also, *Steels v. Souder*, *supra*; *Littlefield v. Dingwall*, 71 Mich. 223; *Tate v. Clements*, 16 Fla. 339, 26 Am. Rep. 709; *Steels v. Jennings*, 1 McMill. L. 297; *Walters v. Kraft*, 23 S. C. 578, 55 Am. Rep. 44; *Belote v. Wynn*, 7 Yerg. 534; *Muse v. Donelson*, 2 Humph. 166, 36 Am. Dec. 309; *Schindel v. Gates*, 46 Md. 604, 24 Am. Rep. 526; *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297; *Mayberry v. Willoughby*, 5 Neb. 368, 35 Am. Rep. 491.

In some of the cases a distinction is made between payments made before the debt is barred, and payments made afterward. Of this distinction, it is said in *Whitcomb v. Whiting*, Dougl. 653, Smith, Lead. Cas. pt. 2, p. 1022: "No such distinction can be found in the English cases."

Statutes originally enacted in another state, when adopted, are deemed to be taken with the settled construction given them in the state from which they are carried.

*Sutherland*, Stat. Constr. § 256, p. 287; *Cooley*, Const. Lim. 4th ed. p. 52, and note to p. 64; *Pike's Estate*, 45 Wis. 395; *Hess v. Pegg*, 7 Nev. 23.

Section 2381 was taken from Ohio.

It was held by the supreme court of the state of Ohio that the statute meant, not only that promise and acknowledgment must be made by the party to be charged, but that payment likewise must be so made.

*Hance v. Hair*, 25 Ohio St. 340; *Marienthal v. Mosler*, 16 Ohio St. 566.

*Clark, J.*, delivered the opinion of the court:

It is the settled construction of our code of civil procedure that "where it appears upon the face of the petition that the cause of action accrued at such a period that, under the statute of limitations, no action can be brought, the defendant may demur to the petition on the ground that the petition does not state facts sufficient to constitute a cause of action." *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582. It is clear that more than five years elapsed between the date the cause of action accrued upon the note and the commencement of the suit, and hence the demurrer of the defendant Altman was properly sustained by the court below, unless the payment of the interest by the defendant Shingle on the 1st day of June, 1890, had the effect of suspending the running of the statute in favor of the defendant Altman. Briefly stated, the sole remaining question for determination is, Does a partial payment by one of two parties jointly and severally liable upon a promissory note suspend the running of the statute in favor of the other? Before proceeding to the consideration of our own statutes, so far as they bear upon this ques-

tion, it may not be amiss to briefly look into the history of the law upon this subject.

The first statute in our system of jurisprudence which placed limitations upon personal actions was chapter 16 of 21 Jac. I., enacted in 1623. In the construction of this statute, and of statutes enacted at an early day, by several of the states of the Union, which were substantially like it, there was great diversity of opinion upon the question we have presented here. The leading case on this question in England is *Whitcomb v. Whiting*, 2 Dougl. 652, decided in 1781, where it was held by Lord Mansfield and his associates that "payment by one is payment for all,—the one acting virtually as agent for the rest,—and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." Willes, *J.*, concurring in the views expressed by Lord Mansfield, further said: "The defendant has had the advantage of the partial payment, and therefore must be bound by it." This case seems to be wholly opposed in principle to the case of *Bland v. Haselrig*, 2 Vent. 151, decided many years before, but after the adoption of the Statute of 21 Jac. I. While the doctrine of *Whitcomb v. Whiting*, was several times seriously questioned by eminent English judges,—notably by Lord Ellenborough in *Brandram v. Wharton*, 1 Barn. & Ald. 463,—it became the generally accepted rule in England, and was such until parliament interfered in 1828, and, adopting what is known as "Lord Tenterden's Act," declared among other things, that no joint contractor should be in any manner affected by any written acknowledgment or promise made by his co-contractors, thus limiting the effect of written acknowledgments or new promises to the parties making them. This act, however, contained this proviso: "Provided, always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." We cite this thus fully because it is urged upon us that this statute is in substance the same as our section 2381, quoted in the statement of facts hereto appended, and inasmuch as the English courts after the adoption of the act, gave the same effect to a partial payment by one of two or more joint obligors as was given in *Whitcomb v. Whiting*, that hence the cases so holding are authority for the proposition that our statute should be so construed as to make a payment by one obligor effective as to the others. I cannot assent to this contention, because, considering the state of the law in England at the time of the adoption of Lord Tenterden's act as declared by the courts there, it seems clear to my mind that the effect of the proviso in that act was to leave the legal effect of a payment made by "any person whatsoever" just exactly what it had been held by the courts to have been. In fact, it might be very strongly urged that the proviso was in effect a legislative affirmation of the rule previously established by the courts; and such in effect seems to have been the view taken by the court in *Wyatt v.*

*Hodson*, 8 Bing. 809, and by *Chief Justice Shaw* in *Sigourney v. Drury*, 14 Pick. 387. By this act of *Lord Tenterden* the effect of the decision in *Whitcomb v. Whiting*, was limited solely to partial payments, and its effect in that respect was entirely overthrown in 1856 by the Act entitled the "Mercantile Law Amendment Act." So that long before the territory or state of Wyoming came into existence the doctrine of that celebrated case had met its death in the land of its birth, and, as stated at pages 608 and 609 of *Wood on Limitations*, "the judgment of the profession, as well as of the people generally, as to the wisdom of the doctrine, is best evidenced by the circumstance that it has been nearly obliterated by legislative and judicial action."

In the United States, under statutes substantially like the English statute, the doctrine of *Whitcomb v. Whiting*, met with great disfavor at an early day, and was wholly repudiated in several well-considered cases. Among them may be mentioned, as specially worthy of consideration, *Bell v. Morrison*, 26 U. S. 1 Pet. 351, 7 L. ed. 174; *Easter Bank v. Sullivan*, 6 N. H. 125; *Coleman v. Fobes*, 22 Pa. 156, 60 Am. Dec. 75; *Lory v. Cadet*, 17 Serg. & R. 126, 17 Am. Dec. 650; *Van Keuren v. Parmelee*, 2 N. Y. 524, 51 Am. Dec. 322; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Yandes v. Lefavour*, 2 Blackf. 371; *Belote v. Wynne*, 7 Yerg. 534; *Muse v. Donelson*, 2 Hump. 166, 36 Am. Dec. 309; *Louther v. Chappell*, 8 Ala. 353, 42 Am. Dec. 645; *Voorhies Succession*, 21 La. Ann. 659; *Walker v. Duberry*, 1 A. K. Marsh. 189; *Steele v. Jennings*, 1 McMull. L. 297. In some of the above cases the acknowledgment or partial payment relied upon to take the case out of the statute was made before the bar of the statute had become complete, but in my judgment there is no distinction in principle between the legal effect of acknowledgment or payment made before or after the bar of the statute had attached. In either case the legal effect thereof is to create a new cause of action. *Muse v. Donelson*, 2 Hump. 169, 36 Am. Dec. 309; *Bell v. Morrison*, and *Shoemaker v. Benedict*, *supra*; *Allen v. O'Donald*, 28 Fed. Rep. 17, at page 25; *Wheelock v. Doolittle*, 18 Vt. 440, at page 442, 46 Am. Dec. 163; *Willoughby v. Irish*, 35 Minn. 68, at page 69, 59 Am. Rep. 297.

In the case of *Coleman v. Fobes*, *supra*, it is said: "We cannot but regard the case of *Whitcomb v. Whiting*, which declared that a payment by one joint debtor was a new promise by all, as being at the bottom of all the confusion that exists in the decisions in England and in this country on the subject of this statute, in its relation to joint debtors." And, from the review in that case of the English decisions, it would seem that the doctrine had led to inextricable confusion, and to such extreme views that the statute was in effect a nullity, as shown by the decision in *Goddard v. Ingram*, 3 Q. B. 839. In this case the two defendants had been partners with one Shuttleworth. The partnership was dissolved in 1832, and, upon the dissolution, was indebted to the plaintiffs, bankers, in the sum of £2,000. In 1839 James Goddard,

one of the plaintiffs, who was individually indebted to the old partnership, on his single account, in the sum of £35, drew his check upon his own bank for that sum, and placed it to the credit of the partnership. A day or two afterwards, Shuttleworth, who was hopelessly bankrupt, called at the bank, and expressed himself satisfied with the transaction. This was held a sufficient payment to take the case out of the statute as to the two defendants; and, in the light of this case, it is not surprising that the Pennsylvania court should say: "To carry out this principle of *Whitcomb v. Whiting* would allow a debtor that is hopelessly bankrupt to bind others by his new promise, and even to be hired to do it, and thus far the example has led in England." On the other hand, it is true that in many states, especially the New England states, the doctrine of *Whitcomb v. Whiting* was upheld, and, under statutes similar to the English statute, enforced. In *Sigourney v. Drury*, *supra*, *Chief Justice Shaw* rendered an opinion sustaining the doctrine of *Whitcomb v. Whiting*, and which may well be considered the leading case upon that side of the question in the United States. *Cox v. Bailey*, 9 Ga. 467, 54 Am. Dec. 358, is another strongly reasoned case in favor of the doctrine. The same rule was held to be the law in Rhode Island, Connecticut, Maine, and other states; but it is, I think, a circumstance worthy of great consideration that within a few years after the rendition of the decisions sustaining this rule the legislatures of nearly all the states so holding, by legislative enactment, declared that no joint debtor should be deprived of the benefit of the statute by reason of the fact of payment by his codebtor.

It must be admitted that at the time of the adoption of section 21, chap. 18, Wyo. Comp. Laws 1876, to wit, December 11, 1873,—in fact, at the time of the organization of the territory of Wyoming, in 1868,—the rule that one joint debtor was affected by the partial payment of his codebtor in such way as to deprive him (the former) of the benefit of the statute prevailed in only a few of the states of the Union, to wit, Connecticut, New Jersey, Rhode Island, Delaware, Georgia, Oregon, North Carolina, Missouri, and perhaps, at that date, Minnesota and one or two other states. In all the other states, and in England as well, the rule had been entirely overthrown, either by judicial decision or by legislative enactment. This fact is in my mind a strong circumstance as evidencing the judgment of the profession, and of the people as well, concerning the wisdom and propriety of the rule here contended for by the plaintiff, and is entitled to consideration in attempting to properly construe our statute upon the subject, because, when we come to construe our statute it is a fair presumption that our legislature, when engaged in legislating upon a subject so generally acted upon in other jurisdictions, did have some regard for the general state of the law upon that subject, and we may very properly bear this in mind when we undertake to ascertain what was the legislative intention with respect to the statute. It is urged upon us that "when a statute is in general terms it is subject to



the principles of the common law, and is to receive such construction as is agreeable to that law in cases of the same nature;" and then it is said "that the common-law rule is clearly laid down in *Whitcomb v. Whiting*." As a rule the term "common-law" means both the common law of England, as opposed to statute or written law, and the statutes passed before the emigration of the first settlers of America. *Patterson v. Winn*, 30 U. S. 5 Pet. 241, 8 L. ed. 111; *Com. v. Leach*, 1 Mass. 61. And, applying this definition to the matter in hand, I am unable to perceive that there is any common-law rule upon the subject. At common law there was no limitation as to time upon the right to bring a personal action. Such limitations are, and always have been, pure creatures of the statute; and the rule contended for is a rule which grew up and developed in the construction of the Statute of 21 Jac. I., and in no other way. It was first announced in 1781 by Lord Mansfield, in *Whitcomb v. Whiting*; and, while any statement of the law made by that great judge is entitled to great weight and respect, his declarations, even as to the common law, are simply persuasive authority.

This brings us now to the consideration of our own statute, and, before reviewing the authorities construing this and similar statutes, I will examine the statute independently of them. It is quite clear that under the statute no written acknowledgment or new promise, howsoever solemnly executed or made by one of two codebtors, could in any measure suspend the running of the statute as to the other, and this would be so whether the acknowledgment or promise was made before or after the statutory bar had attached. This being so, it would seem that inasmuch as the law does not permit one codebtor, by his express promise or acknowledgment, to bind the other, it would logically follow that he could not, by an act which is simply, in legal effect, an acknowledgment from which the law implies a promise, bind him. I am unable to escape this conclusion, and it seems to me to be abundantly justified by the authorities. In 1866 the 24th section of the Code of Ohio was identical with section 21, chap. 18, Wyo. Comp. Laws 1876. Thereafter, the legislature of Ohio adopted a new Code, section 4992 of which is identical with our section 2881, Wyo. Rev. Stat. 1887. These sections are set forth in the statement of facts preceding this opinion. In my judgment the two sections are in substance the same. There is no sort of difference in their effect. In *Marienthal v. Mosler*, 16 Ohio St. 570, the supreme court of Ohio, in construing the 24th section of their Code, used this language: "By comparing this section with the one for which it is substituted in the Limitation Act of 1831, and judicial constructions given to the Act of 21 Jac. I., it is apparent that the legislature did not intend to enlarge the facilities for taking cases out of the statutory bar. Before this can now be effected by an acknowledgment of an existing debt, or a promise to pay the same, it 'must be in writing, signed by the party to be charged thereby.' No change is made in the effect of a part payment of a debt. It will be seen,

however, that the same effect is given to such part payment as is given to a written promise signed by the party to be charged thereby. It would seem, therefore, from analogy, that the payment must be made by the party to be affected thereby, or by an agent authorized for that express purpose. In the contemplation of the statute, the part payment of a debt is regarded as evidence of a willingness and obligation to pay the residue, as conclusive as would be a personal written promise to that effect. It could not then have been intended to give this effect to payments other than those made by the party himself, or under his immediate direction. Surely, nothing short of this would warrant the assumption of a willingness to pay, equal to his written promise to that effect." In *Hance v. Hair*, 25 Ohio St. 849, it was held, under the same section, that "a partial payment on a joint and several promissory note by one of the several makers will not prevent the running of the statute of limitations as to the other makers." And the case of *Marienthal v. Mosler*, *supra*, was expressly affirmed. In *Kerper v. Wood*, 48 Ohio St. 618, 15 L. R. A. 656, the statute in existence and relied upon was section 4992, Ohio Rev. Stat., identical with our section 2881, Wyo. Rev. Stat. 1887. The court quoted from the decisions in *Marienthal v. Mosler*, *supra*, and *Hance v. Hair*, *supra*, and say, at page 631, 16 Ohio St.: "These decisions give emphasis to the reason and language of the statute. A payment or acknowledgment or a promise in writing will not avail to take a case out of the statutory bar, unless made by the party to be charged thereby, or by an agent authorized for that express purpose." It is quite apparent from these decisions from Ohio that the supreme court of that state regarded the two sections as the same in substance, and, in view of the fact that we adopted our statute from that state, these decisions are entitled at least to more than ordinary weight in the construction of our statute. In *Com. v. Hartnett*, 8 Gray, at page 451, it is said that "it is common learning that the adjudged construction of the terms of a statute is enacted as well as the terms themselves, when an act which has been passed by the legislature of one state or country is afterwards passed by the legislature of another." In *Steele v. Souder*, 20 Kan. 89, *Mr. Justice Brewer*, delivering the opinion of the court, in construing a statute identical with section 21, chapter 18, Wyo. Comp. Laws 1876, uses this language: "The language may indeed be open to three constructions,—one, that the mere fact of payment, whether by a party to the instrument or not, keeps it alive as to all originally liable on it; another, that payment by one party keeps it alive as to all; and, third, that payment, like acknowledgment or promise, keeps it alive only as to the party paying. It seems to us that the latter is the true construction. No valid reason exists why payment should be more potent than acknowledgment or promise. Indeed, payment was treated by the courts as simply an evidence of acknowledgment. Such construction makes the various provisions of

this section not only harmonious with each other, but with the general provisions of the statutes making each party to an instrument severally liable thereon. Severally liable, each should be severally protected. We conclude, then, that payment suspends the running of the statute only as against the party making the payment." I think there is no room to doubt the correctness of the learned justice's views with respect to the effect of the payment. It is certain that Lord Mansfield made no distinction between the legal effect of a payment and acknowledgment, and such is the generally accepted opinion. It is true that Tindall, *Ch. J.*, in *Wyatt v. Hodson*, 8 Bing. 809, attempted to draw a distinction between a payment and "an ordinary acknowledgment;" but, however much force there may be in his remarks when applied to an ordinary oral acknowledgment, I am unable to perceive any in cases where the acknowledgment or new promise is required to be in writing, and subscribed by the party. In Nebraska the statute was as follows (Code Civ. Proc. § 23): "In any case founded on contract when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same after such payment, acknowledgment, or promise." In *Mayberry v. Willoughby*, 5 Neb. 869, 25 Am. Rep. 491, it was held that part payment by one of two joint debtors does not take the case out of the statute as to the other. In Minnesota the statute was (Gen. Stat. chap. 66, § 24): "No acknowledgment, or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." In *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, it was held, in a well-considered case, that "a partial payment upon a promissory note by one of the joint and several makers thereof, and indorsed upon it before the note is barred by the statute of limitations, and within six years before suit is brought, is inoperative to prevent the running of the statute as to the others." Syllabus. In New York the statute is identical with that of Minnesota just quoted. In *McMullen v. Rafferty*, 89 N. Y. 456, it was held that payments made by one of two joint and several makers of a note did not prevent the running of the statute as to the other, although the partial payments were made before the statutory bar had attached. The following cases also hold that payment by one of two joint obligors does not suspend the running of the statute as to the others: *Bush v. Stovell*, 71 Pa. 208, at page 212, 10 Am. Rep. 694; *Kallenbach v. Dickinson*, 100 Ill. 427; *Re Sanders's Estate*, 4 Misc. 843; *Littlefield v. Dingwall*, 71 Mich. 228; *Tate v. Clements*, 16 Fla. 840, 26 Am. Rep. 709; *Davis v. Mann*, 48 Ill. App. 302. See also 1 Smith, Lead. Cas. pt. 11, p. 957, giving note to *Whitcomb v. Whiting*; Angell, Lim. 25 L. R. A.

6th ed. p. 269, and note at page 281 *et seq.*; 3 Parsons, Cont. 6th ed. p. 79 *et seq.*; Wood, Lim. Act. p. 605; *United States v. Wilder*, 80 U. S. 13 Wall. 254, 20 L. ed. 681; 3 Kent, Com. 50.

We have examined with care the cases upon the other side of this question, especially *Sigourney v. Drury*, 14 Pick. 387; *Quimby v. Putnam*, 28 Me. 419; *Hewlett v. Schenck*, 82 N. C. 234; *Moore v. Goodwin*, 109 N. C. 218; *Moore v. Beaman*, 111 N. C. 328; *Merritt v. Day*, 88 N. J. L. 82, 30 Am. Rep. 363; *Cox v. Bailey*, 9 Ga. 470, 54 Am. Dec. 858; *McClurg v. Howard*, 45 Mo. 365, 100 Am. Dec. 378; *Perkins v. Barstow*, 6 R. I. 505; *Woonsocket Inst. for Savings v. Ballou*, 16 R. I. 351, 1 L. R. A. 555. In the last-cited case, from 16 R. I. 351, 1 L. R. A. 555, the supreme court of Rhode Island, at page 147, after reviewing the cases in that state, says, "The cases are doubtless at variance with the rule now generally prevailing in the United States," and hold that the doctrine is too firmly established in that state to be altered except by a statute. In the case of *Hunter v. Robertson*, 80 Ga. 479, the court, while holding to the rule declared in *Cox v. Bailey*, 9 Ga. 467, 54 Am. Dec. 858, as to the effect of a payment by one of two joint obligors, refuse to extend the rule so as to affect indorsers or sureties, and express grave doubts as to the correctness of the rule as to joint obligors, and use this language: "But, again, if the principle is wrong when applied to joint makers,—and there is no doubt in my mind that it is,—shall we extend it to an indorser, on the same fallacious reasons." In the case of *McClurg v. Howard*, *supra*, Judge Bliss, delivering the opinion of the court, and referring to the case of *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95, says: "I confess it would be very difficult to reply to or resist the force of the reasoning of Judge Allen, who gave the opinion of a majority of the court in that case; and, were the question a new one in Missouri, I would favor the application of its doctrine to the present case, but the question was expressly decided the other way by this court in *Craig v. Callaway County Ct.*, 12 Mo. 94, and the decision was in accordance with the authorities at that time." And hence the question was considered as not an open one in Missouri. To the same effect is *Campbell v. Brown*, 86 N. C. 876, at pages 880, 882, 41 Am. Rep. 464.

And thus, upon examination of the authorities, we find, not only that the principle here contended for by the plaintiff is denied by the overwhelming weight of authority, but also that in some of the states where it is recognized as the law the courts continue to sustain it solely for the reason that it has been so decided in earlier cases.

The case of *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, is strongly urged upon us as being a case which, in effect, denies the doctrine of *Bell v. Morrison*, *supra*. There are some expressions in this case which give some foundation to the contention, but an examination of the case leads me to the conclusion that it was correctly decided for reasons which in no wise conflict with anything

said in *Bell v. Morrison*. The case arose in the state of Oregon, and the question was whether the payment by a principal suspended the running of the statute as to a surety. Of course, this called for a construction of the statute of Oregon. The statute in force was peculiar to that state and Minnesota. In each of those states the statute had been considered by their supreme courts, and held to mean that payment by any party upon an existing contract after it becomes due had the effect of causing the statute to run as to all the parties only from the date of the last payment. *Whitaker v. Rice*, 9 Minn. 14 (Gil. 1), 86 Am. Dec. 78; *Parillon v. Singer*, 2 Or. 307; *Sutherland v. Roberts*, 4 Or. 378. In these cases the peculiarities of the statute are pointed out and commented upon. We have hereinbefore quoted the present statute of Minnesota. A comparison of that statute

with the one existing at the time of the decision in 9 Minn. 14 (Gil. 1), will show the reasons for the different rulings in that state. See *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297.

Upon the whole case, I am of the opinion that the true construction of our statute (Rev. Stat. 1887, § 2881), is that given by the supreme court of Ohio in *Korper v. Wood*, 48 Ohio St. 621, 15 L. R. A. 656, viz.: "A payment, an acknowledgment, or a promise in writing will not avail to take a case out of the statutory bar, unless made by a party to be charged thereby, or an agent authorized for that express purpose."—and that *the judgment of the district court of the county of Laramie should be, in all respects, affirmed.*

**Groesbeck, Ch. J., and Conaway, J.,** concur.

### NEW HAMPSHIRE SUPREME COURT.

Daniel BARNARD, Attorney-General,

David A. TAGGART.

(.....N. H.....)

**Illness of the governor of the state which** disables him from performing the duties of his office constitutes a vacancy during which the president of the senate shall exercise the powers of the office, under Const., art. 49, making such provision "whenever the chair of the governor shall become vacant by reason of his death, absence from the state, or otherwise."

(April —, 1890.)

**A**PPPLICATION for a writ of mandamus to compel defendant, who was president of the senate, to assume the office of governor during the governor's alleged disability. *Judgment for plaintiff.*

Prior to March 31, 1890, D. H. Goodell, the governor of the state, became by reason of illness unable to perform the duties of his office. He requested the defendant, the president of the senate, to perform them in accordance with the constitutional requirements. The defendant, being doubtful whether or not the case came within the constitutional provisions, desired instructions from the supreme court as

to his duties. Thereupon the governor addressed to the attorney-general a letter requesting him to take the necessary steps to compel defendant to perform the duties. The attorney-general thereupon presented to the supreme court a petition asking for a writ of mandamus, or other appropriate or adequate process requiring defendant to exercise the powers and authorities of the governor during the vacancy, according to his duty in the premises. Defendant answered that he did not exercise the power of governor because his duty to do so was not settled by any adjudication or conclusive evidence of record. He stated that he was ready to do his duty, when he had authoritative evidence as to what it was, and submitted to the judgment of the court. Further facts appear in the opinion.

*Messrs. Daniel Barnard and R. M. Wallace* for plaintiff.

*Mr. David Cross* for defendant.

**Doe, Ch. J.,** delivered the opinion of the court:

"Whenever the chair of the governor shall become vacant, by reason of his death, absence from the state, or otherwise, the president of the senate shall, during such vacancy, have and exercise all the powers and authorities which, by this constitution, the

**NOTE.**—How far is sickness a vacancy in office authorizing performance of incumbent's duties by another.

This case seems to be the first one in which the question of the right of a subordinate officer to fill the place of the governor during the latter's sickness has been directly decided. There are, however, two cases in which dicta occur, one of which supports BARNARD V. TAGGART, and the other holds the opposite theory. In *State v. Graham*, 26 La. Ann. 568, 21 Am. Rep. 351, the court in discussing the question what absence from the state will authorize the lieutenant governor to assume the duties of the governor, says: "It is evident that if the lieutenant governor be authorized to exercise the functions of the governor during any temporary absence of the governor from the state, he

may also whenever the governor is unable to attend to the duties of his office because of sickness. We do not believe this to be the meaning intended by the framers of the constitution." The inability to discharge the duties of the office as well as the absence from the state spoken of in the constitution, is such as would affect injuriously the public interest. The mere absence within a few hours' run of the capitol would not by any possibility affect the public interest.

On the other hand the California court in *People v. Wells*, 2 Cal. 224, seems to be of the opinion that under the language of the California constitution the lieutenant governor would be authorized to exercise the duties of the governor in case of the latter's temporary disability.

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governor is vested with when personally present; but when the president of the senate shall exercise the office of governor, he shall not hold his office in the senate." Const. art. 49. From 1784 to 1792 the governor (then styled the "President of the State of New Hampshire") was president of the senate. Instead of his present power of vetoing or approving bills passed by the senate and house, he had "a vote equal with any other member" of the senate, and also "a casting vote in case of a tie," and when his office was vacant all his powers were exercised by "the senior senator." When the constitution took effect, and the legislature met for the inauguration of the new government, June 2, 1784, Meshech Weare, the governor elect, was unable to be present. In brief periods of his illness and absence, in June, 1784, and February, 1785, his duties were performed by Woodbury Langdon, senior senator, acting as governor *pro tem*. On both occasions Langdon presided in the senate, by virtue of his provisional tenure of the governor's office; and on the 8th of June, 1784, as governor, he sat with the council, and exercised the governor's power (with the required advice and consent of the council) of signing warrants for the payment of money out of the state treasury. The authority of this precedent has not been shaken, and it does not appear that the soundness of the contemporaneous construction has ever been doubted. "Where a word having a technical as well as a popular meaning is used in the constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the text suggests, that it is used in its technical sense." *Weill v. Kenfield*, 54 Cal. 111; *Sprague v. Norway*, 81 Cal. 178. Words used in a constitution should be construed in the sense in which they were employed. They 'must be taken in the ordinary and common acceptance, because they are presumed to have been so understood by the framers, and by the people who adopted it. . . . It . . . owes its whole force and authority to its ratification by the people, and they judged of it by the meaning apparent on its face, according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense.' *Manly v. State*, 7 Md. 135. *Miller v. Dunn*, 72 Cal. 462, 465. "The terms 'jury' and 'trial by jury' are, and for ages have been, well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. . . . At that date . . . no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices, had ever been known, or ever been the subject of discussion, in any country of the common law." *Opinion of the Justices*, 41 N. H. 551, 552. A similar narrowness of meaning has not been attached to "vacant by reason of his death, absence from the state, or otherwise." And, if the public service could be thrown into disorder by a rule of construction with which the people who adopted the constitution were not familiar, the law would not apply

a rule which they did not apply, but would carry into effect the understanding and intent of the voters who enacted article 49 for cases of necessity, and used "otherwise" in its comprehensive and usual sense. In the connection in which the word here occurs, "otherwise" includes the governor's physical disability, as equivalent, for the provisional purpose of this article, to his death or absence from the state. "The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. . . . We must presume that words have been employed in their natural and ordinary meaning. As Marshall, *Ch. J.*, says, the framers of the constitution, and the people who adopted it, 'must be understood to have employed words in their natural sense, and to have intended what they have said.' *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 188, 6 L. ed. 23, 68. This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often, by interested subtlety and ingenious refinement, to induce the courts to force from these instruments a meaning their framers never held, that it frequently becomes necessary to redeclare this fundamental maxim. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned or unlearned, may be able to trace the leading principles of government. . . . The real question is what the people meant, and not how meaningless their words can be made by the application of arbitrary rules." When there is doubt, evidence may be found in the primary and leading "object to be accomplished, or the mischief designed to be remedied or guarded against, by the clause in which the ambiguity is met with. 'When we once know the reason which alone determined the will of the lawmakers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent.' Smith, Stat. & Const. Constr. 634. . . . We have not thought it important to quote and to dwell upon those arbitrary rules to which so much attention is sometimes given, and which savor rather of the closet than of practical life. . . . They are more often resorted to as aids in ingenious attempts to make the constitution seem to say what it does not, than with a view to make that instrument express its real intent. All external aids, and especially all arbitrary rules, applied to instruments of this popular character, are of very uncertain value; and we do not regard it as out of place to repeat . . . that they are to be made use of with hesitation, and only with much circumspection." Cooley, Const. Lim. 69, 73, 75, 80, 101.

The primary and leading object of article 49 is evidence tending to show that the construction adopted in the first year of the constitution is correct. The mischief designed

to be prevented was the suspension of executive government by the governor's death, absence from the state, or disability. 9 Cong. Rec. pt. 1, 46th Cong. 1st Sess. pp. 184-189, 278-285, 287-293, 312-325, 341-355; *Opinion of the Court*, 60 N. H. 585. The prescribed remedy is the duty of a substitute to act in cases of necessity. The services of a substitute may be necessary when the governor's absence or disability is temporary as well as when it is permanent. When there is an office to which no one has a title, and which is in fact held by no one, there is a vacancy. *Johnston v. Wilson*, 2 N. H. 202, 203, 9 Am. Dec. 50; *Mechem*, Pub. Off. § 127. But, in article 49, "vacant, by reason of his death, absence from the state, or otherwise," has a broader signification if due weight is given to the evidential force of the primary and leading purpose that the executive work shall go on without interruption. An intermittent vacancy, such as occurred in the time of Governor Wear, may occur again; and the evils of an interregnum, which article 49 was intended to prevent, are not to be introduced by technical reasoning or arbitrary rules. "If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, . . . the objects for which it was given . . . should have great influence in the construction." *Gibbons v. Ogden*, *supra*. The general object of article 49 forbids a construction that would sometimes cripple the government, and render it powerless in a department in which the public safety requires constant readiness for action.

It is proved by medical testimony that the governor is still in the physical condition stated in his letter to the attorney-general, and that his disability may be reasonably expected to last a few weeks, and perhaps a few months. It is proved by the testimony of the secretary of state and the state treasurer that there is executive business demanding immediate attention, and that the governor's duties should no longer remain unperformed. The case being one of necessity, article 49 directs the president of the senate to exercise executive powers until the governor resumes them. The defendant being reluctant to act without an adjudication or some conclusive evidence of an emergency contemplated by that article, the governor requested the attorney-general to take the steps needed for the protection of public interests. There might be a case in which the attorney-general would intervene without such request. While a determination of the question of vacancy on a petition of this kind is not legally requisite to call the president of the senate to the executive chair, it may be a convenient mode of avoiding embarrassment that might sometimes arise from doubt and controversy in regard to his authority, and the validity of his acts. The existence of an executive vacancy is a question of law and fact within the judicial jurisdiction. If the defendant exercised executive power without a previous judgment on that question, the legality of his acts could be contested and determined in subsequent litigation, and the

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judicial character of the question does not depend upon the time when it is brought into court. With adequate legal process, the consideration and decision of such a question may be prospective as well as retrospective.

Mandamus "is a writ, in England, issuing out of the king's bench, in the name of the king, and is called a 'prerogative writ,' but considered a writ of right, and is directed to some person, corporation, or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate, specific remedy.

. . . . The theory of the British government and of the common law is that the writ of mandamus is a prerogative writ, and is sometimes called 'one of the flowers of the crown,' and is therefore confided only to the king's bench, where the king, at one period of the judicial history of that country, is said to have sat in person, and is presumed still to sit. And the power to issue this writ is given to the king's bench only, as having the general supervising power over all inferior jurisdictions and officers, and is coextensive with judicial sovereignty. And the same theory prevails in our state governments where the common law is adopted.

. . . . The power of issuing this writ is generally confided to the highest court of original jurisdiction." *Kendall v. United States*, 37 U. S. 12 Pet. 524, 614, 620, 621. 9 L. ed. 1181, 1216, 1218. "By the principles of the common law, . . . no court had a right to issue the prerogative writ of mandamus unless it was a court in which the judicial sovereignty was supposed to reside, and which exercised a general superintendence over the inferior tribunals and persons throughout the nation or state. In England this writ can be issued by the king's bench only. . . . The peculiar character and constitution of that court, from which it derives this high power, are so well known and familiar to every lawyer that it is scarcely necessary to cite authorities on the subject. Its peculiar powers are clearly stated in 8 Bl. Com. 42. . . . *Mr. Justice Buller*

. . . also places the right to issue this writ upon the peculiar and high powers of the court of king's bench. . . . In all of the authorities it is uniformly called 'a prerogative writ,' in order to distinguish it from the ordinary process which belongs to courts of justice; and it was not originally considered as a judicial proceeding, but was exercised as a prerogative power. In the case of *Awdeley v. Joy*, Poph. 173, *Doddridge, J.* said: 'This court hath power, not only in judicial things, but also in some things which are extrajudicial. The mayor and commonalty of Coventry displaced one of the aldermen, and he was restored; and this thing is peculiar to this court, and is one of the flowers of it.' These peculiar powers were possessed by the court of king's bench because the king originally sat there in person. . . . According to the theory of the English constitution, the king is the fountain of justice; and where the laws did not afford

a remedy, and enable the individual to ob-

tain his right by the regular forms of judicial proceedings, the prerogative powers of the sovereign were brought in aid of the ordinary judicial powers of the court, and the mandamus was issued in his name to enforce the execution of the law. And, although the king has long since ceased to sit there in person, yet the sovereign is still there in construction of law, so far as to enable the court to exercise its prerogative powers in his name; and hence its powers to issue the writ of mandamus, the nature of which *Justice Doddridge* so forcibly describes by calling it extrajudicial, and one of the flowers of the king's bench. . . . By the principles of the common law, this power would not be incident to any court which did not possess the general superintending power of the court of king's bench, in which the sovereignty might, by construction of law, be supposed to sit, and to exert there its prerogative powers in aid of the court, in order that a right might not be without a remedy." *Taney, Ch. J., in Kendall v. United States*, 37 U. S. 12 Pet. 524, 629, 680, 9 L. ed. 1181, 1222, 1223.

In the case mentioned by *Doddridge*, of an alderman wrongfully displaced, if the board was not judge of the election of its members, and no other tribunal was specially provided, the official title of the displaced member, like his title to land or chattels, was determinable in a court of general common-law jurisdiction, and could not be classed with extrajudicial questions without disregarding the nature of the subject, and the precedents of quo warranto. "A writ of quo warranto is in the nature of a writ of right, . . . against him who claims or usurps any office, . . . to inquire by what authority he supports his claim, in order to determine the right." 3 Bl. Com. 262. "As the election officers perform, for the most part, ministerial functions only, their returns, and the certificates of election which are issued upon them, are not conclusive, . . . but the final decision must rest with the courts. This is the general rule, and the exceptions are of those cases where the law under which the canvass is made declares the decision conclusive, or where a special statutory board is established with powers of final decision." *Cooley*, Const. Lim. 785; *Mechem*, Pub. Off. §§ 218, 480; *Shortt*, Extr. Legal Rem. chap. 8; *High*, Extr. Rem. § 684; *Robertson v. State*, 109 Ind. 79, 99. The forty-second article of the constitution provides that the returns of votes for governor shall be canvassed by the senate and house of representatives. The canvass is not conclusive, the power of final decision is not conferred upon a special statutory or constitutional board, and the controversy on matters of law and fact involved in disputed claims to the office is not an exception to the rule that judicial questions are settled by judicial decisions. A contested election of the chief executive magistrate is not selected and set apart as the only election case to be left undecided. "A mandamus, in modern practice, is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English 26 L. R. A.

crown. . . . But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable." *Kentucky v. Dennison*, 65 U. S. 24 How. 66, 97, 16 L. ed. 717, 725; *Gilman v. Bassett*, 83 Conn. 298, 805. Upon the American theory of government, the state being sovereign,—the people being the state, and all magistrates and public officers being "their substitutes and agents" (Bill of Rights, arts. 7, 8),—a mandamus properly issued by such agents in the name (Const. art. 87) and by the authority of the principal is not inferior to a prerogative writ issued in the name of the king by the king's bench, when the king sat there in person; and other legal process, properly issued by the same agents, and enforceable by the power of the same principal, is not less effective, in the business assigned to it, than a mandamus. All writs lawfully issued in the name of the state, and by its authority, are the state's commands, requiring something to be done by a sheriff or other official or unofficial person, and a division of such orders into superior and inferior classes may be misleading. As our common law furnishes all writs necessary for the furtherance of justice and the due administration of the laws, there can be no legal right without a remedy, and there is no occasion in this case to consider peculiar powers of the king's bench (continuously vested in this court since 1699), or to distinguish between ordinary and extraordinary process, or between prerogative and other powers. *Barty v. Walton*, 64 N. H. 102, 169-171, 178, 179. The statement that a mandamus can be granted, or a bill in equity can be maintained, when there is no other adequate remedy, may be understood in a sense at variance with New Hampshire law. There would be adequate remedies if a mandamus were unknown in England, and chancery had not been invented as a separate jurisdiction. "Mandamus," "trespass," and other names of ancient forms of action, are used here as references to the character of rights asserted, wrongs complained of, or remedies sought, in particular cases, but with no recognition of forms of action as tests or limitations of rights or remedies. When, as in this petition, with due precision and brevity, a plaintiff asserts a legal right, and an infringement of it, and asks appropriate relief, his case is decided on the facts proved, without a waste of time in the consideration of a form of action. *Gage v. Gage*, 66 N. H. 282, 283, 289, 293, 296. In a certain sense, the only form of action is a party's application for a judgment, and his averment of a ground on which he is entitled to it. In another sense, there is no form of action. When used in the technical sense that formerly prevailed, such terms as "assumpsit," "certiorari," and "mandamus" present an obsolete doctrine of procedure, and an inaccurate view of our remedial law. An exercise of judgment on a question of fact is frequently called "discretion" (*Bundy v. Hyde*, 50 N. H. 120; *Darling v. Westmoreland*, 52 N. H. 408, 18 Am. Rep. 55; *Eckstein v. Downing*, 64 N.

H. 259); and that question often is the justice, wisdom, or expediency of some course to be taken on an executive, judicial, or legislative subject, on which there may be no appeal or power of revision, *Ex parte Morse*, 18 Pick. 443, 446; *Boody v. Watson*, 64 N. H. 162, 166. The common council of a city may be compelled by mandamus to call a ward meeting for the election of an alderman. In *People v. Brooklyn*, 77 N. Y. 508, 511, 512, 83 Am. Rep. 659, it was held that the court was "justified in fixing the time for the election. The defendant, by its return, denied that there was a vacancy to be filled, and, although notified by the mayor of the necessity for an election, instituted no proceedings in regard to it. An order to proceed would have been nugatory, unless accompanied by special direction as to the time of the election. It is insisted, however, that this was within the discretion of the common council; and so it was, but the discretion was to be exercised, and not withheld. It was also to be so exercised that the order and election should be complete within the time provided. . . . And as it was obvious from the return that the discretion vested was to be abused, or so exercised as to work injustice, it was a matter to be considered by the court." "If the law requires a certain thing to be done, we may order it to be done by the party upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act, or even consider the matter, we may compel him to put himself in motion to do the thing but we cannot control his discretion." *Best, J.*, in *King v. Yorkshire N. R. Justices*, 2 Barn. & C. 286, 291. "Mandamus . . . extends to all cases of neglect to perform a legal duty, where there is no other adequate remedy. It applies to judicial as well as ministerial acts. If the duty be judicial, the mandate will be to the officers to exercise their official discretion or judgment without any direction as to the manner in which it shall be done. If it be ministerial, then the mandamus will direct the specific act to be performed. . . . Were application made to county commissioners to estimate damages caused by the laying out of a railroad, turnpike, or common highway, the duty required of them would be a judicial duty. If they refused or neglected to perform it, this court would issue a mandamus commanding them to do it; that is, to exercise their judgment upon the matter." *Carpenter v. County Comrs. of Bristol County*, 21 Pick. 268, 269.

In this case the inquiry is not whether the defendant can be compelled by mandamus to exercise the governor's powers in a particular manner (approve and sign a bill passed by the senate and house, concur with the council in the appointment of a justice of the peace and the pardon of a convict, or perform a ministerial act requiring no exercise of judgment), or whether the independence of each branch of the government shall be maintained in matters of law or fact which it is exclusively authorized to determine (*King v. Faneu*, 2 Barn. & C. 584, 596, 598; *Decatur v. Paulding*, 39 U. S. 14 Pet. 497, 25 L. R. A.

515-517, 10 L. ed. 559, 568, 569; *Kentucky v. Dennison*, 65 U. S. 24 How. 66, 106, 16 L. ed. 717, 729; *Cox v. United States*, 76 U. S. 9 Wall. 298, 312, 19 L. ed. 576, 583; *Cotten v. Ellis*, 52 N. C. 545, 550; *Cooley*, Const. Lim. 186), but whether there is a vacancy, during which it is the defendant's right and duty to act, under article 49, and whether the state shall have the executive service to which it is entitled. Between the governor's and the defendant's right to "exercise all the powers" of the governor's office, there is no difference that excludes this case from the jurisdiction in which the title of the office could be determined, if it were disputed. The duty of jurors may be made as imperative as that of conscripts (*Bowles v. Landaff*, 59 N. H. 191); and the state's right to the executive service of the president of the senate, under article 49, is no less enforceable than its right to the judicial service of a juror. There is no express or implied exemption of the executive substitute from the compulsion of legal process. "The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties. . . . the court having no appellate power for that purpose, but when they refuse to act in a case at all . . . a mandamus may be issued to compel them." *United States v. Black*, 128 U. S. 40, 48, 32 L. ed. 354, 357; *United States v. Baum*, 185 U. S. 200, 204, 24 L. ed. 105, 106. The law generally authorizes coercion when a public officer refuses to act in a particular case in which it is his duty to act. *Smith (N. H.) 482*; *Butler v. Selectmen of Pelham*, 19 N. H. 553; *Bullou v. Smith*, 29 N. H. 530; *School-Dist. v. Carr*, 63 N. H. 201; *School-District No. 3 in Greenfield v. Greenfield*, 64 N. H. 84; *Boody v. Watson*, 64 N. H. 162. His refusal to act in all cases is not an exception to the rule applicable to his refusal in a single case.

If the defendant were exempt from mandamus, there would be another question. "That a man who has a judgment for possession may enter without a writ [of possession] is common learning. . . . And why should the commonwealth, which cannot be disclaimed,—the whole people,—require the aid of an officer to give them actual possession, when it is not necessary in the case of an individual? The highest evidence of title that can exist is the solemn judgment of a court. When, then, this judgment says that the demanded premises, which were the property of A., have been forfeited by him, and have escheated, inured, and accrued to the government, if this be not evidence that his title was transferred to the government, we must abandon the idea of the absolute verity of judgments. . . . The issuing of a writ of possession on such a judgment was . . . not necessary to complete the absolute title of the government." *McNeil v. Bright*, 4 Mass. 282, 300-302. "The service of an *habere facias* is not necessary to perfect or complete the title evidenced by the judgment. It is a convenient process to enable a party having a judgment in a real action to avail himself of the power of the law to obtain a lawful and peaceable entry and

possession under his judgment title. It adds nothing to the strength of such title." *Oreighton v. Proctor*, 12 Cush. 433, 437; *Farwell v. Rogers*, 99 Mass. 33, 35. A decree that a deed "is hereby reformed," and "shall take and have effect, for all purposes, as if it had been originally made as now reformed," corrects the erroneous evidence of title without a writ of possession or an additional conveyance. *Winnipisseeogee Lake Cotton & Woolen Mfg. Co. v. Perley*, 46 N. H. 83, 109; *Boody v. Watson*, 64 N. H. 162, 182. In the construction of wills and trusts, and the location of boundaries, private ways, dams, and public waterways, declarative judgments may be complete remedies, settling controversies and removing doubts without the aid of the sheriff. Pom. Eq. Jur. § 171; *Wheeler v. Perry*, 18 N. H. 307; *Goodhue v. Clark*, 37 N. H. 525, 531; *Petition of Baptist Church and Soc. in Londonderry*, 51 N. H. 424; *Methodist Episcopal Soc. v. Harriman*, 54 N. H. 444; *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171; *Marcy v. Amazeen*, 61 N. H. 131, 60 Am. Rep. 320; *Gardner v. Webster*, 64 N. H. 520, 522, 523; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 19, 20. What trees a tenant for life can cut without committing waste may be judicially determined before they are cut as well as afterwards. *Bennett v. Danville*, 56 N. H. 216. A judgment establishing his right to cut all trees of a certain description,

or all on a certain lot, would not be carried into effect by legal process. A common-law award is a judgment, and by such judgment a title or right may be determined without subsequent process of enforcement. *Truendale v. Straw*, 58 N. H. 207, 213. A real action lies for a remainder in fee expectant upon a life estate. Although the tenant for life cannot be ousted, and a judgment against a claimant of the remainder cannot be enforced by any process that will give the plaintiff the occupation, use, or income of the land during the life of the tenant, justice may require adjudication of the disputed title of the remainder. *Walker v. Walker*, 68 N. H. 321, 323, 324, 327, 56 Am. Rep. 514.

If a judgment for the state in this case could not be carried into execution by a writ of mandamus, the plaintiff might contend that the suit should not be dismissed for want of jurisdiction. An amendment of the petition could raise the question whether the best procedure would enable the state to obtain a judgment establishing the fact of an executive vacancy, and the public right to the defendant's service as a substitute. A decision of this question might be as important as the establishment of a private right by a declarative judgment.

*Judgment for the plaintiff.*

All concurred.

## CONNECTICUT SUPREME COURT OF ERRORS.

Mary E. GREGORY, *Appt.*,

v.

Frank LEE.

(.....Conn.....)

**A minor leasing rooms for a year while attending college** is bound on the ground that the lodging is a necessary only to pay for the time he continues to occupy them, and may terminate the lease at any time.

(June 20, 1894.)

**A PPEAL** by plaintiff from a judgment of the Court of Common Pleas for New Haven County in favor of defendant in an action brought to recover rent alleged to be due and unpaid. *Affirmed*.

The facts are stated in the opinion.

**Mr. Talcott H. Russell**, for appellant:

Education is a necessary and for that purpose the infant may enter into fair and suitable contracts if necessary for an entire year.

See 1 Roll, 729; 8 Comyn, Dig. 563; *Pickering v. Gunning*, Pal. 523; *Chapple v. Cooper*, 18 Mees. & W. 252; *Squier v. Hyalif*, 9 Mich. 274.

A lease may of itself be a necessity.

**Wood**, Land. & T. § 108, p. 146; Co. Litt.

172 a; Taylor, Land. & T. § 96, p. 76; *Lous v. Griffiths*, 1 Hodges, 80, 1 Scott, 458; *Peters v. Fleming*, 6 Mees. & W. 42; *North Western R. Co. v. McMichael*, 5 Exch. 113, 125.

Our law is laid down in *Riley v. Mallory*, 33 Conn. 206; 1 Swift, Dig. 52.

The rule that an infant's contracts are voidable is one made for his protection. Where it is necessary for him to have power to make contracts the law will allow him to make them.

*Chapple v. Cooper*, *supra*.

**Messrs. Watrouse & Buckland and Harry G. Day**, for appellee:

To every perfect contract there must always be (1) subject-matter; (2) consideration; (3) meeting of the minds; (4) parties capable, in contemplation of law, to contract.

1 Parsons, Cont. 8.

But "the law assumes the incapacity of an infant to contract."

*Riley v. Mallory*, 33 Conn. 206.

Therefore, where an infant is a party, one element of a perfect contract is missing and it is an anomaly to say that there is any contractual obligation on his part. The contract, so far as there is a contract, is a unilateral one, binding only on the adult and voidable by the infant at any time.

*Shipman v. Horton*, 17 Conn. 481; *Mustard*

**NOTE.**—The above case makes an important distinction upon the question how far lodgings are a necessity for which an infant may make a valid contract.

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As to the general question of what are necessities, see notes to *Kilgare v. Rich* (Me.) 13 L. R. A. 859, and *Askey v. Williams* (Tex.) 5 L. R. A. 176.



*v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209; *Thompson v. Hamilton*, 12 Pick. 425, 28 Am. Dec. 619; *Cannon v. Alsbury*, 1 A. K. Marsh. 76, 10 Am. Dec. 709; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496.

Whatever enforceability a transaction with an infant may have is due solely to the operation of law, and not to any act of the infant, and the only obligation which the law implies is the obligation to pay the reasonable value of necessities actually supplied.

*Barnes v. Barnes*, 50 Conn. 572; Keener, Cases on Quasi Contracts, pp. 20, 21; 1 Parsons, Cont. \*318; *Trainer v. Trumbull*, 141 Mass. 527; *Parsons v. Keys*, 48 Tex. 557; Schouler, Dom. Rel. \*555; Bishop, Cont. §§ 86, 266; Tyler, Infancy & Coverture, § 60.

An infant is not liable on his executory agreement to take and pay for necessities to be supplied.

*Catlin v. Haddox*, 49 Conn. 492; Lawson, Cont. § 136; 2 Greenl. Ev. § 387; *Fleener v. Dickerson*, 72 Ala. 318; 1 Parsons, Cont. 8th ed. \*321, 326, note 1; *Pool v. Pratt*, 1 D. Chip. 264; Bishop, Cont. §§ 265, 267; *Minock v. Shortridge*, 21 Mich. 304; *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 514; *Gaffney v. Haydon*, 110 Mass. 187, 14 Am. Rep. 580; 1 Am. Lead. Cas. Hare & Wallace notes, pp. 109, 110.

Even if assumpsit would lie it must in addition be shown to maintain this action that the room was a necessary.

The fact that he obtained and was occupying a suitable room elsewhere during this time disposes of this question, for those things with which an infant is already supplied are not necessities.

*Conboy v. Howe*, 59 Conn. 112; *Trainer v. Trumbull*, 141 Mass. 527; Pollock, Cont. \*50; *Barnes v. Toye*, L. R. 18 Q. B. Div. 410; *Johnson v. Lines*, 6 Watts & S. 80, 40 Am. Dec. 542.

An infant is liable on his lease only while he is in possession and then only for a reasonable price.

*Ketley's Case*, Brownlow & Goldsborough's Rep. 120; *Blake v. Concannon*, 4 Ir. C. L. Rep. 323; *North Western R. Co. v. McMichael*, 5 Exch. 114; Taylor, Land. & T. § 96; 1 Keener, Cases on Quasi Contracts, 514; *Holmes v. Blogg*, 8 Taunt. 508.

It makes no difference how near to full age an infant may be nor what is his actual capacity in fact.

1 Parsons, Cont. \*295; Lawson, Cont. § 129.

The fact that an infant has an allowance and is not under the immediate direction and control of his parent does not confer upon him any capacity to make a contract.

1 Parsons, Cont. \*311; Lawson, Cont. § 129.

Evidence of custom is not admissible to contradict a positive rule of law.

*Barnard v. Kellogg*, 77 U. S. 10 Wall. 384, 391, 19 L. ed. 987, 989, 990.

The fact that a contract may be beneficial to an infant does not make it binding upon him. The privilege of avoidance still remains.

*Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; 1 Parsons, Cont. \*295, note u; 1 Am. Lead. Cas. Hare & Wallace notes, pp. 203, 204.

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*Torrance, J.*, delivered the opinion of the court:

The complaint in this case alleges that on the 1st of June, 1892, the defendant being a student in Yale College, entered into a contract with the plaintiff, by which he leased a room for the ensuing college year of forty weeks, at an agreed rate of \$10 per week, payable weekly, and immediately entered into possession of said room, and has neglected and refused to pay the rent of said room for the ten weeks ending February 7, 1893.

The answer, in substance, is as follows: On or about September 15, 1892, the defendant agreed to lease a room in the house of the plaintiff for the ensuing college year of forty weeks, at the agreed rate of \$10 per week, payable weekly; that he then entered into possession of said room, and occupied it until December 20, 1892; that on said day he gave up possession of said room, and ceased to occupy the same, and then paid to the plaintiff all he owed her for such occupation and possession up to that time; that immediately thereafter he engaged at a reasonable price another suitable room elsewhere, and continued to possess and occupy the same till the end of said college year; that during all of said period he was a minor, and a student in said college; and that on December 20, 1892, he refused to fulfill said agreement with the plaintiff to occupy or pay for said room for the remainder of said forty weeks, and has always refused to pay for the time during which he did not possess or occupy said room. The reply to the answer was as follows: "Paragraph 1. Plaintiff admits all the allegations of said defense. Par. 2. Defendant, at the time of making said contract, was between nineteen and twenty years of age. Par. 3. Defendant and his parents are residents of the island of Trinidad. His father makes him an annual allowance, out of which he is expected to defray all his college expenses, including room and board, transacting the business incidental thereto in his own name, and not on account of his father. Par. 4. It is the general custom among students and lodging house keepers to rent rooms for the college year of forty weeks, and students also usually contract for and pay tuition by the year. Defendant, at the time of renting said rooms, had contracted for his tuition during the college year. Par. 5. The rent charged for the room was fair and reasonable, and was suitable to his necessities as a student and to his condition in life. It was also necessary for him to have a room as a place of lodging and study during his college year. Par. 6. Defendant could not have obtained a room equally suitable for his purpose, nor on such advantageous terms, if he had not contracted for the year, except by going to a hotel, and paying the usual charges made by hotels for such period as he wished to stay. The cost of this would have been considerably greater. Par. 7. Owing to the customs above noted, the plaintiff cannot rent her room for the balance of the year, and will be subjected to great loss, unless defendant is compelled to pay rent for the balance of said period." There was also filed in the case a second defense and a reply to the same, which, in view of the conclusion reached upon the first

defense and the reply thereto, need not be considered. To the reply above set out the defendant demurred specially, the court below sustained the demurrer, and judgment was rendered for the defendant. The sole reason of appeal is the claimed error of the court in sustaining the demurrer.

Upon this appeal the facts stated in the answer, and also in the reply so far as the same are well pleaded, must be taken to be true. It thus appears that the defendant, a minor, agreed to hire the plaintiff's room for forty weeks at \$10 per week, and that he entered into possession and occupied it a part of said period; that he gave up and quit possession of the room, and refused to fulfill said agreement, on the 20th of December, 1892, paying in full for all the time he had occupied it; that he has never occupied it since, but has been paying for and occupying a suitable room elsewhere. Under the facts stated, it must be conceded that this room, at the time the defendant hired it, and during the time he occupied it, came within the class called "necessaries," and also that to him during said period it was an actual necessary, for lodging comes clearly within the class of necessities; and the room in question was a suitable and proper one, and during the period he occupied it was his only lodging room. "Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt." *Chapple v. Cooper*, 18 Mees. & W. 252; 1 Swift, Dig. 52. So long then as the defendant actually occupied the room as his sole lodging room it was clearly a necessary to him, for the use of which the law would compel him to pay; but, as he paid the agreed price for the time he actually occupied it, no question arises upon that part of the transaction between these parties. The question now is whether he is bound to pay for the room after December 20, 1892. The obligation of an infant to pay for necessities actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all. *Dyman v. Cain*, 48 N. C. 111. And where an infant agrees to pay a stipulated price for such necessities, the party furnishing them recovers not necessarily that price, but only the fair and reasonable value of the necessities. *Earle v. Reed*, 10 Met. 387; *Barnes v. Barnes*, 50 Conn. 572; *Trainer v. Trumbull*, 141 Mass. 537; Keener, Cases on Quasi Contracts, p. 20. This being so, no 25 L. R. A.

binding obligation to pay for necessities can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessities. For the purpose of this case, perhaps, we may regard the transaction which took place between these parties in September, 1892, either as an agreement on the part of the plaintiff to supply the defendant with necessary lodging for the college year, and on the part of the defendant as an executory agreement to pay an agreed price for the same from week to week; or we may regard it as what, on the whole, it appears the parties intended it to be, a parol lease, under which possession was taken, and an executory agreement on the part of the defendant to pay rent. If we regard it in the former light, then the defense of infancy is a good defense; for in that case the suit is upon an executory contract to pay for necessities which the defendant refused to take, and never has had, and which, therefore, he may avoid. If we regard the transaction as a lease under which possession was taken, executed on the part of the plaintiff, with a promise or agreement on the part of defendant to pay rent weekly, we think infancy is equally a defense. As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory. *Riley v. Mallory*, 83 Conn. 201. The alleged agreement in this case does not come within any of the recognized exceptions to this general rule. "An infant lessee may also avoid a lease, although it is always available for the purpose of vesting the estate in him so long as he thinks proper to hold it. . . . As to his liability for rent, or the performance of the stipulations contained in the lease, he is in the same situation, with respect thereto, as in case of any other contract; for he may disaffirm it when he comes of age, or at any time previous thereto, and thus avoid his obligation." Taylor, Land. & T. § 96. In this case the defendant gave up the room and repudiated the agreement, so far as it was in his power to do so, in the most positive and unequivocal manner. The plea of infancy, then, under the circumstances must prevail, unless the matters set up in the reply make the facts set up in the answer unavailable in this case. Upon this point, without dwelling in detail upon the matters set up in the different paragraphs of the reply, we deem it sufficient to say that neither singly nor combined do the matters so set up constitute a sufficient reply to the answer.

*There is no error.*

The other Judges concurred.

## SOUTH DAKOTA SUPREME COURT.

City of SIOUX FALLS, *Appl.*,

v.

Joe KIRBY, *Resp't.*

(.....S. Dak. ....)

\*1. An action to recover a penalty prescribed by a municipal ordinance, not made a criminal act by the general law of the state, but forbidden by such ordinance, is a civil action, and may be brought to this court by appeal.

2. A municipal corporation possesses the following powers, and no others: First, those granted in express terms; second, those necessarily and fairly implied, or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

3. The right of a party to exercise dominion over his own property, and to build upon and improve the same, in accordance with the general laws of the land and municipal ordinances applicable alike to all citizens of a city, is secured by the fundamental principles of the constitution; and he cannot be compelled by the municipal government under which he lives to hold that right subject to the power of granting or refusing a permit to build upon or otherwise improve his property, vested in a city building inspector, from whose decision there is no appeal.

4. An ordinance of the city of Sioux Falls which prescribed that before any person can erect any building, or any addition thereto, within the city limits, he must first apply to and obtain from the city building inspector a permit, and who may grant or refuse such permit, and from whose decision there is no appeal, and which subjects such party to a penalty in case he builds without such permit, violates the constitutional rights of the citizen, in that it makes the right of the owner of property to improve and use the same dependent upon the decision of the city building inspector, and is therefore void. Keilam, J., dissents, on the ground that the ordinance in question does not contemplate or allow the inspector to arbitrarily grant or refuse a permit, but authorizes him to decide whether the proposed building will not conform to the requirements of the ordinance, and upon such decision to grant or withhold such permit.

(October 4, 1894.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Minnehaha County reversing a judgment of the City Police Court convicting defendant of the violation of a city ordinance. *Affirmed.*

The facts are stated in the opinion.

Mr. D. E. Powers, for appellant;

The ordinance in question prescribes just

\*Headnotes by CORSON, P. J.

**NOTE.**—As to the power of a municipality to prescribe the character of buildings to be erected within fire limits, see *note* to *Olympia v. Mann* (Wash.) 12 L. R. A. 150.

For power to delegate municipal authority to license, see *note* to *St. Louis v. Russell* (Mo.) 20 L. R. A. 721.

25 L. R. A.

how a building outside of the fire limits shall be constructed, and it also provides that any person constructing a building outside of the fire limits in compliance with the ordinance which is uniform, shall upon the payment of the fees be entitled to his permit. An ordinance of this character was sustained in *Welch v. Hotchkiss*, 89 Conn. 141.

Mr. Joe Kirby, for respondent:

The ordinance in question was void. First, the city had no power under the act creating it to require defendant to procure a building permit.

A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the power expressly granted; third, those absolutely essential to the declared object or purpose of the corporation—not simply convenient but indispensable; and any fair doubt as to the existence of a power is resolved by the court against the corporation.

*Treadway v. Schnauber*, 1 Dak. 227; *Vincent v. Nantucket*, 12 Cush. 103; *Clark v. Davenport*, 14 Iowa, 494; *Clark v. Des Moines*, 19 Iowa, 199; *Minturn v. Larue*, 64 U. S. 23 How. 435, 16 L. ed. 574; *Bank of Chillicothe v. Chillicothe*, 7 Ohio, pt. 2, p. 31, 80 Am. Dec. 185; *Collins v. Hatch*, 18 Ohio, 528, 51 Am. Dec. 465; *Sharp v. Speir*, 4 Hill, 76; *Ham v. Miller*, 20 Iowa, 450.

Section 101 of the city ordinance of Sioux Falls, provides a graduated tax ranging from one dollar up, according to the value of the improvement. This is a tax and not a registration fee.

*Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Dunham v. Rochester Trustees*, 5 Cow. 462; *Mays v. Cincinnati*, 1 Ohio St. 268; *Gale v. Kalamazoo*, 23 Mich. 844, 9 Am. Rep. 80; *St. Paul v. Traeger*, 25 Minn. 248, 38 Am. Rep. 462; *St. Paul v. Stoltz*, 33 Minn. 238.

A municipal corporation can exercise no power of taxation unless such power is expressly conferred upon it by the legislature.

*State v. Smith*, 81 Iowa, 493; *Davenport v. Mississippi & M. R. Co.* 12 Iowa, 539.

There is also another reason why the ordinance in question is void. The building inspector must be satisfied; if he is satisfied the building may go on. If he is not satisfied it must stop. He is made sole judge of the matter, and it is his satisfaction or disapproval which will constitute or not the offense, and it is his approval or disapproval which will make the act a crime. It is not made a crime to erect a building dangerous or otherwise, but it is made such not to have the inspector's approval.

An ordinance to be valid must leave no discretionary power vested in the officer whose duty it is to execute it. The ordinance must specify the condition on which the license if any is required, should be granted, and the

As to constitutionality of laws charging the expense of police regulations upon the business to be regulated, see *note* to *Pittsburgh, C. & St. L. R. Co. v. State* (Ohio) 16 L. R. A. 360.

officer should merely be intrusted with the duty of issuing the license to all who shall comply with the conditions.

*State v. Tenant*, 15 L. R. A. 423, 110 N. C. 609; *State v. Hunter*, 8 L. R. A. 529, 106 N. C. 796; *State v. Webber*, 107 N. C. 962; *Bills v. Goshen*, 8 L. R. A. 261, 117 Ind. 221; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Baltimore v. Radecke*, 49 Md. 217; *Richmond v. Dudley*, 13 L. R. A. 587, 129 Ind. 112; *Newton v. Belger*, 143 Mass. 598; *Anderson v. Wellington*, 2 L. R. A. 110, 40 Kan. 178.

**Corson, P. J.**, delivered the opinion of the court:

The respondent and defendant was arrested and tried upon a complaint charging him, in substance, with having willfully refused to take out a building permit and to pay the prescribed fee therefor, after being requested so to do by the building inspector of the city of Sioux Falls, contrary to the ordinance of said city. The respondent was convicted in the city police court, but on appeal to the circuit court he was acquitted; that court holding that the provisions of the ordinance requiring a party to take out a permit, and pay a fee therefor, were void. The case was brought to this court from the circuit court by appeal.

The respondent moved in this court to dismiss the appeal upon the ground that the case should have been brought to this court by writ of error, and not by appeal. In a similar case (*Huron v. Carter* [S. Dak.] 57 N. W. Rep. 947) this court held that the act charged, not being punishable by imprisonment, was properly brought to this court by appeal. Following the decision of that case, the motion to dismiss upon that ground is denied.

The respondent relied on his motion to dismiss the appeal upon the further ground that the notice of appeal was not properly served upon the clerk of the circuit court; but after a careful examination of the affidavits read on the hearing, and the original records in this court, we are inclined to the opinion that the notice of appeal was properly served, and so hold. The only question that we shall consider on this appeal is the one upon which the circuit court ruled, namely, that so much of the city ordinance as required the respondent to take out a permit, and pay the prescribed fee therefor, was void.

Section 100 of the ordinance reads as follows: "Building Permits.—Any person desiring to erect, alter, or repair any building to be used exclusively not for business purposes, shall apply to said building inspector for a permit for such purpose and furnish him a written statement showing the location, dimensions and manner of construction of the proposed building, stating the material to be used, and manner of construction of chimneys and stove pipe connections, and exhibit to said inspector any plans or specifications of the same which he may have. If satisfied that such building, alteration, or repair is in compliance with the provisions of this chapter, the building inspector shall give his permit for such proposed building or struc-

ture on payment of the fees prescribed in the next section." Section 101 of the ordinance prescribed the fee to be paid for such permit, being from \$1 to \$4 for buildings not exceeding in value \$5,000, and 50 cents additional for each \$1,000 above \$5,000, with certain exceptions not necessary now to be noticed, and section 126 provides that a fine not less than \$5 nor more than \$100 may be imposed for a violation of the ordinance. The learned counsel for the respondent contends that the city council has no power under the act of 1890 providing for the incorporation of cities, to require the respondent to procure a building permit, and pay the prescribed fee therefor. He admits that, under the power conferred upon the city council by the statutes of this state, it has power to pass ordinances to prevent the construction of buildings having dangerous chimneys, etc., within the city limits, and to provide penalties for the violation of such ordinances; but he contends that in this case there is no charge that respondent has erected any defective chimney or other appliance in violation of any ordinance, and that, therefore, no offense is charged. We are inclined to agree with counsel in his contention.

By chapter 87, article 5, Laws 1890, it is provided that: "The city council shall have the following powers, . . . (50) To prescribe the limits within which wooden buildings shall not be erected or placed or repaired without permission, and to direct that all and any buildings within said limits (which shall be known as the fire limits), when the same shall have been damaged by fire, decay, or otherwise, to the extent of fifty per cent of the value, shall be torn down or removed, and to prescribe the manner of ascertaining such damage. (51) To prevent dangerous construction and condition of chimneys, fire places, hearths, stoves, stove pipes, ovens, boilers, and apparatus used in and about any building and manufactory, and to cause the same to be removed or placed in a safe condition where considered dangerous; to regulate and prevent the carrying on of manufactories dangerous in causing and promoting fires; to prevent the deposit of ashes in unsafe places, and cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition."

Mr. Dillon, in his work on Municipal Corporations, defining the powers of such corporations, says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily and fairly implied, or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." 1 Dill. Mun. Corp. 4th ed. § 89, and cases there cited. And this is substantially the rule as laid down in *Treadway v. Schnauber*, 1 Dak. 237, by the late territorial supreme court. It will be observed that no power is expressly granted to the city council to require of a party desiring to construct a building, or an addition to one existing, to procure a permit therefor, and that no

express power is conferred upon the city council to require a fee to be paid for a permit. The city council, by the ordinance in controversy, it will be noticed, has not only assumed to require a permit to be procured for the erection of any building or structure within the city limits, and to require a fee to be paid therefor, but has provided that this permit can only be obtained from the inspector when he is "satisfied that such building, alteration, or repair is in compliance with the provisions" of that chapter. The ordinance is therefore much broader and more comprehensive in its scope than the power conferred by the statute referred to, and cannot be justified, it seems to us, as a reasonable exercise of the authority conferred by the statute. The right of a person to use and improve his property as he may deem proper, consistent with law, is a constitutional right, of which he cannot be deprived at the mere will and pleasure of a city council, or of any officer appointed by it. While the city council may pass any ordinance that may be proper and necessary as to the manner of constructing buildings, chimneys, and other fire apparatus so as to protect the residents of the city from the dangers of fire, and may prescribe such penalties for the violation of the same as are within the limits provided by statute, it cannot impose upon the citizen unnecessary burdens, and in effect permit him to improve his property, or refuse to permit him so to do, as the building inspector may determine. Section 100 of the ordinance does not contain any regulations to guide the landowner in the construction or alteration of a building upon his land, but requires of such landowner, before any such building can be constructed or alteration made, that he must apply to the inspector for a permit, which he is required to give when he is satisfied that such building or alteration is in compliance with the ordinance. It does not merely forbid the erection of any building which is hazardous, or which exposes property or persons to danger from fire; but it requires of the landowner that he obtain a permit from the inspector, and pay the prescribed fee therefor, which may be granted or withheld by such inspector, as he may or may not be satisfied that the building complies with the requirements of the ordinance, which, as we have seen, makes no provisions as to what shall be deemed necessary to constitute a safe construction. It is clear that the ordinance in controversy, upon its face, attempts to restrict the right of dominion which every individual possesses over his property, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own property depend upon the arbitrary will of the city inspector, and therefore makes the right of the citizen to use his property subject to the will of such inspector, from whose decision no appeal is given. Such an ordinance cannot be sustained. Its provisions are not necessarily or fairly implied from, or incidental to the power granted the city council. *Fick Wo v. Hopkins*, 118 U. S. 356, 80 L. ed. 220; *Newton v. Belger*, 143 Mass. 598; *State v. Tenant*, 110 N. C. 609, 15 L. R. A. 423; *State v. Webber*, 107 N. C. 962; *Bills v.* 25 L. R. A.

*Goshen*, 117 Ind. 221, 3 L. R. A. 261; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110; *May v. People*, 1 Colo. App. 157; *Tugman v. Chicago*, 78 Ill. 405.

We cannot close the discussion of this section of the ordinance better than by quoting the vigorous language of *Mr. Justice Matthews* in the case first above cited. He says: "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men,' for the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Section 101 of the ordinance is equally objectionable. While it does not in terms impose a tax upon the landowner who desires to improve his property, it in effect does so. The office of building inspector is created, and he is clothed with certain powers, not alone for the benefit of those who are about to erect buildings, but for the benefit of the citizens of the municipality generally; and to require a person, before he can be permitted to improve his property, to pay for a permit which is not required of the other residents, imposes a burden upon him not imposed upon the citizens generally. Such a burden cannot be imposed except by express authority. We know of no reason why a landowner should be required to pay a fee for the privilege of improving his property that might not be applied to the removal of a person from one part of the city to another, or to the renting or any other use of property. We are of the opinion that no such fee can be legally required, in the absence of an express legislative power authorizing its collection.

Our conclusions are that the circuit court ruled correctly, and properly instructed the jury to find a verdict for the respondent.

*The judgment of the Circuit Court is affirmed.*

**Fuller, J.**, concurs.

**Kellam, J.**:

I dissent. The law of the opinion is abstractly correct, but I think it is misapplied to this case. No one at this day will question the power of the legislature to prohibit the erection of buildings constructed of wood or other inflammable material within the limits of a city. It is a police regulation often demanded by considerations of public safety. In such cases the convenience of the individual citizen must give way to the safety of the public. Nor can it be doubted that such power can be delegated to municipalities. They are but subdivisions of the state, created by the state, and upon them

the state confers a portion of its sovereignty to enable them to control their local affairs. Among the powers so generally conferred is the right to protect property from destruction by fire, by prohibiting the erection of combustible and dangerous buildings within the limits of such municipality, or within more circumscribed limits, to be designated by the governing body of such municipality. This is all plain enough, but the majority of the court is of the opinion that this particular ordinance is invalid because it subordinates the right of the individual landowner to improve his property, by building thereon, to the arbitrary will of a building inspector, in that it requires the landowner, as a condition precedent to the erection of such building, to make a statement to such inspector of the character and location of the building he proposes to erect, the material to be used, and how the chimneys are to be constructed, and then that such inspector may refuse a permit for such building, and thus prevent its erection, unless he is satisfied that such building is to be constructed "in compliance with the provisions of this chapter." I think the mistake of the opinion is in considering the power thus conferred upon the inspector an arbitrary one. The language of this section plainly implies that this particular provision is supplementary to other sections of this "chapter," which prescribe general regulations concerning material to be used, and manner of construction, and with them the statement of the landowner as to his proposed building is to be compared, and, "if satisfied that such building is [will be] in compliance" with the requirements of such chapter, "the inspector shall give his permit for such proposed building, on payment of the fees prescribed in the next section." It cannot be contemplated that his decision will be arbitrary or willful or capricious. It is to be the exercise of a quasi judicial function by a sworn and bonded public officer. In this respect he is put upon the same footing as many other ministerial or executive officers who are required to pass upon acts or instruments, and govern their conduct accordingly. Statutes have often forbidden the doing of acts otherwise lawful, such as selling intoxicating liquors, except when certain preliminary conditions exist or have been complied with, and have committed to local boards and officers the right and duty of granting or refusing permits or licenses therefor, according as they are or are not satisfied that such prescribed conditions exist, or have been conformed to by the applicant, but such laws have not been held invalid because under them such board or officer might capiously refuse to be satisfied. If the objection is good at all, it would be equally good as against the exercise of such power by the common council of the city, for the objection is to the nature of the power, and not to the character of the party exercising it. In the cases cited in the majority opinion the ordinances condemned contained no such element as appears in this. There were no general regulations applicable to all proposed buildings, as to material or construction, to guide and control the inspector; but the power of determining

whether or not a permit to build should be granted was left to the unqualified, unguided, and therefore arbitrary will of the council or inspector. In *State v. Tenant*, a North Carolina case, found in 110 N. C. 609, 15 L. R. A. 423, and cited in the opinion, the ordinance was this: "That no person, firm or corporation shall build or erect within the limits of the city, any house or building, of any kind or character, or otherwise add to, build upon or generally improve or change, any house or building, without having first applied to the alderman and obtained a permission for such purpose." The court, it seems to me, rightly held the ordinance void because "it prescribed no general rule for the exercise of discretion in granting permits," but allowed the granting of a permit to one, and the refusal to another, under precisely the same conditions, with no reason therefor but the irresponsible and arbitrary will of a majority of the aldermen. In *Newton v. Belger*, 143 Mass. 598, the ordinance was as follows: "No person shall erect, alter or rebuild, or essentially change any building or any part thereof, for any purpose other than a dwelling house, without first obtaining in writing a permit from the board of aldermen. The application for such permit shall specify the location and size of the building, the material of which it is to be constructed and the use for which it is intended." This ordinance was held void on the same ground stated in the North Carolina case, the court remarking, "Under the ordinance they may refuse a permit because, in their opinion, it is desirable that certain parts of the city shall be used only for handsome dwelling houses." These cases are representative of their class, but I discover nothing in them that requires the condemnation of an ordinance that first prescribes general and uniform rules regulating the kind of buildings that may and may not be erected, and then merely intrusts to an officer qualified by an oath and bond the duty of issuing permits to all who satisfy him that their proposed buildings will comply with the prescribed conditions. To me the ordinance does not seem obnoxious to the objection urged against it.

I also dissent from the second proposition of the opinion, which denies the right of the city to require the payment of a fee upon the issuance of a permit. While the specific power to demand such fee may not be found, in express terms, in the law under which the city is organized, I think it is there by intendment. The legislature having conferred upon the city, as a part of its police functions, the power of prescribing the kind and character of buildings that may be erected within its limits, as a prudential safeguard against the general destruction of property by fire, and the common council having, as a means of executing such general power, provided, by an ordinance regulating the matter of the construction of buildings, that the building inspector should issue a permit whenever, upon examination, it appeared that the conditions of such ordinance were complied with, it does not seem to me beyond the power of the city, as contemplated and

intended by the legislature, to exact a reasonable fee upon the issuing of such permit. Such fee is not intended, nor should it be considered or treated, as a tax. It is simply an expense incurred at the instance of the proposed builder, in a manner and for a purpose authorized, as I think, by the statute and the city ordinance,—an expense incurred in obtaining his permit to build, the reasonable cost of which may properly be charged to the person procuring it, as in many other cases in the exercise of its police power the

municipality requires the payment of a fee by a party securing a permit or license. This question, in the precise phase in which it is here presented, was discussed and decided in *Welch v. Hotchkiss*, 89 Conn. 140. The reasoning and conclusion of that court commends itself to my judgment, and is adverse to the views of this court. There may be grounds upon which this judgment ought to be affirmed. I merely dissent, in justice to my own views, from the opinion of the court affirming upon the grounds stated.

## NEW YORK COURT OF APPEALS.

Susan A. PHELPS, *Resp.*,

v.

John W. PHELPS *et al.*, *Appts.*

(448 N. Y. 197.)

**A woman cannot under the New York statutes enforce dower rights in land purchased with her husband's money and conveyed to a third person, who has contracted in writing to permit the husband to receive all the benefit of and have full control over the property.**

(October 9, 1894.)

**APPEAL** by defendant from an order and judgment of the General Term of the Supreme Court, Second Department, affirming an interlocutory judgment entered in the office of the clerk of Kings County, overruling demurrers to the complaint, in an action brought to establish dower rights in certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. Herbert T. Ketcham, with Mr. Albert G. McDonald, for appellants:

A widow shall be endowed of a third part of all the lands whereof her husband was seised of an estate of inheritance at any time during marriage.

Statute of Estates in Dower, § 1.

Seisin in the husband is the first essential of the right of dower.

Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.

Statute of Uses & Trusts, § 51.

The agreement and arrangement under which Lewis is alleged to have taken title did not vest any legal estate in the defendant Phelps.

"Every person who by virtue of any grant, assignment, or devise, now is, or hereafter shall be, entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or equity, shall be deemed to

have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.

Statute of Uses & Trusts, § 47.

A promise to give excludes all suggestion of present gift.

The holder of a "grant" needs nothing more from his grantor.

*New York Dry Dock Co. v. Stillman*, 80 N. Y. 174.

The equity sought to be invoked is claimed to exist for the prevention of a fraud. But there is no fraud or wrong according to the view of law or equity simply in preventing a woman from acquiring a right in something in which she never had or was legally or equitably entitled to have or to expect any right whatever.

Her husband having complete control of his own, has used it as he chose, and has lawfully and reasonably availed himself of a device to prevent her from acquiring any interest in it while he was employing it in business uses.

*Holmes v. Holmes*, 3 Paige, 363, 8 L. ed. 186.

*Messrs. Bailey, Bell & Crane*, for respondent:

The novelty of the present action is no bar to its maintenance.

*Youngs v. Carter*, 10 Hun, 194.

An action may be maintained in the lifetime of a husband to preserve and protect the wife's inchoate right of dower in his lands, and such right is a valuable and subsisting interest which will be protected by the courts.

*Kursheedt v. Union Dime Sav. Inst.* 7 L. R. A. 229, 118 N. Y. 364; *Simar v. Canaday*, 53 N. Y. 298, 18 Am. Rep. 523; *Mutual L. Ins. Co. v. Shipman*, 119 N. Y. 330; *Youngs v. Carter*, *supra*, affirming 50 How. Pr. 410.

The fact that the paper title is not alleged to have been in the defendant Phelps is not a bar to the maintenance of this action.

*Hawley v. James*, 5 Paige, 318, 3 L. ed. 734; *Church v. Church*, 3 Sandf. Ch. 434, 7 L. ed. 910; *Gilson v. Hutchinson*, 120 Mass. 27; *Crocelius v. Horst*, 11 Mo. App. 304; *Rabbitt v. Gaither*, 67 Md. 94; *Bispham*, Eq. p. 550; 3 Beach, Mod. Eq. Jur. § 999; *Douglas v. Douglas*, 11 Hun, 406; *Munroe v. Crouse*, 59 Hun, 248; *Babcock v. Babcock*, 15 How. Pr. 97; *Pomeroy v. Pomeroy*, 54 How. Pr. 228.

It has been held over and over again that a conveyance made on the eve of marriage for the purpose of defrauding the wife of her dower is void as to her, and I can only understand the reasoning on which these cases are based to

**NOTE.**—As to the power of a man to defeat his wife's dower rights, see note to *Flowers v. Flowers* (Ga.) 18 L. R. A. 76.

25 L. R. A.

mean that she must be regarded as a creditor, and therefore has the right to set aside a conveyance that is in the way of her rights.

*Youngs v. Carter, supra.*

"Gray, J., delivered the opinion of the court:

This is an action in equity brought by a wife to establish and to protect an inchoate right of dower in certain lands now held by and in the name of a third person, but which were paid for by the plaintiff's husband, and also to establish her dower right in the proceeds of the sale of certain other lands similarly purchased and held. Her complaint having been demurred to for insufficiency to state a cause of action, we must assume all its averments of material facts to be true. After alleging a marriage and the birth of children, she sets forth a separation between herself and her husband, caused by his neglect, wrong conduct, and desertion. She alleges that since his desertion of her, "with the intent and purpose of defrauding her of her dower rights in his real estate, her husband had purchased various pieces of land, and caused the title to be taken in the name of one Lewis, as a dummy in the transaction, under an agreement and arrangement with the said Lewis that the said defendant [meaning her husband] should receive all the benefit of, and have full control over, said property, which agreement was in writing." She alleges that her husband "retained and exercises full possession and control over the same," and that when he desired to dispose of any of the property he would, "under the agreement and arrangement with said Lewis, present the deeds and papers to him, which said Lewis, under his agreement, was bound to execute;" that all of the property, with the exception of one piece, was thus disposed of by her husband "to bona fide purchasers, without notice of the dower interest of this plaintiff;" and that her husband "received the full amount of the purchase money paid for the same, for his own use and benefit." She then proceeds to describe the piece remaining unsold, which she alleges to have been conveyed by Lewis, at the request of her husband, without consideration, to the defendant Goodwin, a partner of her husband, "who was to hold the same under the same agreement that said Lewis had with her husband," and as to this property the plaintiff charges her husband to be the real owner. She prays for a decree which will adjudge, because of these transactions and their fraudulent purpose, that the proceeds received by her husband upon the sale of any of this property "are still real property, and that this plaintiff has an inchoate right of dower in the same;" that her husband be ordered to pay one third of these proceeds into court, there to be held and invested, etc.; and that, as to the land held by Goodwin, it be adjudged to be subject to her inchoate right of dower, etc.

With this as a sufficient summary of the material facts of her complaint, we are confronted with a pretended cause of action, for which I am unable to find any sufficient basis in our revised statutes, to which we must

look for the authority for the claim of a wife to be entitled to dower in lands. To entitle the wife to dower, the husband must be seised, either in fact or in law, of a present freehold in the premises, as well as of an estate of inheritance. That proposition follows from the language of the section in the revised statutes that "a widow shall be endowed of the third part of all the lands, whereof her husband was seised of an estate of inheritance at any time during the marriage." 4 Rev. Stat. 8th ed. chap. 1, title 8, § 1.

How can seisin be predicated of the plaintiff's husband with respect to the lands purchased through the use of his money, but never conveyed, nor agreed to be conveyed to him? The plaintiff certainly had no control over the use which her husband chose to make of his personal estate. That was his absolutely, and she had no interest in it which she could assert, beyond a claim upon him for the support of herself and their children. He might have chosen to use it in the acquisition of any of the many kinds of personal property, without any right on the part of his wife to complain of, or to interfere in, his acts. Instead of confining his use of his money to purchases of personal property, or instead of putting them into land, and of taking title to himself, he has adopted methods set forth in his complaint for its use; and they were effectual to prevent the vesting in him of any legal estate in the realty, although paid for with his money. He undoubtedly intended to prevent his wife from acquiring any dower right in the real property, in the purchase and sale of which he was dealing through his friend; but unless he was actually seised, or unless he had such a seisin at law as would entitle him to its possession, it is difficult to see how his wife could claim that she ever gained any dower interest. Her complaint seems to concede that her husband acquired no legal title unless through the agreement alleged to have existed between him and Lewis. But that agreement is not one which could operate to vest in her husband any right to the actual possession of the property conveyed to Lewis. The agreement is purely executory in its nature, and, if not complied with by Lewis, would only have given to Phelps a cause of action in damages for its breach. Taken at its strongest meaning, it cannot be said to import any grant by Lewis of any interest in the property to be acquired by him, through which a legal estate would arise in favor of Phelps. It does not rise beyond the promise of Lewis that Phelps should have the full control and enjoyment of whatever real property he might become vested with the title to under their arrangement. Phelps' rights rested in the mere promise of Lewis. It is manifest from the statute that, notwithstanding the consideration for the grant of the real property to Lewis was paid by Phelps, the title vested in the grantee, free of all claims, except the claim which creditors might have to assert that the transaction was fraudulent as to them. See sections 51 and 53 of the article of "Uses and Trusts." It is needless to argue that wives cannot come under that



classification. The position of a wife with respect to her husband's property is limited by the revised statutes, and unless she can bring herself within their limitations, she is without the right to assert any claim to it. Concededly, in this case, the husband was never seized of the property in question, and the agreement set forth, and which is claimed to confer upon him its real ownership, could create no interest, or right to possession. If it were possible to assume a right in Phelps, based upon the agreement, to maintain an action for the reconveyance by Lewis to himself of the lands, such an assumption clearly negatives any idea of the existence of a legal estate in Phelps. We may assume, as it is alleged, that he was to receive the benefits arising from the lands; but if there was a beneficial use it must be united with a right to the possession (a right which is not alleged here), before we can perceive the existence of any estate upon which a claim of dower may be impressed. It is not pretended that any precedent exists in the decisions of

the courts of this state for the maintenance of this action. So far as my examination has gone, I am unable to find in the adjudged cases any support for the proposition that a right to dower can be asserted, except with respect to real property of which the husband was actually seized during his lifetime, or to the actual seisin of which he had a legal right. The cases referred to by the respondent's counsel in the reports of the courts of other states are inapplicable in the construction of the statutes of our own state. They may or may not turn upon the wording of particular statutes; and however it may be, they cannot control when our own statutes are in question.

It results from my consideration of the case that *the order and judgment below should be reversed* and that an order should be entered dismissing the complaint, with costs in all the courts to these appellants.

All concur, except *Andrews, C. J.*, not sitting.

### MICHIGAN SUPREME COURT.

Henry HEINLEIN, *Appt.*,

*v.*

IMPERIAL LIFE INSURANCE CO.

(.....Mich.....)

**1. A life insurance policy payable to the son of the insured is not a wager policy, where the first premium was paid by**

the insured and the others by the son, who had general charge of the business of the insured and forwarded them in her behalf.

**2. A life insurance policy surrendered on return of the premiums paid will be revived, where the surrender was procured during the illness of the insured by false assertions that it was a wager policy and threats of litigation unless it were surrendered.**

**NOTE.—Right to take life insurance for benefit of stranger.**

With one or two possible exceptions the courts all agree that in case the transaction is bona fide, a person may take insurance upon his own life for the benefit of one having no insurable interest in his life, and that the latter may collect and hold the amount which becomes due upon the policy.

Some requirements are insisted upon in some jurisdictions by way of safeguards which do not appear in others, but these are more by way of local regulations of the rule than of exceptions to it.

Insuring one's life for the benefit of a stranger is not void as against public policy. *Johnson v. Van Epps*, 110 Ill. 551.

Where a person obtains a policy on his own life of his own accord and pays the premiums himself he may make the policy payable to one who has no insurable interest in his life, and by so doing no rule of law or principle of public policy would be violated. *Bloomington Mut. Ben. Assn. v. Blue*, 120 Ill. 121, 60 Am. Rep. 553.

A man may take out insurance in favor of his grandson, which in the absence of fraud will be valid and binding. *Elkhart Mut. Aid Benev. Relief Assn. v. Houghton*, 103 Ind. 236, 53 Am. Rep. 514.

A policy procured by a man on his own life, he paying the first premium and made payable to his sister's husband who pays subsequent premiums as agent for the insured, and who is shown to be a trustee for the insured, is valid. *Forbes v. American Mut. L. Ins. Co.* 15 Gray, 249, 77 Am. Dec. 360.

The fact that the beneficiary has no insurable interest is no defense to the insurer. *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 637.

In Wisconsin it seems that there is no statute 25 L. R. A.

prohibiting taking insurance on the life of another. *Hurd v. Doty*, 21 L. R. A. 746, 86 Wis. 1.

So the general rule is that a contract for the benefit of a third person is valid. *Milner v. Bowman*, 119 Ind. 443; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Vivar v. Supreme Lodge K. of P.* 52 N. J. L. 455; *Freeman v. National Ben. Soc. of New York*, 42 Hun, 252; *Tucker v. Mutual Ben. Life Co. of Hartford, Conn.* 50 Hun, 50; *Mallory v. Travelers Ins. Co.* 47 N. Y. 53, 7 Am. Rep. 410; *Olmsted v. Keyes*, 85 N. Y. 593; *Sabin v. Grand Lodge, A. O. U. W.* 6 N. Y. S. R. 151; *Hill v. United Life Ins. Assn.* 154 Pa. 29; *Butler v. State Mut. L. Assur. Co. of Worcester*, 55 Hun, 293; *Lamont v. Hotel Men's Mut. Ben. Assn.* 30 Fed. Rep. 517; *Lamont v. Grand Lodge Iowa L. of H.* 31 Fed. Rep. 177; *Ingersoll v. Knights of Golden Rule*, 47 Fed. Rep. 273; *Lemon v. Phoenix Mut. L. Ins. Co.* 38 Conn. 294; *Equitable L. Assur. Soc. of United States v. Paterson*, 41 Ga. 338; *Provident L. Ins. & Investment Co. v. Baum*, 29 Ind. 236; *Hogle v. Guardian L. Ins. Co.* 4 Abb. Pr. N. S. 246, 6 Robt. 567.

In Pennsylvania it was held in *Gilbert v. Moore*, 104 Pa. 74, 49 Am. Rep. 570, the policy had been procured by the one whose life was insured for the benefit of one having no insurable interest, and had been assigned by the latter to a third person also having no insurable interest, who kept up the premiums. The court held that he could not hold the sum recovered on the policy, saying: "As a beneficiary merely, having no interest in the life, it seems to us very clear that he could lawfully have no interest in the policy. For if we admit the contrary; if we admit that one man may insure his life for the benefit of another who is neither a relative nor a creditor, our whole doctrine concerning wa-

3. A life insurance policy is not forfeited by failure to pay an assessment which came due after the surrender of the policy had been improperly procured by the company.
4. Instructions by an insurance company that premiums must be paid at the office, and that due notice will be given of the day when due will prevent forfeiture for nonpayment, unless notice has been given.

(June 22, 1894.)

**A**PPPEAL by plaintiff from a decree of the Circuit Court for Bay County in favor of defendant in a proceeding brought to reinstate a policy of life insurance. *Reversed.*

The facts are stated in the opinion.

*Messrs. Tarsney & Wicker*, for appellant:

The son could be made the beneficiary in the policy.

*Voorheis v. People's Mut. Ben. Soc. of Elk-hart*, 91 Mich. 469; *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722.

Whether "where a party effects an insurance on his own life, for the benefit of another who pays the premiums, the policy is a valid one has been doubted, but the weight of authority

seems to be in favor of the validity; it being in substance a contract with the beneficiary, who is the insured."

1 May, Ins. 3d ed. § 12; *Wainwright v. Bland*, 1 Moody & R. 481, 1 Mees. & W. 32; *Valton v. National Loan Fund Life Assur. Soc.* 22 Barb. 9, 20 N. Y. 82; *Fairchild v. Northeastern Mut. L. Ins. Assn.* 51 Vt. 618.

If the person whose life is insured pays the premiums, there can be no doubt, even if the beneficiary has no interest, since his own interest supports the policy.

*Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 881; *Hogle v. Guardian L. Ins. Co.* 6 Robt. 587.

A man may insure his own life, himself paying the premiums for the benefit of another, who has no insurable interest.

*Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Olmsted v. Keyes*, 85 N. Y. 593.

A son may insure for the benefit of his father.

*Tucker v. Mutual Ben. L. Co. of Hartford, Conn.* 50 Hun, 54; *Forbes v. American Mut. L. Ins. Co.* 15 Gray, 249.

There was no consideration whatever for giving up the policy and getting back nothing

giving policies goes by the board." But the court in considering language used by Judge Sharswood in *American Life & Health Ins. Co. v. Robertshaw*, 26 Pa. 189, says: The position assumed by the learned judge is that where a policy is bona fide and founded upon an insurable interest, an assignment or gift of it to a friend or other person is no fraud upon the insurance company by which it was issued. The court then says that admitting this to be correct, it is no authority in the case in hand, and the result of the decision seems to be that although the policy may not be void as far as the insurer is concerned, yet the beneficiary if having no insurable interest, cannot hold the proceeds when collected.

But in a case arising a few years later in which *Gilbert v. Moore* was relied on as authority for the rule that one could not insure his life for the benefit of another having no insurable interest in it, the court said: "The validity of such policies has never been doubted. Policies of this nature are in no sense wagering. It would be denying a man's right to do what he will with his own to say that he could not in any form insure his life for the benefit of an indigent relative, or a friend to whom he felt under obligations." *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192.

In Texas, as will appear from cases cited, *infra*, the tendency has been to hold the policy valid but to prevent the beneficiary from taking the advantage of it.

But in *Mayher v. Manhattan L. Ins. Co. (Tex.)* June 24, 1894, it appeared that at the request of the one whose life was insured, premiums were paid by the father of a child in whom the insured was interested, for the purpose of procuring the insurance in her favor. The court says that the facts bring the case within the cases of *Price v. Supreme Lodge K. of H.* 68 Tex. 361, and *Schonfield v. Turner*, 7 L. R. A. 189, 75 Tex. 325, and that the transaction was practically an insurance of another's life by one having no insurable interest, and could not be upheld. But the court states: "The record does not present a case in which a man insures his own life for the benefit of another, the person whose life was insured paying the premiums, thereby making an investment of his own money for a friend selected by himself, and we are therefore not called upon to decide upon that question." 25 L. R. A.

The effect of this decision is therefore to leave the question open in that state as to the rule in case the latter state of facts existed.

In *Swick v. Home L. Ins. Co.*, 2 Dill. 160, the language of the court is such as to lead to the conclusion that one could not insure his life for the benefit of a stranger, but it seems from other language of the case that in it the beneficiary paid the premium, and of course if that fact existed it takes the case out of the rule as to insuring for the benefit of another, and makes it practically a cover for an insurance on the life of a stranger.

In *Mutual Ben. Assn. v. Hoyt*, 46 Mich. 472, the policy was declared void on the ground that it was a mere wager policy, but it is not shown who procured it and paid the premiums.

The beneficiary has the burden of establishing his claim. *Pfeiger v. Browne*, 28 Beav. 391.

After a verdict in favor of plaintiff, the presumption is that the beneficiary in making the payments acted as agent for the insured. *Fairchild v. North Eastern Mut. L. Assn.* 51 Vt. 612.

#### *Speculative policies.*

While a bona fide transaction will be upheld the courts are very quick to condemn the contract if circumstances of speculation appear.

The form of the policy cannot be made a cover for a wager contract. *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 285, 22 Am. Rep. 180.

In discussing the validity of a policy on the joint lives of persons who had been husband and wife, but were subsequently divorced and married to other persons, the Supreme Court of the United States in *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, said: "There is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend. The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insurer has no interest."

Where the person whose life is insured is the real contracting party and continues to pay the premiums, it is of no consequence that the beneficiary has no insurable interest in the life insured. In case, however, the party insured is only nominally the contracting party, while the beneficiary named in the policy has in reality procured the insurance

more than would have been a matter of right in case of actual default, and it cannot be imagined that any such arrangement would have been made, unless under some gross mistake whether brought about by fraud or not.

*Tabor v. Michigan Mut. L. Ins. Co.* 44 Mich. 824.

While a person cannot generally be justified in acting solely on the statement of his legal right by an agent of the insurance controversy, yet they may be so mixed with unconscionable conduct as to stand differently.

*Mayhew v. Phœnix Ins. Co.* 28 Mich. 105; *Stevens v. Saginaw County Supra.* 63 Mich. 592.

Payment or tender of payments on premiums is not necessary where the insurers have already declared the policy forfeited, or done any other act which is tantamount to a declaration on their part that they will not receive it if tendered.

*May, Ins. § 358; Pelcher v. National Life Ins. Co.* 10 Ins. L. J. 312; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806.

*Mr. Hoyt Post*, for appellee:

An insurable interest will be held to exist when the relationship is such that the assured has a legal claim upon the insured for services, or for support, or where, though such legal

claim does not exist, yet from the past personal relations of the two and the treatment of the assured by the insured the assured has a reasonable right to expect some pecuniary advantage from the continuance of the life of the insured, or to fear loss from his death.

*Bliss, Life Ins.* 2d ed. § 81; *May, Ins.* 8d ed. §§ 102A-105, 107B; *Continental L. Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 85, 23 Am. Rep. 180; *Mitchell v. Union L. Ins. Co.* 45 Me. 104, 71 Am. Dec. 529; *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. 154, 23 Am. Rep. 741; *Flecy v. Odd Fellows Mut. Relief Assn.* 142 Mass. 234; *Cooke, Life Ins. § 58*; *Crawley, Life Ins. p. 24*; *Halford v. Kymer*, 10 Barn. & C. 724; *Alexander, New York Law of Life Ins. chap. 4*; *Warnock v. Davis*, 104 U.S. 775, 26 L. ed. 924; *United Brethren Mut. Aid Soc. v. McDonald*, 1 L. R. A. 238, 123 Pa. 824.

An insurable interest is necessary to support a policy of insurance, and a wager policy is void as contrary to public policy.

*O'Hara v. Carpenter*, 28 Mich. 410, 9 Am. Rep. 89; *Agricultural Ins. Co. v. Montague*, 83 Mich. 648, 31 Am. Rep. 826; *Castner v. Farmers Mut. F. Ins. Co. of Van Buren*, 46 Mich. 15; *Mutual Ben. Assn. of Michigan v. Hoyt*, 46

and paid the premiums, then in order that the transaction may be taken out of the category of wagering contracts the beneficiary must have had an insurable interest of a pecuniary character, or of that nature either present or prospective at the time the policy had its inception. *Amick v. Butler*, 111 Ind. 573, 60 Am. Rep. 723.

If the policy issues directly to the beneficiary and states that the advance premium is paid by him and that he undertakes to pay the future premiums as they fall due, he must show an insurable interest in order to recover, although the policy was procured for his benefit by the insured, and the premiums in fact were paid by the latter. *Burton v. Connecticut Mut. L. Ins. Co.* 119 Ind. 207.

Although the policy in form purports to have been procured by the person whose life is insured, it should not be so treated if it was applied for and obtained by another who took the initiatory steps for procuring it, stating in the application that it was for his benefit, and paid the original and all subsequent premiums on it. *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282, 84 Am. Dec. 280.

A policy taken out nominally in the name of the insured and for his benefit and in the interest of one having no insurable interest, is void. *Brookway v. Mutual Ben. L. Ins. Co.* 9 Fed. Rep. 242.

If the policy is a part of a fraudulent scheme to procure insurance on several lives to take assignments of the policies and then hasten the period at which the policies become claims upon the insurer, the transaction is void. *Prince of Wales Assn. Co. v. Palmer*, 26 Beav. 606.

If the policy is made in the name of the life insured, as a cover for the real transaction which is in favor of a third person, it is void. *Shilling v. Accidental Death Ins. Co.* 2 Hurlst. & N. 42, 23 L. J. Exch. 256, 2 Bigelow, Life & Acc. Ins. Cas. 423, 27 L. J. Exch. 14.

If there is evidence tending to show that the policy was a wager, the question is for the jury. *Langdon v. Union Mut. L. Ins. Co.* 14 Fed. Rep. 272; *Johnson v. Van Epps*, 14 Ill. App. 201.

In *Burke v. Prudential Ins. Co.*, 135 Pa. 236, policies were held not to be wagering, which were taken by the person whose life was insured and then handed to her daughter-in-law with directions to pay the premiums, pay funeral expenses and

pay what was left to the grand-daughter of the insured.

#### *The effect of existence of insurable interest.*

If the policy is procured by a man for the benefit of his sister, it is totally immaterial what arrangement they choose to make between themselves about the payment of the premium. Where the relationship between the parties is such as to constitute a good and sufficient consideration in law for a gift or grant the transaction is entirely free from any imputation of being done by way of cover for a wager policy. *Etina L. Ins. Co. v. France*, 94 U. S. 551, 24 L. ed. 287.

#### *Payment of premiums.*

One of the tests as to the validity of the contract is to determine by whom the premiums are to be paid. If the one taking the insurance pays the premiums the transaction is generally upheld. But there is a strong, though not universal, tendency to condemn contracts in which the premiums are paid by the beneficiary.

The fact that the person whose life was insured made the application for the policy will not of itself render it valid if the premiums are all paid by the beneficiary. *Trinity College v. Travelers Ins. Co. of Hartford, Conn.* 22 L. R. A. 291, 113 N. C. 244.

In *Hearing's Succession*, 28 La. Ann. 323, the policy was taken for the benefit of the wife of the insured and she paid the premium, and the court held the policy valid, although there is no discussion of the effect of the manner of paying the premiums, and what the effect would be if the beneficiary were other than the wife.

The fact that the beneficiary pays the premiums would not avoid the policy so far as the insurer is concerned, but if it is found that he has no insurable interest, he may be held to be a trustee for those entitled to the proceeds of the policy as distributees of the one whose life was insured. *Mutual L. Ins. Co. of New York v. Blodgett (Tex.)* 28 Ins. L. J. 512.

In *Wainright v. Bland*, 1 Mees. & W. 82, 1 Moody & R. 431, 1 Gale. 408, it is said there is no doubt whether a person cannot insure his life for the benefit of another who pays the premiums.

The question of payment of premiums has most

Mich. 478; *Carmichael v. Northwestern Mut. Ben. Asso.* 51 Mich. 494; *Smith v. Finch*, 80 Mich. 832.

Whether this court would now decide that in this state this policy was valid, and that the complainant had an insurable interest in his mother's life, or not, the question, in the condition of the authorities, was, at the time of the settlement and surrender of the policy, in sufficient doubt and uncertainty to constitute a good consideration for the compromise.

*Moore v. Detroit Locomotive Works*, 14 Mich. 286; *Hull v. Swarthout*, 29 Mich. 249; *Sanford v. Husford*, 32 Mich. 318, 20 Am. Rep. 647; *Prichard v. Sharp*, 51 Mich. 432; *Nash v. Manistee Lumber Co.* 75 Mich. 846; *Pratt v. Castle*, 91 Mich. 484; *Mayhew v. Phania Ins. Co.* 23 Mich. 105.

frequently arisen in cases of assignments and the cases being upon that question are therefore referred to, without attempting to discuss the general question of the validity of the assignment of a policy.

To show that assignments are treated as quite similar to insurance for a stranger attention is called to the following decisions.

If policies are valid at their inception the fact that they are assigned to one having no insurable interest in the life insured does not change the liability of the insurer. *St. John v. American Mut. Ins. Co.* 18 N. Y. 81, 64 Am. Dec. 529.

If the assignee has no insurable interest in the life of the subject insured which would sustain a policy to himself, the assignment would take effect only as a designation by mutual agreement of the contracting parties of the person who should be entitled to recover the proceeds when due. And if it should appear that the arrangement was a cover for a speculative risk contravening the general policy of the law, it would not be sustained. *Stevens v. Warren*, 101 Mass. 564.

The fact that the assignee has no insurable interest in the life does not avoid the assignment. *Mutual L. Ins. Co. of New York v. Allen*, 138 Mass. 24, 52 Am. Rep. 245.

If the policy provides that the beneficiary must have an interest in the life insured it is a fraudulent evasion of the provisions of the policy to procure one to effect insurance on his own life and then to assign it to a third person having no interest. *Scott v. Roose*, 1 Long & T. 54, 3 Ir. Eq. Rep. 170.

An assignment of a policy is valid. *St. Johns v. American Mut. L. Ins. Co.* 2 Duer, 419; *Murphy v. Red*, 64 Miss. 614.

In *Ashley v. Ashley*, 3 Sim. 149, it was ruled generally that a policy might be lawfully assigned.

The question then arises as to who must pay the premiums, and while in many of the cases the question has not been discussed the following cases have considered it:

If the beneficiary is to pay the dues and assessments, the policy is void. *Melly v. Herschberger*, 16 W. N. C. 136.

If the assignee of the policy pays the premiums, it cannot be enforced. *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116, 18 Am. Rep. 313; *Franklin L. Ins. Co. v. Serton*, 53 Ind. 390.

The policy cannot be assigned to one having no insurable interest if the premiums are to be paid by him. *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 624.

In Pennsylvania it is held that there is nothing speculative in the origin or continuance of a contract of insurance so long as the insured keeps it within his own control and pays the premium him-

*McGrath, Ch. J.*, delivered the opinion of the court:

This is a bill to revive a life insurance policy, issued December 22, 1890, on the life of Maretha Heinlein, and payable "to Henry Heinlein, Jr., hereon if living; if not living, to the executors, administrator, or assigns of said insured." One Smith, an insurance agent, applied to Henry Heinlein to take out insurance. Heinlein replied that he did not desire to take out a policy, but that his mother had spoken to him about insurance, and he thought that she wanted insurance. Smith requested him to see his mother, and let him know. Afterwards Smith, who was accompanied by a physician, met Heinlein, and asked if the latter had seen his mother. Heinlein replied that he had, and Smith sug-

self, but it is a different case when he assigns the policy out and out to one having no insurable interest. *Downey v. Hoffer*, 110 Pa. 109.

And the rule that an absolute assignment is void when the insured parts with all control over the policy is recognized in *Carpenter v. United States L. Ins. Co.* 23 L. R. A. 571, 181 Pa. 2.

In an earlier Pennsylvania case, however which seems to have been completely ignored in the later cases, it was held that one may have his life insured with the money of another and assign the policy to him absolutely. *Cunningham v. Smith*, 70 Pa. 450.

In New York it has been said that a person has an insurable interest in his own life. And no use made by him of the policy subsequent to the completion of the contract will convert it into a wager policy. *Valton v. National Loan Fund Life Assur. Soc.* 22 Barb. 9, 20 N. Y. 32. In that case the opinion is expressed that if a person insures his own life for the benefit of another, the contract would not be void although the latter advances the money to pay the premium.

And in Rhode Island in *Clarke v. Allen*, 11 R. I. 439, 23 Am. Rep. 498, an assignment of the policy was upheld, although the assignee paid the premiums subsequently falling due.

The reason for condemning a policy for the benefit of a stranger who pays the premiums is much stronger than that for condemning an assignment under similar circumstances. An assignment may frequently be made a matter of decided pecuniary advantage to the one insured of which there seems to be no good reason for depriving him. As seen by the cases cited *supra* if the assignment is simply a cover for a wager it is not upheld. On the other hand in case an insured derives a benefit from a policy made in favor of another the circumstances are usually such as to give the latter an insurable interest and it then becomes immaterial who pays the premiums.

#### *The Texas doctrine.*

In Texas there have been a series of cases the effect of which was to deny the general doctrine by holding that the beneficiary will be held to be a trustee for the heirs-at-law. *Equitable L. Assur. Soc. v. Hazlewood*, 7 L. R. A. 217, 75 Tex. 322; *Goldbaum v. Blum*, 79 Tex. 688; *Lewy v. Gilliard*, 75 Tex. 400; *Schonfield v. Turner*, 7 L. R. A. 189, 75 Tex. 324.

Those decisions have never been directly overruled but they are somewhat shaken by a statement found in *Mayher v. Manhattan L. Ins. Co.* (Tex.) June 21, 1894, which is set out *supra*. The future rule in that state is therefore left in uncertainty.

H. P. F.

gested that they go right up to the house, and they did so. The application was filled out, and the medical examination made. The defendant company declined to take the full amount, viz. \$10,000, but issued a policy for \$5,000, and the Berkshire Life took a policy for \$3,000; a new application being made out, and another medical examination having been made. The first premium was paid by check on a bank at Saginaw, signed "M. Heinlein, by Henry Heinlein." The insured resided at East Saginaw, and it would appear from the testimony that Henry Heinlein also resided there, at the time the policy was taken out. The subsequent premiums were payable quarterly, and were paid by Henry Heinlein, although he testified that he had general charge of his mother's affairs, and paid the premiums in her behalf. The policy seems to have lapsed in 1891, owing to the failure to pay the premium promptly, but a health certificate was furnished, and the policy was restored. Maretha Heinlein was taken sick in the spring of 1892, and died July 2d, of that year. On June 14, 1892, the president of the defendant company and the secretary thereof and the general agent of the Berkshire Life Company went to Bay City where complainant then resided, and secured both policies from Henry Heinlein, refunding to him the amount of the premiums paid. It appears that, before going to Bay City, the officers of these companies had been to East Saginaw, and had there learned of the illness of the insured. Upon arrival at Bay City, they sought out Smith, who had solicited the insurance, and secured his services to aid in recovering the policies. The interview with Smith is described by him as follows: "We went up to a room, Mr. Angus, and Mr. Oliver and Mr. Early and myself, and Mr. Angus, I think, was the one who broached the subject to me, and told me that they were there to see what could be done with the Heinlein matter. As near as I can remember, Mr. Early showed me the papers, and asked me as to the certificate of health, etc., and wanted to know if I knew that that was graveyard insurance. I told him, 'No, sir; I didn't consider it in that light; that the insurance was solicited in the regular way. He says: 'I understand that this, where the party is paying the premium on his mother, makes it graveyard insurance or speculative insurance.' I told him I didn't know that that was the case,—that this was a case of that kind,—because, in Mr. Heinlein's statement to me previous to this, he told me what his mother wanted the insurance for,—to protect the property of some minor children. That is what she was taking this insurance for. And Mr. Angus said to me, or Mr. Oliver,—I could not say which one; the conversation was between the two of them,—they said it was graveyard insurance, and that if he pressed it, that they should put it into the courts, and it would be a question whether they would get anything or not and stated to me that they wanted to take them, and would pay for the taking up of the policies, and wanted to know what I thought about it. I says: 'Gentlemen, if I have done anything wrong in any way, shape, or manner, I am

willing to right it.' They wanted to know how I was willing to right it. I told them I was willing to go to Mr. Heinlein, and state to him their statements, and the only condition that I would go would be that they would pay the premiums in full that Mr. Heinlein had paid. And Mr. Early and Mr. Angus talked together, and wanted to know if I would go and do that, and I told them I would, and Mr. Angus signed a check for Mr. Oliver, and Mr. Early signed a check payable to my order." He says, further: "I told Mr. Heinlein that, as I understood it, we had got ourselves in trouble with that insurance; and he wanted to know how, and I told him Mr. Oliver says we had made a mistake in writing the insurance in that way, making him the beneficiary, as it came under the head of graveyard insurance, and that they wanted to settle the matter, and they would do so by paying him back the entire amount of his premiums that he had paid if he would release the policies, both for the Imperial and for the Berkshire; and Mr. Oliver says to him, 'That is the facts in the case,' as near as I can remember what he said. 'It comes under the head of old folks' insurance, and ain't legitimate business.'" Complainant testifies that he met Oliver and Smith in the street, and "Smith said: 'You are the man we are looking for.' We went into a store, and Smith says: 'We have got ourselves in a nice box. We have got ourselves in trouble.' I asked him in what way." Oliver is then introduced, and he proceeds to assert that the policies are void; that it was graveyard insurance; that Heinlein didn't have any insurable interest in his mother, and she had no insurable interest in him; that, if the insured should die, Heinlein could recover only the premiums paid in; that they would refund the premiums if he would surrender the policies; that, unless he accepted, they would throw it into the courts, and then he would get nothing; that he had insured his mother for a speculation; that they were in haste to leave the city; that Heinlein suggested that the insurance commissioner lived in the city, and that he would go to him for advice; that Oliver said: "There is no use going to him. He cannot help you in the matter, and, if you don't take what we offer you, why, we will take it, and throw it into court, and you will not get anything." The matter seems to have been closed out within a few hours. Heinlein went to the office of Shepard & Lyon, attorneys. The parties went with him. Neither Shepard nor Lyon were in. Heinlein then went to the office of a justice of the peace. They went with him, and the matter was then concluded. From the time that Oliver and Smith met Heinlein until the policies were received by them, Heinlein was not out of their sight. Heinlein had a short talk with the justice about the matter. Oliver and Smith were in the room, and Oliver reiterated the assertions as to speculative and graveyard insurance, and exhibited to the justice a pamphlet containing some reference to the subject of speculative insurance, and read therefrom.

We think that the facts bring the case within the rules laid down in *Taber v. Mich-*

igan Mut. L. Ins. Co., 44 Mich. 324, and that complainant is entitled to the relief prayed. There is no ground for the claim that this was a wager policy. It affirmatively appears that the first premium was paid by the insured, and the fact that the check for the premium was signed as it was, and was, as thus signed, presented and honored, supports Heinlein's claim that he was acting for his mother, had general charge of her affairs, and for her forwarded the other premiums. See also *Ronard v. Olink*, 91 Mich. 1. Mr. May says, at section 112, if the person whose life is insured pays the premiums, there can be no doubt, even if the beneficiary has no interest, since his own interest supports the policy. *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Hogle v. Guardian L. Ins. Co.* 6 Robt. 567; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 723. It is apparent from the policy itself that the mother's regard for the son's interest was not the only motive for its procurement. The record discloses that the policy was made payable on the event of the death of Henry Heinlein to the estate of the insured, at the special instance of the insured. This fact tends to corroborate

what Smith says as to the purpose of the policy.

It is urged, however, that a premium fell due July 1st, following the surrender, which was not paid or tendered. There are two reasons why this contention should not prevail: First. Payment or tender of premiums is not necessary when the insurers have already declared the policy forfeited, or done any act which is tantamount to a declaration on their part that they will not receive it if tendered. May, Ins. § 858. Second. On February 12, 1892, the company, by its president, had sent a written notice to the insured, which contained the following: "Your premiums on insurance with this company will be collected hereafter at this office, instead of at Saginaw Bank, and must be here before twelve o'clock noon on the day of maturity. You will receive due notice of day when due, amount," etc. See May, Ins. §§ 856, 856a.

The decrees of the court below will be reversed, and a decree entered here for the complainant, restoring the policy, and for the amount thereof, with costs of both courts.

The other Justices concurred.

## MAINE SUPREME JUDICIAL COURT.

STATE of Maine, *Appl.*,  
v.

George H. HAMLIN, Exr., etc., of Edward  
Mansfield, Deceased.

(.....Me.....)

1. A succession duty or tax on the transmission of decedent's estates is not within the scope of Const., art. 9, §§ 7, & providing for the valuation of property and that it shall be "apportioned and assessed equally, according to the value thereof," as these sections contemplate only the general, constantly occurring assessment upon the same property and do not include occasional, exceptional and special subjects and modes of taxation.
2. A tax upon the right or privilege of taking property by will or descent under the law of the state is an excise or duty and not a tax on property.
3. The constitutional requirement of uniformity is satisfied by a tax on the transmission of property by will or descent to strangers and collaterals, when it is uniform in its rate as to the entire class affected, although other classes of persons are exempted from the tax.
4. The right to transmit property at death free from a succession tax is not within the constitutional right of acquiring, possessing, and protecting property.
5. Each beneficiary is entitled to receive \$500 free from tax under a statute providing that all property which shall pass by

will or the intestate laws shall be liable to a tax upon its value above \$500.

(July 27, 1894.)

**R**EPORT by the Supreme Judicial Court for Penobscot County for the opinion of the Law Court of an appeal by the State from the Probate Court determining the amount of the collateral inheritance tax to be paid upon the estate of Edward Mansfield, deceased. *Affirmed.*

The court determined that under the provisions of the act the sum of \$500 should be deducted from each legacy in the will which comes under the operation of the law, and that the tax should be computed upon the residue of the legacy.

Further facts appear in the opinion.

Mr. C. A. Bailey for the State.

Mr. A. W. Paine, for appellee.

That this is a "tax" within the meaning of the constitution and that it is "assessed by authority of the state" are apparently indisputable.

The tax is one levied or assessed for the purpose of supporting the state government and to be paid into the state treasury. Whether or not the assessment is one imposed "equally according to the just value thereof" is well illustrated by a case in which the owner of the estate taxed died in one week after the tax day. The usual city tax was of course assessed "according to the just value thereof." If the tax

**NOTE.**—As to validity of collateral inheritance taxes, see *Wallace v. Myers* (C. B. D. N. Y.) 4 L. R. A. 171, and notes to *Re Bomaine's Estate* (N. Y.) 12 L. R. A. 401, and *Re Howe's Estate* (N. Y.) 21 L. R. A. 325.

25 L. R. A.

See also 26 L. R. A. 259; 28 L. R. A. 178; 30 L. R. A. 218; 39 L. R. A. 170; 40 L. R. A. 280; 41 L. R. A. 446; 47 L. R. A. 525.

The construction placed upon the statute in the above case as to the amount of exemption is in accord with the New York case of *Re Howe's Estate*, *supra*.

in question is legal a double tax of 24 per cent is now to be paid in addition to that assessed one week before. The case would seem to come within the principles already settled in *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 895; *Dyar v. Farmington Village Corp.* 70 Me. 515.

Upon the organization of state governments legislatures and courts were to a great extent deprived of power.

In adopting rules regulating so important a subject as the taxing power, special care was taken to provide for the same and the appropriate language was used to express the intended meaning.

What is the meaning of the words "all taxes assessed by authority of the state?" Does it include a "tax" on a dead man's property assessed by the legislature? And what is the meaning of the words "assessed equally?" Does it admit of a second assessment on one's property in addition to a prior one made" according to the just value "thereof" "equal" with all others?

The purpose of a statute must be determined by its natural and reasonable effect.

*Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Passenger Cases*, 48 U. S. 7 How. 283, 12 L. ed. 702.

The language "all taxes assessed by authority of the state" is too plain to allow of any question or doubt.

*Com. v. Hamilton Mfg. Co.* 12 Allen, 298; *State v. United States & O. Exp. Co.* 60 N. H. 219; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *State v. Moore*, 22 L. R. A. 472, 118 N. C. 697.

*Messrs. C. J. Dunn and F. A. Wilson* also for appellee.

*Strout, J.*, delivered the opinion of the court:

This appeal from the decree of the judge of probate arises under chapter 146, § 1, of the Statute of 1893. That section is as follows:

"Section 1. All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of the daughter of a decedent, shall be liable to a tax of two and a half per cent of its value, above the sum of five hundred dollars, for the use of the state, and all administrators, executors, and trustees, and any such grantee under a conveyance made during the grantor's life shall be liable for all such taxes, with lawful interest as hereinafter provided, until the same shall have been paid as hereinafter directed."

It is strenuously claimed by the appellee that the act is in violation of the constitutional provision that all men "have certain natural, inherent, and unalienable rights, among which are those of enjoying, and defending life and

liberty, acquiring, possessing, and protecting property." Art. 1, § 1.

"Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Art. 1, § 21.

"All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." Art. 9, § 8. Also of the 14th Amendment to the Constitution of the United States.

Succession duties or taxes have been in existence in other countries for centuries, and have been regarded with favor, as a convenient and comparatively nonburdensome means of revenue. They were well known in Roman jurisprudence (1 Gibbon's Rome, p. 183), and were imposed upon all successions, except those to the nearest relatives and to the poor. The practice has long been resorted to in European countries, and was introduced in England in the last century, and was enlarged from time to time till 1853, when it was extended to all successions to real property, chattels real, and a vast variety of personal property and rights.

In this country they were imposed by Congress by Acts of June 30, 1864, and July 18, 1866, which were repealed in 1870. They were held by the Supreme Court of the United States to impose an excise tax or duty, and, as such, not in violation of the Constitution of the United States. *Scholey v. Rew*, 90 U. S. 23 Wall. 331, 23 L. ed. 99.

The policy of taxing collateral inheritances was adopted in Pennsylvania in 1836, and has been adhered to ever since. In that state the statute has been constantly recognized as valid by its supreme court. *Strode v. Com.* 52 Pa. 181; *Orcutt's App.* 97 Pa. 179; *Bittinger's Estate*, 129 Pa. 838.

In Maryland, Virginia, Delaware, New York, and several other states, laws imposing succession taxes have been enacted and are now in force,—that of Virginia dating back to 1844; of Delaware, to 1869; Maryland, to 1864, the others, of more recent date. In Maryland the act was attacked as in violation of the declaration of rights in the constitution of 1864, which declared, "that the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; that paupers ought not to be assessed for the support of the government, but every other person in the state, or person holding property therein, ought to contribute his proportion of public taxes, for the support of government, according to his actual worth in real or personal property; yet fines, duties, or taxes may properly and justly be imposed or laid, with a political view, for the good government and benefit of the community." But the court of appeals held the statute to be constitutional. *Robinson, J.*, in delivering the opinion of the court said: "We have not the slightest doubt as to the constitutionality of the law. . . . The restrictions imposed by it [the constitution] upon the legislative power, as to the objects of taxation, are explicitly declared. Poll taxes are denounced as grievous and oppressive, paupers are exempted from assessment, and all other persons are required to pay their

proportion of public taxes according to the value of their property. Arbitrary taxes on property, without regard to value, are expressly prohibited, and all measures for the collection and imposition of taxes upon property are required to conform to this general principle of equality. Whilst thus providing for a uniform mode of taxation on property, it was not the purpose of the framers of the constitution to prohibit any other species of taxation, but to leave the legislature the power to impose such other taxes as the necessities of the government might require." *Tyson v. State*, 28 Md. 586; *State v. Dalrymple*, 70 Md. 204, 8 L. R. A. 872.

In Virginia the supreme court held the same doctrine in *Eyre v. Jacob*, 14 Gratt. 480, 78 Am. Dec. 867. In that case the court said: "The right to take property by devise or descent is the creature of the law, and secured and protected by its authority. The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent, to a particular class of his kindred,—say to his lineal descendants and ascendants,—and it might impose terms and conditions upon which collateral relatives may be permitted to take it, or it may to-morrow, if it please, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party his property shall be applied to the payment of his debts, and the residue appropriated to public uses."

The Statute of New York (Laws 1885, chap. 488), contains substantially the same provisions, and nearly the same exemptions, as the first section of chapter 146 of the Laws of 1893 of our state. It does not differ in principle from ours. The question of the constitutionality of this act came before the New York court of appeals in *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, and that court said: "We entertain no doubt that such a tax can be constitutionally imposed. The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded. It is for that body, in the exercise of its discretion, to select objects of taxation. It may impose all the taxes upon land, or all upon personal property, or all upon houses or upon incomes." A like statute in New Hampshire was held by the supreme court of that state to be in violation of that state's constitution, which empowered the legislature to assess and lay taxes, but expressly limited that grant of power to "proportional and reasonable assessments, rates, and taxes, upon all the inhabitants and residents within the said state, and upon the estates within the same." And, by article 12 of the Bill of Rights, every member of the community "is bound to contribute his share to the expense" of the state. *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337.

We are not aware that the question has been decided in any other state where similar statutes exist. These decisions of the courts, being based upon constitutions containing provisions in some cases unlike, and in others like, but not the same, as our constitution, have a lessened weight as authority here. In Virginia the constitution required taxes to be equal and uniform. In Maryland the constitutional pro-

vision required every person holding property to contribute his proportion of public taxes, according to his actual worth in real or personal property. But, whatever may be the particular language of the several state constitutions, all the cases assume that the constitution, either in terms or by necessary implication, requires taxation of property to be equal and uniform; and in all of them, except the New Hampshire case, succession taxes are regarded as special taxes or duties, or, more exactly excises, not falling within the regular and ordinary annual taxation of property, contemplated and provided for and guarded by constitutional provisions and limitations.

The statute under consideration provides a subject and mode of taxation not heretofore resorted to in this state. The act provides sufficient opportunity to parties interested to be heard and have their rights protected, and cannot be deemed to conflict with article 1, § 6, of the Constitution, which provides that no person shall be deprived of his property or privileges, but by judgment of his peers or by the law of the land, nor with section 21 of the same article, which prohibits the taking of private property for public uses without just compensation. Perhaps the latter provision is limited to the exercise of the right of eminent domain, and does not extend to the subject of taxation. The word "compensation" seems to imply a money or other valuable consideration, as distinguished from the protection of life and property afforded by the state as a return for the tax contributions of its citizens.

Does the act conflict with the constitutional provision which requires all taxes assessed upon real and personal estate to be apportioned and assessed equally, according to the just value thereof? The first constitution of Maine provided that, "while the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years." Art. 9, § 7. Section 8, immediately following was: "All taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." These provisions remained unchanged until 1875, when, by an amendment, the words "and personal" were inserted after the word "real," in the eighth section. Prior to this amendment there was no express constitutional requirement that taxes on personal property should be uniform; but it was left to the legislature to determine the subjects, mode, and rate of taxation of personal property, in its discretion, and without limitation or restriction, unless such exercise of power should degenerate into such arbitrary, oppressive, and unreasonable exactions as to be subversive of the principles of the constitution and the rights of the people. *Cooley*, Const. Lim. pp. 616, 617.

The two sections, 7 and 8, as they now stand, must be construed together, to determine their scope and extent. Section 7 provides that so long as the public expenses shall be assessed on polls and estates, to equalize the burden as nearly as practicable, a general valuation shall be taken as often as every ten years. By its terms it necessarily implies a periodical and regularly recurring assessment



of predetermined amounts, proportioned to the entire estates within the taxed district, to meet continuing and regularly recurring expenses, while section 8, manifestly referring to the same class of general taxes, provides for an equal apportionment and assessment according to value. It is clear that these sections contemplate only the general, constantly recurring assessment upon the same property, and do not include occasional, exceptional, and special subjects and modes of taxation. The constant practice, hitherto unobjected to, of imposing a duty or exacting a fee for the right to exercise certain vocations, not illegal in themselves, but made so by statute for the purpose of deriving a revenue therefrom, such as that required of itinerant vendors, retail liquor dealers, while a license law existed, innholders, auctioneers, insurance brokers, etc., notwithstanding all the real and personal property of such persons was assessed in common with the property of all others in the state in the general and recurring assessments, conclusively shows that many subjects of taxation have constantly been regarded as not falling within the prohibition of sections 7 and 8 of the Constitution. The tax imposed upon the franchises of railroads and other corporations, upon a basis which did not result in equal taxation according to value and proportion, has been held by this court as not in violation of the constitution, but within the legitimate province of the legislature. *State v. Western U. Teleg. Co.*, 78 Me. 527; *State v. Maine Cent. R. Co.*, 74 Me. 382. So, also, the extensive exemptions of property from all taxation, such as the property of literary, benevolent, and charitable institutions, acquiesced in for many years without objection, afford a practical construction of sections 7 and 8, that they do not require an absolute equality, but that the legislature may, in its discretion, exempt from taxation classes of property within the terms of these sections, although the effect is to increase the rate upon other assessable property, and may select classes of subjects from which duties and excises may be required, not, however, degenerating into arbitrary and oppressive burdens. The duties exacted by the state from justices of the peace and other officers, and attorneys before admission to the bar, have never been regarded as a violation of the constitutional provisions in regard to taxation, but as excise taxes, rightfully levied. *Cooley*, Const. Lim. pp. 617-619; *Portland Bank v. Apthorp*, 12 Mass. 256.

It is evident, therefore, that these constitutional requirements do not include every species of taxation, but all special cases like those referred to are, by implication, excepted.

The tax provided for in the statute under consideration is clearly an excise tax. *Scholey v. Rew*, 90 U. S. 23 Wall. 846, 23 L. ed. 101. The whole tenor and scope of the act is one of excise, and not a "tax upon property," as that term is used in the constitution. It is not laid according to any rule of proportion, but is laid upon the interests specified in the act, without any reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the state liable to be assessed for public purposes. It

is true that the act contains some language indicating a tax upon property, but it should be construed according to its essential principle, object, and effect. Substance, and not form or phrase, is the important thing. All exactions of money by the government are taxes, but they are not all levied by assessment upon values. The latter class refers to the burdens recurring periodically, which are assessed upon valuations of property, made at stated intervals. Danforth, J., in delivering the opinion of the court in *State v. Western U. Teleg. Co.*, *supra*, said: "Such is the variety and extent of meaning attached to the word 'tax,' or 'taxes,' that no argument either way can be drawn from its use. It has been at different times applied to nearly if not quite every burden imposed upon persons, property, or business for the support of government; and, in acts for raising a revenue for public purposes, it seems to be used as meaning the same thing as 'impost,' 'duty,' or 'excise.'"

The tax under this statute is, once for all, an excise or duty upon the right or privilege of taking property, by will or descent, under the law of the state. It is uniform in its rate as to the entire class of collaterals and strangers, which satisfies the constitutional requirement of uniformity. *State v. Western U. Teleg. Co.*, *supra*; *Brewer Brick Co. v. Brewer*, 62 Me. 74, 16 Am. Rep. 395. "It is not levied as property taxes usually are. There is no given sum to be assessed, in which the percentage is fixed by valuation; but the percentage is fixed by law, leaving the amount to be ascertained by the valuation." The value of the property is resorted to, to measure the amount of the excise. The act taxing telegraph companies in terms imposed a tax of  $\frac{2}{4}$  per cent on the value of any telegraph line, etc., and it was strongly urged by counsel that this was a property tax, and not an excise, and therefore violated the constitutional provision requiring equal taxation; but this court, in *State v. Western U. Teleg. Co.*, *supra*, held that the tax was an excise, and clearly within the constitutional right of the legislature to impose. *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 162. The same reasoning applies with equal force to the tax on collateral inheritances. *State v. Maine Cent. R. Co.*, *supra*.

The constitution guarantees to the citizen the right of acquiring, possessing, and protecting property (art. 1, § 1), which includes also the right of disposal. But the guaranty ceases to operate at the death of the possessor. There is no provision of our constitution, or that of the United States, which secures the right to any one to control or dispose of his property after his death, nor the right to any one, whether kindred or not, to take it by inheritance. Descent is a creature of statute, and not a natural right. 2 Bl. Com. pp. 10-18; *Strode v. Com.*, 52 Pa. 181. At common law, prior to the statute of distribution in England (22 & 23 Car. II.), descent of personal property could hardly be recognized; and, even after the statute requiring administration to be granted, the administrator, after the payment of the debts and funeral expenses of the deceased, was entitled to retain to himself the residue of his effects, the court holding that

there was no power to compel a distribution. 2 Bl. Com. 515; *Edwards v. Freeman*, 2 P. Wms. 442.

Degrees of kindred and the laws of descent in the several states of the Union differ widely. In this state there have been frequent changes in the law governing the subject. It is entirely within the province of the legislature to determine who shall and who shall not take the estate, and the proportion in which they may take, and whether severally or as joint tenants, *per capita* or *per stirpes*. In the absence of constitutional prohibition the legislature is supreme, and may dispose of an intestate decedent's estate, after payment of his debts, to any class or classes of his kindred, to the exclusion of any class or classes. It may limit heirship to lineal descendants, to the absolute exclusion of all collaterals. If it permits, as our laws now do, collateral kindred to inherit, no reason is perceived why the state is debarred from exacting an excise or duty from such collateral for such privilege allowed by the state. It is necessary to make such excise uniform as to the entire class of collaterals. It must not tax one and exempt another in the same class. But it is not a violation of this principle to require an excise from all collaterals and strangers, and exempt from the excise classes nearer in blood to the decedent.

The right to dispose of estates by will is of very ancient origin, but is a creature of municipal law, and not a natural right. Redf. Wills, chap. 1. § 1; *Mager v. Grima*, 49 U. S. 8 How. 494, 12 L. ed. 1170. Before the Statute of Wills in England (82, 84 & 85 Hen. VIII.), the right did not extend to real estate, and was limited as to personal, if the testator left a widow or children. If he had both, he could dispose of but one third of his personal estate by will; if but one, he could dispose of one half. This right has since been extended by statute to include real estate, and all personality. The restriction has never existed in this country, except as to widows, where right to dower and a share of the personal estate is secured by statute in most of the states, and in Louisiana, where the rules of the civil law prevail. Our statute of wills authorizes certain persons to make wills, and prescribes the mode of their execution. This is a statute right, and it is competent for the lawmaking power to modify or take away the right. If the right itself can be wholly destroyed, it must be competent to impose conditions and limitations upon it. The greater always includes the less.

While it has always been the policy of our law to allow collaterals to inherit, in default of lineal descendants, and to allow the disposal of estates by will, which take effect only at the death of the owner, and when his ownership has ceased, the policy may be changed if the legislature so determine; and it is competent for it, if it chooses, to retain this general policy, and to annex to the privilege of taking a decedent's property by descent or will, such conditions as it may deem wise. An excise tax upon the value of the property so allowed to be received by the collateral or stranger to the blood leaves him in much better condition than an absolute withdrawal of the privilege would. He cannot complain of unjust taxation when the state allows him to

take a property subject to a duty of 2½ per cent, when the estate has the right to exclude him from the whole.

The exemption from the tax of certain classes, not any part of the classes taxed, is unobjectionable on constitutional grounds. *State v. Western U. Teleg. Co.* 73 Me. 527.

We think the Act of 1893 imposed an excise tax upon certain inheritances and reverses and conveyances, to take effect after the death of the grantor, and is not a tax upon property, within the meaning of article 9, § 8, of the Constitution, and does not conflict with any provision of the constitution of Maine.

It is claimed by the appellant that the act is in conflict with the 14th Amendment to the Constitution of the United States, which prohibits any state from depriving "any person of life, liberty, or property, without due process of law." It is argued that the act fails to furnish sufficient means to parties interested for the protection of their rights, and confers upon probate courts powers and duties not authorized or contemplated by our constitution. The Act (sec. 12) provides for an appraisal of the estate subject to the excise, upon application to the probate court, by the state assessors, or any person interested in the estate; and (sec. 13) the probate court having jurisdiction of the settlement of the estate is authorized to "hear and determine all questions in relation to said tax that may arise," etc., "subject to appeal as in other cases." These provisions fully secure the rights of all parties interested, and satisfy the requirement of "due process of law." The act applies equally to citizens of this and other states, and therefore is not in conflict with another provision of the 14th Amendment, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Whether the parties subject to the excise take by will or descent, it is only under and by virtue of the laws of this state that the right or privilege to take at all exists; and when that law places all upon an equality, as this act does, there can be no violation of this constitutional provision, in letter or spirit.

The question whether the exemption of \$500 in the first section is an exemption from the corpus of the estate, or a several exemption of that sum from each portion of the estate passing by will or descent to persons outside the exempted classes, is raised by the appeal. A careful examination of the statute satisfies us that the legislature intended the exemption to apply to each taker within the class subject to the duty. The language of section 1 is that "all property . . . which shall pass by will or by the intestate laws of this state . . . other than to or for the use of the father," etc., " . . . shall be liable to a tax of two and one half per cent of its value above the sum of five hundred dollars," etc., and any grantee under a conveyance made during the grantor's life, to take effect after his death, "shall be liable for all such taxes." It is difficult to construe this language to mean other than that such taker, subject to the tax, shall be liable upon the amount received, above \$500. A grantee is made liable to "such taxes." What taxes? Plainly, 2½ per cent upon the amount received in excess of \$500. This construction is greatly

aided by the second section, which, in dealing with limited estates to the excepted classes (whether including all or part of decedent's estate), and remainder to the taxable class, provides for an appraisal of the value of the limited estate, and, when that is ascertained, that value, "together with the sum of five hundred dollars," is to be deducted from the value of such property, and the remainder becomes sub-

ject to the tax or duty. This provision is plainly inconsistent with the claim that the \$500 exemption is to be taken, once for all, from the corpus of decedent's entire estate. The legislature undoubtedly intended the same rule to apply in both sections. We think, therefore, that the decree of the probate court was correct, and the entry must be, *decree of Probate Court affirmed.*

## NEW YORK COURT OF APPEALS.

John D. FORWARD, *Respt.*,

CONTINENTAL INSURANCE CO., *Appt.*

(142 N. Y. 882.)

**1. Knowledge of an agent, with power to solicit insurance, collect premiums, and deliver policies, of the existence of a bill of sale of property insured, takes such instrument out of the operation of a condition as to title and incumbrances in a policy, which at his discretion he fills up and delivers.** (*Per O'Brien Finch, and Peckham, JJ.*)

**2. A mere paper transfer called a bill of sale, without consideration and without delivery of possession of the property, does not constitute a change of title or an incumbrance within the meaning of an insurance policy containing conditions as to title and incumbrances, even if it was intended to defraud creditors.**

(*Gray, J., dissents. Earl, J., dissents from proposition 1.*)

(June 5, 1894.)

**A**PPEAL by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, denying a new trial upon exceptions taken at a trial at the Genesee Circuit of an action brought to recover the amount alleged to be due upon a policy of fire insurance. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. M. H. Peck, Jr.*, for appellant:

A policy of insurance, like other contracts, is presumed to embrace the entire agreement between the parties.

After it has been delivered and accepted parol evidence is not admitted to control or vary its terms.

*New York v. Brooklyn F. Ins. Co.* 8 Abb. App. Dec. 251; *Pindar v. Resolute F. Ins. Co.* 47 N. Y. 114; *Ripley v. Atlas Ins.* 30 N. Y. 186, 86 Am. Dec. 862; *Allen v. German American Ins. Co.* 123 N. Y. 6.

The bill of sale, whether intended to be absolute or as a chattel mortgage, transferred the title to the goods to the persons therein mentioned.

*Woodward v. Republic F. Ins. Co.* 32 Hun, 365.

If this mortgage or bill of sale was good between the parties, the fact that it was void

**NOTE.**—As to the effect of knowledge by insurer's agent of falsity of statements in application, see *note* to *Clemons v. Supreme Assembly Royal Soc. of Good Fellows* (N. Y.) 16 L. R. A. 83, 25 L. R. A.

See also 44 L. R. A. 361.

as to third persons does not affect the question. *Wood, Fire Ins.* § 822.

By the terms of the policy it became entirely void, by the giving of this bill of sale; the insurance was not separable.

*Smith v. Agricultural Ins. Co.* 118 N. Y. 518.

Insurance policies must, like other written contracts, be so construed as to give effect to the intent of the parties as indicated by the language employed. Such a construction should be adopted as will uphold the whole contract and give effect to all its provisions in preference to one that will render some of its provisions nugatory.

*Weed v. London & L. F. Ins. Co.* 116 N. Y. 114.

The conditions violated in this case were contained in the authorized blank, and as to these the agent has no power in any manner, in writing or otherwise, to waive them, but power is given to agents to waive added provisions or conditions, provided such waiver is written upon or attached to the policy. It is immaterial whether the plaintiff read the policy or not. The conditions and limitations were a part of the contract and he was bound to take notice of them.

*Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356; *O'Brien v. Prescott Ins. Co.* 134 N. Y. 28.

It was perfectly proper and competent for the parties to this contract to provide therein that anything done by, or known to, the agent should be without effect upon the contract unless made known in writing to the principal.

*Allen v. German American Ins. Co.* 123 N. Y. 6.

The burden of showing the power and authority of the agent is upon the plaintiff and it is not sufficient to simply prove that a person signed the policy as agent, and this does not prove authority in him to waive any conditions of the policy.

*Messelback v. Norman*, 122 N. Y. 578.

What was done by the adjuster in ascertaining the amount of the loss does not operate as a waiver of the forfeiture.

*Weed v. London & L. F. Ins. Co.* 116 N. Y. 106; *Armstrong v. Agricultural Ins. Co.* 130 N. Y. 560.

This is an action on the policy, and not to reform it, and evidence of a waiver, not having been pleaded, is not admissible.

*Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *Bogardus v. New York L. Ins. Co.* 101 N. Y. 828; *Reining v. Buffalo*, 102 N. Y. 808.

The power to waive could only be exercised in the mode prescribed, unless it was shown that the agent whose acts were alleged to

amount to a waiver possessed actually or apparently the power of his principal in respect to the provision alleged to have been waived.

*Messelback v. Norman, supra; Glenn v. Garth*, 188 N. Y. 18.

It was essentially a conditional obligation of the company, and when he accepted it the plaintiff became chargeable with knowledge of its contents and took it according and subject to its terms. There is no reason why any provision should be set aside.

*Allen v. German-American Ins. Co.* 128 N. Y. 6; *Quinlan v. Providence-Washington Ins. Co.* 188 N. Y. 850.

Of such a condition existing in another case the supreme court says: Had the company been advised that Mr. Kiernan was placing mortgage after mortgage upon his property insured, and that he had suffered a judgment to be recovered against him, it would undoubtedly have availed itself of the right reserved to cancel the policy; its officials would have concluded that there was a moral hazard which they did not wish to be subjected to.

*Kiernan v. Agricultural Ins. Co. of Watertown*, 72 Hun, 519.

*Mr. Safford E. North*, for respondent:

The knowledge of the agent at the time the policy was issued of any fact or condition contrary to the terms of the policy is to be deemed the knowledge of the company itself.

*Carpenter v. German-American Ins. Co.* 185 N. Y. 296; *Berry v. American Cent. Ins. Co.* 132 N. Y. 49; *Cross v. National F. Ins. Co.* 132 N. Y. 133; *Short v. Home Ins. Co.* 90 N. Y. 16, 43 Am. Rep. 188; *Woodruff v. Imperial F. Ins. Co.* 83 N. Y. 134; *Whited v. Germania F. Ins. Co.* 76 N. Y. 415, 32 Am. Rep. 380; *Van Schoick v. Niagara Falls Ins. Co.* 68 N. Y. 484.

Where a policy is issued containing conditions inconsistent with the facts, and the agent knew the facts when the policy was issued, the conditions are waived so far as they conflict with the facts known to the agent.

*Wood, Ins. § 88; Aetna Ins. Co. v. Maguire*, 51 Ill. 842; *Minor v. Phoenix Ins. Co.* 27 Wis. 698, 9 Am. Rep. 479; *Mechler v. Phoenix Ins. Co.* 89 Wis. 665; *Winans v. Alemania F. Ins. Co.* 38 Wis. 842.

Knowledge of the agent was to be deemed the knowledge of the principal.

*Holden v. New York & Erie Bank*, 72 N. Y. 286; *The Distilled Spirits Case*, 78 U. S. 11 Wall, 356, 20 L. ed. 167; *Hoover v. Wise*, 91 U. S. 308, 23 L. ed. 393; *Woodward v. Republic F. Ins. Co.* 82 Hun, 365.

The interest of the plaintiff in the property was proved on the trial to be precisely what defendant understood it to be when the policy was contracted for.

Nothing more than an insurable interest was necessary.

*Wood, Ins. § 86.*

The plaintiff had continued in possession, bought new goods and exercised acts of ownership. Upon the undisputed evidence in the case he was still the sole owner.

*Barry v. Hamburg-Bremen F. Ins. Co.* 110 N. Y. 1.

*O'Brien, J.*, delivered the opinion of the court:

35 L. R. A.

The judgment in this case was recovered upon a policy of insurance issued April 23, 1891, at one year, upon a store and the goods therein, which were owned by the plaintiff. By the terms of the policy the risk was distributed as follows: Upon the store, a sum not exceeding \$1,000; the goods, a sum not exceeding \$1,200; and the furniture and safe, a sum not exceeding \$100. The entire property was destroyed by fire on the 27th of September, 1891. The complaint alleges, and the answer admits, that the loss was adjusted and determined between the plaintiff and a general agent of the defendant on the 6th of October following at \$1,950, and the recovery was for this sum and interest. The only defense interposed by the answer, or urged upon the argument of the appeal in this court, was a breach on the part of the plaintiff of one, or perhaps two, of the conditions contained in the following clause of the policy: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional, sole ownership, . . . or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage. . . . In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company. . . . This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company, shall have power to waive any provision or condition of this policy, except such as, by the terms of this policy, may be the subject of agreement, indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or other representative of this company shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto. Nor shall any privilege or permission affecting the insurance under the policy exist, or be claimed by the insured, unless so written or attached." It was shown at the trial that the plaintiff, about two months before the policy had been issued to him, had executed and delivered to his brother an instrument in the form of a bill of sale upon the stock of goods, furniture, and fixtures in the store, which on March 3, 1891, was filed in the town clerk's office. This instrument, in consideration of \$500, purports to transfer the plaintiff's interest in the property absolutely to his brother. The proof at the trial tended to show that there was in fact no consideration for the transfer; that it was colorable, merely, and made between the two brothers with reference to some litigations pending or threatened against the plaintiff. The brother never in fact paid anything as a consideration for the transfer, and no debt was due or owing to him by the plaintiff. He never in fact claimed any title to the property, or any right to its possession, which always remained in the plaintiff. There was also proof that the existence of this bill of sale, and its true consideration, character, and purpose, were disclosed to the defendant's agent before

the policy was issued or delivered. The court submitted two questions to the jury: (1) Whether the defendant, notwithstanding the condition of the policy, had knowledge of all the facts respecting the existence, nature, and purpose of the bill of sale; instructing them that the knowledge of the agent was the knowledge of the company, and that, if they found that the defendant had knowledge of the facts, the policy was not avoided. (2) Whether a statement contained in the proofs of loss, to the effect that there was no incumbrance on the property at the time, was willfully false, and known to be so by the plaintiff when he made the proofs, and was made for the purpose of defrauding the defendant; instructing them that, if it was not then it did not amount to false swearing, within the intent and meaning of a condition in the policy. The verdict was in favor of the plaintiff, and hence all the disputed facts material to the questions of law must be deemed to be established in the plaintiff's favor.

It was said by Judge Andrews in *Wash v. Hartford F. Ins. Co.*, 73 N. Y. 11, upon the authority of many cases, that "conditions for the prepayment of premium, and the like, which enter into the validity of a contract of insurance at its inception, may be waived by agents and are waived, if so intended; although they remain in the policy when delivered, and that a contract for renewal is, for the purpose, to be treated as the original contract." It has uniformly been held by this court that a condition of this character in a contract of insurance will not operate to avoid it after a loss, providing the company, before delivering the policy, had knowledge of the fact, that the insured, notwithstanding the warranty, or the statement and the condition, was not the sole owner, or that it was incumbered. In such cases the company is deemed to have waived the condition, or by the delivery of the policy with the condition avoiding it in case the insured is not the sole owner, or that the property is incumbered, and accepting the premium, is held estopped from setting up the condition as a defense. It was never supposed that such a condition was intended to apply to a state of facts in regard to which the company had been fully informed when it accepted the risk. The cases on this point are numerous, and it is impossible to make any distinction in principle between the conditions considered and that involved in the case at bar. *Van Schoick v. Niagara Falls Ins. Co.* 68 N. Y. 434; *White v. Germania F. Ins. Co.* 76 N. Y. 415; *Woodruff v. Imperial F. Ins. Co.* 83 N. Y. 134; *Short v. Home Ins. Co.* 90 N. Y. 16, 43 Am. Rep. 138; *McNally v. Phoenix Ins. Co.* 137 N. Y. 389; *Carpenter v. German American Ins. Co.* 185 N. Y. 298; *Cross v. National F. Ins. Co.* 182 N. Y. 133; *Berry v. American Cent. Ins. Co.* 182 N. Y. 49. In these cases it was held, either that the company had waived the condition, or was estopped by the delivery of the policy and the receipt of the premium, since, under such circumstances, it could not be supposed that it intended to deliver to the insured a policy which it knew to be void. When the underwriter, before the inception of the contract, is informed by the owner that the property is in-

cumbered, but still delivers the policy with the condition embodied in it, then, as it seems to me, it is not so much a question of waiver or estoppel, as a question whether the condition ever attached or operated, upon the facts thus disclosed. It can, of course, operate in the future upon transfers or incumbrances, as the facts arise, and then the question is one of waiver. But, when the facts are all known before any contract is made, a condition against a state of things known by all the parties to exist cannot be deemed to be within their intention or purpose. This case cannot be taken out of the rule, by any possible distinction, unless it be by the character and powers of the agent of the defendant, to whom, upon the finding of the jury, the facts were communicated. It is urged that the cases cited do not apply, for the reason that the waiver there was by a general agent. That may be true with respect to the four cases last cited. But it does not seem to me to be so much a question of power or authority in an agent to waive a condition in the contract, as of knowledge by the company, through its agent, of the real facts. In the *Carpenter Case*, *supra*, the information as to the true state of the title was given to a mere clerk of the general agent; and we held that such knowledge was imputable to the company through the general agent, for whom the clerk acted in soliciting the insurance, and that a condition of this character remaining in the policy did not avoid it. Now, the powers of the agent in this case were certainly much broader than those of the clerk in the case referred to. In this case the person to whom the information was communicated was certainly an agent appointed by the defendant itself, while in that the person had no authority directly from the company, but was a mere servant or clerk, acting for, and solely under the authority of, the agent. The agent, in this case, and the clerk, in the other, were engaged in precisely the same duty, and performing the same service, when they acquired the knowledge as to the condition of the property and the state of the title. They were both soliciting insurance, and ascertaining the character and condition of the property upon which the risk was about to be taken; and I am unable to suggest any reason for imputing knowledge in the one case, and not in the other. Moreover, the record is entirely silent as to any facts tending to show that in this case the agent was acting in pursuance of a special or limited power. On the face of the policy, he appears to be the duly authorized agent of the defendant, and actually did grant special permits, and waive conditions in the policy. He had power to waive conditions, providing it was done in the manner stipulated in the policy; that is to say, in writing. He had power to solicit insurance, collect premiums, and deliver policies. There is no proof in the record that the plaintiff ever made application for this policy, written or otherwise, or that he touched the company at any point, or in any form, except through this agent. The fair inference from the proof is that the defendant furnished the agent with policies duly executed, which he filled up and delivered at his discretion, reporting the facts to the company. There is nothing on the face of the policy, and nothing was communicated to

the plaintiff, to lead him to believe that the powers of the agent were special or restricted. Insurance companies, doing business by agencies at a distance from their principal place of business, are responsible for the acts of the agent, within the general scope of the business intrusted to his care; and no limitations of his authority will be binding on parties with whom he deals, which are not brought to their knowledge. *Union Mut. L. Ins. Co. of Maine v. Wilkinson*, 80 U. S. 18 Wall. 222, 20 L. ed. 617; *Mercerau v. Phoenix Mut. L. Ins. Co.* 66 N. Y. 278; *Bodine v. Exchange F. Ins. Co.* 51 N. Y. 117, 10 Am. Rep. 566; *Arff v. Star F. Ins. Co.* 125 N. Y. 87, 10 L. R. A. 609.

It was held in the case of *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495, that an agent, with precisely such powers as I have supposed the agent in this case possessed, could bind the company by a parol contract of insurance, while an application for a policy was pending, but none delivered till after a loss. I am unable to discover in the record any basis for the contention that the knowledge of the agent as to the existence and purpose of the bill of sale is not the knowledge of the defendant. On the contrary, his knowledge of the facts is, I think, imputable to his principal. So far as appears, the plaintiff dealt with him as the representative of the company. If there were in fact any limitations or restrictions on his powers as an ordinary agent, it was for the defendant to show it. His commission was not put in evidence, nor any proof given tending to show that he was not what he was described in the complaint,—the defendant's duly authorized manager or agent at the place where the contract was made. There was no other means of communication between the plaintiff and defendant employed. So far as appears, he made the contract for his principal, and the knowledge that he obtained in the course of the business was the knowledge of the defendant.

There is another view of the question that deserves some notice. Conditions in contracts of insurance against liability when the property is incumbered, or where the title is not absolute in the insured, are inserted for the purpose of guarding against the moral hazard involved. When the transfer or incumbrance is merely colorable or nominal, and not real or effective, the reasons that induced the stipulation do not apply. Was there any real sale or transfer of this property, within the meaning of the policy? Nothing was done, except to execute and file a paper. There was no intention, in fact, to transfer the title, or vest any beneficial interest in the nominal vendee. There was no debt to be enforced, no consideration passed, and the use and possession remained unchanged. The filing of the paper added nothing to its validity. It was not a mortgage, nor intended as security for any debt. It was a mere paper transfer, without consideration, and without delivery of possession; and while it had the form, it had none of the legal elements, necessary, even between the parties, to constitute a valid contract of sale. In legal effect, it was, I think, the same as an unexecuted gift. The worst that can be said of it is that it was intended to defraud creditors; but, if that be true, still the moral 25 L. R. A.

hazard which was the basis of the condition of the policy would still be absent, since the plaintiff's interest in the property at the time of the insurance was in fact the same as before the paper was executed. There is no legal ground upon which this court can properly disturb the verdict, and the judgment should therefore be affirmed.

Finch and Peckham, JJ., concur; Andrews, Ch. J., and Bartlett, J., concur on last ground mentioned in opinion; Earl, J., dissents on first ground, and concurs on last ground; Gray, J., dissents.

Charles EELS, *Resp't.*,  
v.

AMERICAN TELEPHONE & TELEGRAPH CO., *App't.*

(.....N. Y. ....)

**The public easement in a rural highway** of which the fee is in an adjoining owner does not include the permanent and exclusive appropriation of any part of the highway by poles and wires of a telegraph and telephone company.

(October 9, 1894.)

**A**PPEAL by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Erie County Circuit in favor of plaintiff in an action brought to recover possession of a strip of land subject to the public easement to use the same for highway purposes. *Affirmed.*

The facts are stated in the opinion.

*Mr. Melville Eggleston*, for appellant:

The erection of the defendant's telephone line upon the highway was duly authorized by law.

*State v. Central N. J. Teleph. Co.* 11 L. R. A. 664, 53 N. J. L. 341; *Telephone Cases*, 126 U. S. 6, 31 L. ed. 868; *Com. v. Pennsylvania Teleph. Co.* 49 Phila. Leg. Int. 180; *Cheesapeake & P. Teleph. Co. of Baltimore v. Baltimore & O. Teleph. Co.* 66 Md. 399, 59 Am. Rep. 167; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32; *Cumberland Teleph. & Telg. Co. v. United Electric R. Co.* 12 L. R. A. 544, 42 Fed. Rep. 273; *Laws 1848*, chap. 265, amended; see *Laws 1853*, chap. 471.

The legislature may authorize the erection of a telegraph or telephone line on a highway without compensation to the owner of the fee.

The telegraph and telephone are newly discovered methods of exercising the public easement.

*Pierces v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398; *Re v. Russell*, 6 Barn. & C. 566; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 294, 38 Am. Dec. 497; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 94 U. S. 1, 24 L. ed. 708.

If the construction of a telephone line along

**NOTE.**—Upon the question how far telegraph and telephone poles are an additional burden upon a highway, see note to *People v. Eaton* (Mich.) 24 L. R. A. 721.

the highway subserves the proper purpose of the highway, and does not, in any way, incommode its use by the public, then certainly such use of the highway is within the scope of the public easement, and the rights of the owner of the fee are in no way affected.

*Williams v. New York Cent. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *People v. Kerr*, 37 N. Y. 188; *Wager v. Troy Union R. Co.* 25 N. Y. 526; *Oraig v. Rochester City & B. R. Co.* 39 N. Y. 404.

*Waterloo Presby. Soc. Trustees v. Auburn & R. R. Co.* 8 Hill, 567, was placed upon the ground that the public had only the right of way, with the powers and privileges incident to such right—such as digging the soil, etc., for repairs thereto. But this argument, supposing "right of way" to mean only a part of passing over the surface—which we certainly do not admit was not necessary to sustain the decision of either case, and the old authorities cited as authority (*Lade v. Shepherd*, 2 Strange, 1004; *Northampton v. Ward*, 1 Wils. 110; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Harrison v. Parker*, 6 East, 154; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 268; *Gidney v. Earl*, 19 Wend. 98), do not really support it.

The purpose of a highway is not travel and traffic merely, but intercommunication.

The rule which the court may be expected to adopt will not be identical with that of the earlier decisions sometimes referred to as establishing the law.

*Story v. New York Elev. R. Co.* 90 N. Y. 148, 43 Am. Rep. 146; *Elliott, Roads & Streets*, 811; *Witcher v. Holland Water-Works Co.* 66 Hun, 619; *Briggs v. Lewiston & A. Horse R. Co.* 79 Me. 368; *Angell, Highways*, 2d ed. 418.

The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times, and will be made or modified by them. The expanded and still expanding genius of the common law should adapt it here, as elsewhere, to the improved and improving condition of our country and our countrymen.

*Elliott v. Fair Haven & W. R. Co.* 83 Conn. 582; *Van O'Linda v. Lothrop*, 21 Pick. 292, 32 Am. Dec. 261; *Tucker v. Tower*, 9 Pick. 109; *Oushing v. Boston*, 122 Mass. 178; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Chapman v. Albany & S. R. Co.* 10 Barb. 860.

*Mr. Sherman S. Rogers*, also for appellant:

The function of the telephone and telegraph is but a new and legitimate exercise of the easement to which the land was subjected by its appropriation and dedication as a public highway.

*Pierce v. Drew*, 186 Mass. 75, 49 Am. Rep. 7; *Western U. Telep. Co. v. Williams*, 3 L. R. A. 429, 86 Va. 696; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398.

Upon a public highway, if the user be public, it is of no importance whether the user be directly through the officers and employes of the state or through an agency to which the state has entrusted such user for the benefit of the public, although the agent may derive private emolument from the operation and though the appliances employed for such user are its private property.

25 L. R. A.

The operation of an electric telegraph or telephone is a public use.

*Witcher v. Holland Water-Works Co.* 66 Hun, 619; *Pocantico Water-Works Co. v. Bird*, 180 N. Y. 249.

The question then for determination in this case is not in any material respect different from what it would be if this telephone line had been built and operated by the state pursuant to statute and through its own officials.

If the transmission of intelligence upon wires strung in or over a public highway be not in substance a mere newly discovered means of exercising the public easement, it is still such a use of the easement as must have been contemplated in the dedication and acceptance of the public highway, and this is so for the same reason that sewers, water pipes and gas pipes and posts may be properly laid or placed in the highway.

*Witcher v. Holland Water-Works Co. supra.*

The public highway is an instrument of civilization, the use of which necessarily develops public wants, which cannot practically be supplied except by its use, and which cannot be met by the exercise simply of the right of passage and repassage.

It must be the legal intentment, therefore, that in the dedication of the highway the owner purposed that it should be used in the discretion of the public to meet every such necessity or at least every such necessity as could be so met without seriously impairing the original and obvious right of passage.

*Mr. John M. Hall*, for respondent:

Placing telegraph and telephone poles and wires in highways is an additional burden upon the soil, and constitutes a taking which requires compensation to be made.

Private property cannot be taken for a public use without paying or securing to the owner just compensation.

*Elliott, Roads & Streets*, 299.

The primary idea of a highway is motion.

*Peck v. Smith*, 1 Conn. 180, 6 Am. Dec. 216; *Goodtitle v. Alker*, 1 Burr. 183.

Lands taken for public highways are not taken in fee, but an easement or right of passage alone vests in the public, the fee in the land remaining in the adjoining owners.

4 Vin. Abr. 515; *Tyler, Boundaries*, chap. 9; *Knox v. New York*, 55 Barb. 404; *Van Brunt v. Flathush*, 128 N. Y. 50; *Cook's Highway Laws of New York*; *Cooley, Const. Lim.* 559; *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164.

Steam railways are an additional burden on a highway, which entitles the abutting owner to compensation.

*Williams v. New York Cent. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *Wager v. Troy Union R. Co.* 25 N. Y. 526.

The same rule applies to horse railways, where the fee is in the abutting owner.

*Oraig v. Rochester City & B. R. Co.* 39 N. Y. 404.

The laying of a gas pipe along a country highway was likewise held to be an additional burden upon the fee, not included in the easement acquired by the public, and entitled the owner of the land to compensation.

*Re Bloomfield & R. Nat. Gas-Light Co. v. Oaklins*, 63 N. Y. 886.

. The lines of a telegraph or telephone company are on the same footing as the steam railroads.

Lewis, Em. Dom. § 181; Elliott, Roads & Streets, 584; *Dusenbury v. Mutual Tele. Co.* 11 Abb. N. C. 440; *Board of Trade Tele. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 458; *Smith v. Central Dist. Printing & Tele. Co.* 2 Ohio C. Ct. Rep. 259; *Atlantic & Pacific Tele. Co. v. Chicago, R. L. & P. R. Co.* 6 Biss. 158; *American Teleph. & Tele. Co. of Baltimore v. Pearce*, 71 Md. 585; *Western U. Tele. Co. v. Williams*, 8 L. R. A. 420, 86 Va. 696; *Willis v. Erie Tele. & Teleph. Co.* 87 Minn. 847; *Metropolitan Teleph. & Tele. Co. v. Ochsoll Lead Co.* 67 How. Pr. 865; *Blashfield v. Empire State Teleph. & Tele. Co.* 18 N. Y. Supp. 250; *Ocheapeake & P. Teleph. Co. of Baltimore v. Mackenzie*, 74 Md. 86; *State v. Central New Jersey Teleph. Co.* 11 L. R. A. 664, 53 N. J. L. 841; *Broome v. New York & N. J. Teleph. Co.* 42 N. J. Eq. 141; *Thompson, Electricity*, § 18; *Tiffany v. United States Illuminating Co.* 19 Jones & S. 280.

There are also analogous cases holding that the construction of a telegraph line along the right of way of a railroad is a taking of the company's land, for which it is entitled to compensation.

*Southwestern R. Co. v. Southern & Atlantic Tele. Co.* 46 Ga. 43, 19 Am. Rep. 585; *Western U. Tele. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159.

The safer and perhaps sounder view is that such a use of the streets or highway, attended as they may be especially in cities with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof.

2 Dill. Mun. Corp. §§ 698 A, 704, and cases cited.

The argument drawn from public utility is entitled to no consideration.

*Rea v. Ward*, 4 Ad. & El. 884; *Buffalo v. Pratt*, 15 L. R. A. 418, 181 N. Y. 298.

**Peckham, J.**, delivered the opinion of the court:

The sole question involved upon this appeal is the extent of the public easement in a rural highway, the fee of which is in the adjoining owner. The plaintiff herein is the owner in fee, subject to the public easement, of the premises in question, which constitute part of a public highway in the town of Alden, and county of Erie, in this state. The defendant occupies a portion of the highway with its poles, upon which it has strung its wires for the purpose of conducting its business as a telephone and telegraph company. It is incorporated and organized under the laws of this state for the incorporation and regulation of telegraph companies. The plaintiff claims that the defendant has no right to occupy any portion of the public highway with its poles, and he has, therefore, commenced this action of ejectment to recover the premises described in the complaint, subject to the public easement therein for a highway.

The court upon the trial directed a verdict for the plaintiff, and, the judgment entered upon it having been affirmed by the general term, the defendant has appealed here.

The defendant admits that if the use it makes of the highway is outside the scope of the public easement, then the consent of the owner of the soil is necessary, or compensation must be made him for such use. By the 5th section of chapter 265 of the Laws of 1848, providing for the incorporation and regulation of telegraph companies, as amended by the second section of chapter 471 of the Laws of 1853, it is provided that telegraph corporations may construct their lines upon any of the public roads, streets, or highways of the state, provided the same shall not be so constructed as to incommode the public use of the roads or highways; and they are also authorized to construct the same upon any other land, subject to the right of the owner to full compensation therefor. It has been held that a telephone company is, within the provision of the statute, a telegraph company. *Telephone Cases*, 126 U. S. 8, 81 L. ed. 868; *Hudson River Teleph. Co. v. Water-voliet Turnp. & R. Co.* 185 N. Y. 393, 404, 17 L. R. A. 674. The defendant does not, however, contend that the statute gives any right to these companies to make use of the highway for the purpose of constructing their lines thereon without compensation to the owner of the fee of the highway, unless such use is in its nature a part of the public easement for which highways are constructed. The statute, therefore, does not aid in the decision of this question, but it is cited by the defendant as evidence of legislative belief that such use of the highway was legitimate, and within the purpose for which highways were laid out. Defendant also urges that some weight is to be attached to the alleged fact that this use of the highway has been very generally acquiesced in by the adjoining owners of the land, and that such acquiescence is quite strong evidence that the use was proper.

The question is one plainly of law, and, whatever may have hitherto been the legislative belief or the opinion of the adjoining owners as to the propriety of this use of a rural public highway, it must be decided by us in accordance with our own view as to what the law is upon the subject. The length of time which any particular adjoining owner has acquiesced in this use of a highway, the circumstances attending upon and surrounding that acquiescence, the probable considerations operating either to create or to continue it, are all alike matters upon which the court is completely ignorant, and any opinion as to the legality of the use, founded upon an acquiescence by the adjoining owners under circumstances unknown to the court, must, in its very nature, be almost, if not entirely, worthless. The argument founded upon the legislative belief of the legality of such use has also very little weight. There was no warranty implied from the passage of the statute that the consent of the state alone was necessary. All the facts were known to all the parties, and whether, in



addition to the consent of the state, that of the adjoining owners was necessary, was a matter which the state might well leave to the parties interested to try out when the point arose. The question has never been covered up or otherwise concealed, and at the most it can only be urged that the legislature was of the opinion, upon this purely legal question, that the consent of the adjoining owner was not necessary. It is not contended that if it had held the other opinion it would have legislated any more favorably for the companies. If such consent were necessary, it was on account of the constitutional provision that private property should not be taken for public use without due compensation, and this provision the legislature could neither alter nor efface. The companies cannot, therefore, be legally said to have suffered anything by reason of this legislative opinion, and they are not on that account in any position to appeal to a specially favorable construction of the law in their behalf. The legislature could have provided that in all future dedications of land for a public highway, and in taking land under the right of eminent domain for that use thereafter, the right to use it for the purpose for which defendant now uses the highway in question would be implied in such dedication, and paid for when taken. That would have no effect upon land already dedicated or taken for a highway, and could not aid the defendant. An alleged practical construction of the law for many years by the general public in favor of the defendant's contention cannot be the foundation upon which, if proved, to base a legal claim on the part of the defendant; and, unless it can show that its use of the highway at the *locus in quo* is within the limitation of the public easement, it can create no right of continuance in such use arising from a general public acquiescence in its claim, provided the plaintiff, or those under or through whom he claims, have not given, expressly or by implication, the requisite consent. What other parties may have thought, or what action they may have taken, upon such a question, and with regard to their lands, cannot in any manner conclude or affect the plaintiff when he chooses to deny the existence of defendant's right to use land of which plaintiff owns the fee, subject to the public easement therein for a public highway. We agree with the learned counsel for the defendant that the question is not essentially different from that which would arise if the state itself, through its public officers, by virtue of an act of the legislature, should attempt to operate a telegraph line by means of poles, etc., placed in a public highway and without the consent of, or compensation made to, the adjoining owners, who owned the fee of the highway subject to the public easement. If the state itself could do such an act, it could create and authorize a corporation to do it.

We think neither the state nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous, and exclusive use by setting up poles therein, although the purpose to which they are to be applied is to string wires

thereon, and thus to transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation; but the constitution provides that private property shall not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the question is, What are the uses implied in such dedication or taking? Primarily, there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner and he retains the ownership of the land, subject only to the public easement. If this easement do not include the right of a telegraph company to permanently appropriate any portion of the highway, however small it may be, to its own special, continuous, and exclusive use, then the defendant herein has no defense to the plaintiff's claim. Although the purpose of a public highway is for the passage of the public, it may be conceded that the land forming such highway was not taken for the purpose of enabling the public to pass over it only in the then known vehicles, or for using it in the then known methods for the conveyance of property or the transmission of intelligence. Still the primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move, and the intelligence be transmitted by some moving body, which must pass along the highway, either on or over or perhaps under it; but it cannot permanently appropriate any part of it. In the case at bar the fee in the highway at the point in controversy is in the plaintiff, but I do not regard that fact as controlling upon the question of the proper use of the highway. Of course, the plaintiff could not recover in this form of action unless he owned the fee in the highway at this particular point; but I do not think the proper use of the highway depends upon the question as to who owns the fee thereof. I think that the rights of the public in and to the highway remain the same wherever the fee thereof may be placed. 2 Dill. Mun. Corp. 698a, etc. As the fee in this case is in the plaintiff, the discussion of the question must be had with reference to that fact. Where one owns to the center of a street in a city, it has been held that the laying of the rails for a horse railroad imposed an additional burden upon the land forming the street, for which the owner was entitled to compensation. *Craig v. Rochester City & B. R. Co.* 89 N. Y. 404. Although relief was denied a plaintiff who did not own the fee, and who desired to enjoin the use of the street by a horse-railroad company, it was denied upon the ground that there was no taking of the property of the plaintiff by the company, and that being authorized by the legislature the plaintiff could not complain. *Kellinger v. Forty-Second Street & G. Street Ferry R. Co.* 50 N. Y. 206. The plaintiff sought in that action to recover damages for inconvenience of access to his adjoining lands. In the *Craig Case*, *supra*, the case was decided upon the

idea that there was an exclusive occupation of the street, which amounted to an additional burden upon the land. The cases upon the subject of railroads in streets are cited and commented upon in *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 458; *Kans v. New York Elev. R. Co.* 125 N. Y. 164, 11 L. R. A. 640; and *Reining v. New York, L. & W. R. Co.* 128 N. Y. 157, 14 L. R. A. 183; and they show that the primary or fundamental idea of a highway is that it is a place for uninterrupted passage by men, animals, or vehicles, and a place by which to afford light, air, and access to the property of abutting owners, who, in this respect, enjoy a greater interest in the street than the general public, even though their title to the land stops with the exterior line of the street. It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter might be. It was because the highway was permanently, and, to some extent, exclusively, appropriated by the elevated railroads, that it was held their erection, without the consent of the abutting owners, was illegal. *Storry v. New York Elev. R. Co.* 90 N. Y. 122, 48 Am. Rep. 146.

We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly discovered method of exercising the old public easement, for the very reason that this so-called "new method" is a permanent, continuous, and exclusive use and possession of some part of the public highway itself, and therefore cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method, or means of locomotion. All these might be varied, increased as to number, capacity, or form, altered as to means or rapidity of locomotion, or transformed in their nature and character, and still the use of the highway might be substantially the same,—a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway. The following are some of the many authorities which hold that the easement is one of passage only. *Goodtitle v. Alker*, 1 Burr. 183; *Waterloo Presby. Soc. Trustees v. Auburn & R. R. Co.* 3 Hill, 567, and cases cited; *Van Brunt v. Flatbush*, 128 N. Y. 50, 55. Defendant argues that the case in 3 Hill, *supra*, while announcing the principle above stated, yet did not in fact involve the question, and is not authority to be regarded, while the cases cited in the opinion in that case, the defendant claims, do not really support the principle. We think the case in Hill correctly states the law upon the subject, and that case has been very frequently cited with approval by this court to sustain the above proposition, and among the cases 25 L. R. A.

where such citations are to be found is that of *Re Bloomfield & R. Nat. Gas-Light Co. v. Calkins*, 62 N. Y. 886. That case is, as we think, substantially decisive of this one. It was there decided that plaintiff had no right to lay its gas pipes in a country highway without the consent of, or compensation to, the owner of the fee. It was also reiterated that the right of the public was a mere right of passage, and the fee of the land remained in the owner for all other purposes. As to whether there is a different or more comprehensive right in regard to streets in cities, the case does not decide, although it is intimated the right may be greater there than in a purely country highway. While concurring in the view that the easement in a public street in a city or village may well be greater as the actual necessities of the case are greater for sewers and gas and water pipes, yet in this case, as we have to deal only with the easement in a purely country highway, it is not important to discuss how the easement became greater in the one case than in the other, or as to the time when the right to the enlarged use of the highway or street attaches, or the method or means by which the right to such enlarged use was attained. Density of population creates public necessities for water, light, drainage, and other conveniences which do not exist in purely rural districts, and along a purely rural highway. Yet the same land might alter from a country highway to a city street, and it might be determined that there was an implied dedication of the country highway at the time the land was taken to the uses which the future village or city street might require. We do not decide as to that matter, nor do we intimate that the defendant would or would not have the right to place its poles in the city street without compensation to the owner, if he owned to the center of the street.

The argument is pressed upon us that the question to be decided in this case is new, and that it ought to be decided with reference to the wants and customs of the advancing civilization, which it is alleged is doing so much to render life more comfortable attractive, and beautiful. Courts are frequently addressed with such arguments, which are quite forcible, and have in this case been very eloquently, plausibly, and aptly advanced. The answer to be made is that, although this particular phase of the question, strictly speaking, may itself be new, yet the principle which governs our decision is as old almost as the common law itself; and in deciding this appeal favorably to the defendant herein we should be overturning and making nothing of cases which have been regarded as the law for generations past. A majority of the states whose courts have considered the question have decided it in accordance with our own views. The cases are collected in the brief of the learned counsel for the respondent herein. Let the defendant pay the owners for the value of the use it makes of the land outside and beyond the public easement in the highway, and the necessity of the broader decision is done away with. It has the power to take the land upon

making compensation, and hence the refusal of an owner will not stop the proposed undertaking. The amount of the compensation is not now the question, but that in many cases it can be anything more than merely nominal would seem to be a proposition which would not require great elaboration of argument to make plain. The use would frequently be but a technical encroachment

upon the rights of the adjoining owner, and there would be but little fear that anything more than nominal damages would be allowed. This cannot, however, alter the legal rights of the parties, and in regard to them we think the courts below have decided correctly, and the judgment appealed from should be affirmed, with cost.

All concur.

### MICHIGAN SUPREME COURT.

Howard S. JAFFRAY *et al.*, *Plffs. in Certiorari*,

Ward H. JENNINGS.

(.....Mich. ....)

**Individual property of an innocent partner is not subject to attachment for a partnership debt fraudulently contracted by his copartner under a general provision of**

the statute authorizing attachment for fraud of the debtor where another provision expressly says that in a case for attachment against partners or joint debtors the writ shall issue against the property and effects of those brought within the statute.

(September 26, 1894.)

**CERTIORARI** to the Circuit Court for Lapeer County to set aside an order quashing an attachment upon the property of

*NOTE.—Attachment of individual property of one partner for fraud of his copartner.*

The attachment laws of the several states are so diverse that upon some phases of them it is difficult to find precedents for one state among the decisions of another.

The above question seems to be one which has not frequently arisen, but so far as the authorities go they seem to be in accord with JAFFRAY v. JENNINGS.

The individual property of one partner cannot be seized when the attachment is issued because of the acts of another partner. *Williams v. Muthersbaugh*, 20 Kan. 730.

In *Hill v. Bell*, 111 Mo. 85, the court in discussing the effect of an attachment upon one partner's share in the firm property said: The underlying principle of the attachment act is that an attachment can issue only against such defendants as have been guilty of some one or more of the matters therein specified as a ground of attachment; and the attachment when issued binds and holds only the property of the defendant against whom it is issued.

And in the analogous case of an arrest it is held that one partner cannot be arrested for the fraud of his copartner. *McNelly v. Haynes*, 76 N. C. 122.

So in an action against copartners to recover a debt fraudulently contracted by one of them, only the one guilty of the fraud is liable to arrest. *National Bank of Commonwealth v. Temple*, 30 How. Pr. 422, 3 Sweeny, 344; *Hitchcock v. Peterson*, 14 Hun, 390.

Some of the cases even go to the extent of refusing to permit an attachment of firm property because of the acts of one of the partners.

In *Bogart v. Dart*, 25 Hun, 395, the court refused to permit an attachment against the partnership property because of the fraud of one of the partners, holding that his interest only could be seized.

In *Edwards v. Hughes*, 20 Mich. 290, the court dissolved an attachment against partnership property which had been issued because of the fraud of one of the partners.

And in *Wilson Obeare Grocery Co. v. Cole*, 26 Mo. App. 5, in which the partnership was held liable for the fraud of one partner so as to sustain an attachment, it does not appear upon what property the attachment was levied, but the general

language of the opinion would lead to the conclusion that it was upon the partnership property simply.

In Wisconsin it has been held that the firm property may be attached if one of the partners is fraudulently using it to pay his individual creditors. *Keith v. Armstrong*, 65 Wis. 225.

So in case of an attachment because of the non-residence of one of the partners the courts of many of the states refuse to permit it to be levied on firm property.

There can be no attachment against firm property because one partner is a nonresident. *Wiley v. Sledge*, 8 Ga. 532; *Taylor v. McDonald*, 4 Ohio, 149; *Cowdin v. Hurford*, 1d. 132; *White's Case*, 10 Watts, 217; *Wallace v. Galloway*, 5 Coldw. 510; *Leach v. Cook*, 10 Vt. 239.

In case the absconding of one partner is the ground for the attachment, it cannot be levied upon the partnership effects. It can reach only the interest of the absconding partner in such effects. *Re Smith*, 16 Johns. 102.

But there is authority upon the other side of that proposition holding that the property of a firm may be attached because of the nonresidence of one of the partners. *Andrews v. Mundy*, 36 W. Va. 22; *Wilcox v. Carey*, 9 Dana, 297; *Conklin v. Harris*, 5 Ala. 213.

In the states in which individual property is held to be attachable for firm debts the question does not seem to have been considered how far a debt fraudulently contracted by one partner is within the rule.

In *Pearce v. Shorter*, 30 Ala. 313, the property of an individual partner was held liable to be attached for the firm debt, but there is nothing to show what the ground of attachment against the firm was.

So in Massachusetts one partner is attachable for the debt of the firm. *Stevens v. Perry*, 113 Mass. 380.

And in *Davis v. Werden*, 13 Gray, 305, there was an attachment of the property of a nonresident partner for a debt of the firm, on the ground of his nonresidence.

While in *Allen v. Wells*, 22 Pick. 450, 33 Am. Dec. 757, in which the effect of an attachment of individual property is discussed, the question was one of priority between individual and firm creditors.

H. F. F.

one person for the alleged fraud of his partner in procuring goods. *Order affirmed.*

The facts are stated in the opinion.

*Messrs. Fletcher & Wanty*, for plaintiffs in certiorari:

The fraud was committed for all the members of the firm in the course of the partnership business and the firm reaped the benefit of the fraud by taking and keeping the goods which were its fruit.

In *Smith v. Adrian*, 1 Mich. 495, this court held that where two persons are engaged as partners in selling liquor without a license, a sale by one is the act of both and is sufficient to subject the partner who does not participate in the sale to the penalty provided by the law.

In *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, it is also held that all the members of the firm are liable for slanderous statements made by one partner the purpose of which is to aid the partnership business.

In *May v. Newman*, 95 Mich. 501, the court sustained the attachment based upon an affidavit that the indebtedness was fraudulently contracted, although the fraudulent statements were made by an agent instead of the defendant personally.

The principles upon which partnerships are held responsible for the acts of one of the partners are analogous to, and in most cases identical with, those upon which employers are bound by the acts of their agents.

*Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Bradner v. Strang*, 89 N. Y. 299; *Strang v. Bradner*, 114 U. S. 561, 29 L. ed. 250.

Such fraud is presumably committed for the benefit of the partnership and the individual partners are therefore liable for the wrong.

*Wilson Obeur Grocery Co. v. Cole*, 26 Mo. App. 5; *Keith v. Armstrong*, 65 Wis. 225.

*Messrs. Geer & Williams*, for defendants in certiorari:

The remedy by attachment being authorized alone by statute and in derogation of the common law, and moreover being summary in its effect and liable to be abused and used oppressively, its application will be carefully guarded by the courts and it will be confined strictly within the limits prescribed by the statute.

*Delaplain v. Armstrong*, 21 W. Va. 211.

*Edwards v. Hughes*, 20 Mich. 289, was a case where Reams, one of the partners, was disposing of partnership property to defraud his creditors, and in doing so was defrauding the creditors of the firm, and this court held that the firm property was not liable to attachment.

In *Bogart v. Dart*, 25 Hun, 897, Daniels, J., says: "The provisions of the Code as they have been enacted, have provided for the remedy by attachment only because of some specified delinquency on the part of the person or persons whose property is to be seized."

One party is not allowed to be arrested because of the fraud or misconduct of another, and from the terms made use of prescribing the cases in, and the circumstances under which attachments may be issued, it is evident that the legislature intended that a like policy should be observed.

*Andrews v. Mundy*, 36 W. Va. 22; *Hill v. 25 L. R. A.*

*Bell*, 111 Mo. 85; *Hathaway v. Johnson*, 55 N. Y. 93, 14 Am. Rep. 186; *Hitchcock v. Peterson*, 14 Hun, 890; *National Bank of the Commonwealth v. Temple*, 2 Sweeney, 344.

*Hooker, J.*, delivered the opinion of the court:

Plaintiffs were copartners, residing in New York, and were jobbers, of whom the defendants (father and son, and also partners) purchased goods. The son, Ward L. Jennings, having purchased a quantity of goods for his firm from the plaintiffs, the latter commenced proceedings by attachment upon an affidavit which alleged that the defendants fraudulently contracted the debt upon which the action was brought, viz., that arising from the purchase mentioned. The writ was levied upon property belonging to the father, and upon his application the attachment was dissolved by the circuit judge. It was admitted that at the time of the levy the firm had sufficient personal property out of which the claim could have been satisfied. Defendants' contention is that the individual property of the innocent defendant was not subject to seizure by attachment. Counsel for the plaintiffs build a strong argument upon the doctrine that each partner is an agent of his fellows, citing *May v. Newman*, 95 Mich. 501, to the proposition that an attachment lies against a debtor whose agent fraudulently contracted the debt. But the statute upon which the remedy by attachment depends has relieved the innocent partner from the application of this rule. An examination of the statutes may aid in solving this question. We start with the proposition that "attachment is a harsh and extraordinary remedy, unknown to the common law; and the statutory provisions upon which the right depends, being in derogation of the common law, must be strictly construed, and cannot be extended beyond their terms." See cases cited in 1 Jac. & O. Dig. p. 96, § 1; *Estlow v. Hanna*, 75 Mich. 219. An action against joint debtors is like any other action. It is aimed at the individual debtors. A service on one is not a service upon the other; they may appear separately; their defenses may be different; the judgment is against each for the whole amount; the execution issues against the individuals, the officer being commanded to collect the debt from the goods and chattels, and, for want thereof, of the lands and tenements, of the individuals. And this is as true where the joint obligation is a partnership debt as in cases where the debtors are not copartners. The act authorizing proceedings in attachment permits any creditor to have an attachment against his debtor, upon conditions mentioned. The conditions are that he shall show that the defendant—i. e. the debtor—is believed to be guilty of certain acts, or to possess certain intentions regarding the debt or his property, fraudulent in character, the general tenor of which indicates danger that such debtor will put his property beyond the reach of the creditor. The law lays hold of the property of such debtor, to preserve it for the creditor. So long as there is a sole debtor, no difficulty is likely to arise, but when the debt is joint the question arises, how far should the fraudulent acts and

intentions of one subject the property of another to seizure? The acts, if strictly construed, only provide for attachment against the debtor who is guilty of the fraud. An additional remedy, summary in its nature, is given against him. It is given, in terms, against no others. And where the act is done by one only, the law can only be made applicable to another by invoking the doctrine of agency.

No one will question the fact that one can, through an agent, subject his property to attachment; and this is as true where the agent is a partner as where he is not, and where the act complained of is the fraudulent purchase of goods by a partner, as in this case. There is much persuasiveness in the argument that, as the firm received the benefit and appropriated the fruit of the transaction (whether with knowledge upon the part of both or not), the rule that a partner is an agent of his copartners makes his act the act of both. It would not be so convincing if the cause for attachment were another of those named in the statute,—*a. g.* if one only was shown to have an intent to dispose of the firm property, or had actually done so without the knowledge of his partner, or where he absconded, or removed out of the state, or was about to do so, with intent to defraud the firm creditors. Still more hard would be the attachment against one where his copartner had merely resided out of the state for three months, which in itself is ground for attachment, regardless of the honesty of his intention. Can it be said that in all of these cases these acts are partnership acts, binding the partners under this application of the doctrine of agency? It is true that the creditors of a firm in Michigan, one of the members of which lives in Chicago, have the absolute right to commence all actions against the firm by attachment, and to levy not only on the firm property, but that of each resident member, as well as that of the nonresident? If not, it must be that this doctrine is improperly applied, or a distinction must be drawn between the different causes for attachment named in the statute, and the liability limited to those acts which, we may say, either as a conclusion of fact or law, are the acts of the firm, which would seem to limit the cases to those where the debt was fraudulently contracted, and where the property of the firm had been assigned, concealed, or disposed of with intent on the part of one to defraud the firm creditors. If plaintiffs' theory is correct, these would be the acts of all partners, and subject to seizure not only the partnership property, but the individual property of each partner, no matter how honest, and notwithstanding their solvency. There can be no doubt that partners are bound by the contracts, and many times by the torts, of one of their number, to the extent of liability. But is it as clear that the nature of the remedy is always subject to the same rule? As already stated this remedy is statutory, and the statutes must show the design to cover such cases as this, or they are not to be treated as within them. The attachment statute is borrowed from New York. It will be found in the Revised Statutes of 1883 and 1846 and the Compiled Laws of 1867. The section of which Howell (section 8015) is

an amendment remained unchanged from the time of its adoption until 1861. It is section 19, chap. 1, title 4, pt. 8, p. 512, Rev. Stat. 1883. The same is found in Rev. Stat. 1846, § 80, p. 517, and Comp. Laws 1867, § 4771. It reads as follows, viz.: "When two or more persons are jointly indebted as joint obligors, partners, or otherwise, the attachment may be issued against the separate or joint estates or property of such joint debtors or any of them, and the same proceedings shall be had as hereinbefore prescribed." It goes without saying that under this act, where all of the joint debtors are shown to have participated in the statutory act, or where it appears that each has entertained the fraudulent intent, the writ should issue against all; and it is as plain that in such case the writ could be issued against the separate or joint estates of the debtors. So far it lays down a plain, consistent, and just rule. Shall we go further, and say that it was meant that the writ would be as far-reaching in cases of joint debtors, who are not partners, where one was innocent of wrong? That would probably not be claimed by any one. As to partners, the same claim might be made as is made here, viz. that in dealing with the partnership property the act of one is the act of all, and that the consequences are the same to all. But this act had received a construction before it became a law in Michigan. In *Chipman's Case*, an absconding debtor (14 Johns. 217), decided in 1817, it was held that the attachment might issue against the property of one of several partners who absconds, for a debt due by the firm, although his copartners are resident within the state, and subject to process. This is not conclusive of the question here, and is cited only to show that counsel in that case did not resort to the remedy by attachment against all of the partners. Two years later the same court held that an attachment might issue against the separate property of an absconding debtor upon a debt due from his copartnership. Here, again, the writ appears not to have been sought against the partners who remained. But the case went further, and held that the partnership property could not be seized; and the reason was that the other partner had a right to retain it to pay the partnership debts. *Re Smith*, 16 Johns. 102. It may still be said that in neither of these cases were all of the partners sued in attachment, and therefore there yet remains doubt if the right contended for does not exist under this statute, and it is probable that such doubts led to the Amendment of 1861, which reads as follows: "When two or more persons are jointly indebted as joint obligors, partners, or otherwise, and an affidavit shall be made, as provided in section two of this chapter, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of attachment, then the writ of attachment shall issue against the property and effects of such as are so brought within the provisions of said section; and the officer shall be also directed in said writ to summon all such joint debtors as may be named in the affidavit attached thereto, to answer to the said action as in other cases of attachment." Before discussing the statute, let us review the situation. Under the previous statute, attachment lay against all joint debtors,

whether partners or not, where it could be shown as matter of fact that all participated in the act constituting a cause. It was also plain that, where one joint debtor only committed such act, his property only was subject to the writ, unless there was a partnership. There was, then, no necessity for legislation to reach either of these cases, for joint debtors, where not partners, were fully protected where innocent of wrong, and the creditor had his remedy against both where both participated, and against the offender where only one was guilty. In this condition of affairs, the legislature passed section 8015, thereby giving immunity from attachment to joint debtors, including partners, who were not themselves participants in the wrongful act. Now, by a construction of this act, it is sought to say that partners are not within its terms, because the act of one is the act of all, and that, as a matter of law, they are, therefore, all participants in the fraudulent act. If that is so, the statute seems to have no office to perform. It has relieved nobody. Joint debtors, not partners, could not be attacked by attachment before unless guilty. But there may have been a doubt about partners. That doubt seems to have caused the enactment of a law whose only object must have been to reach and relieve the very class of cases which the construction contended for seeks to exclude from its protection.

As said at the outset, attachment is a harsh and extraordinary remedy. The law may well restrict its use, and deny it as against all honest persons, though they have the misfortune to be connected in business as partners with dishonest persons. Such persons have legal obligations to discharge in relation to the partnership affairs. They must see that obligations are discharged, and the law presumes that they will faithfully do so. No very good reason suggests itself why the private fortune of an honest partner should be seized because his partner has been detected in a fraudulent act in connection with partnership affairs. It is common knowledge that few men or firms can survive an attack by attachment. It is the almost certain precursor of insolvency, as in former days it was of bankruptcy, and we should hesitate before broadening the scope of the act in question. A case quite similar to the present was before the court, viz., *Edwards v. Hughes*, 20 Mich. 290. Mr. Justice Cooley wrote the opinion, and seems to have taken a similar view of these statutes to that expressed above. It is true that the facts in that case may permit it to be distinguished from the present, but the language used is broad, and it is hardly possible that the court could have overlooked the contingency of such cases as this. Since this decision we think the bar have understood that the liability was limited to such partners as personally participated in the fraudulent act. See *Tiffany's Justice Guide*, p. 60, note 1, where this doctrine is laid down; *Shinn, Pl. & Pr.* § 807. See also *People v. Bay County Circuit Ct. Judge*, 41 Mich. 826, where a writ issued against non-resident partners only.

We think the learned circuit judge correct in his conclusions, and that his order dissolving the attachment should be affirmed, with costs.

Ordered accordingly.

25 L. R. A.

**Long and Grant, JJ., concur with Hooker, J.**

**Mongomery, J., dissenting:**

Plaintiffs sued out an attachment against the defendants, alleging that the defendants, comprising a copartnership which consisted of Ward H. Jennings and Ward L. Jennings, fraudulently incurred the indebtedness for which suit was brought. The writ of attachment was levied upon the property of Ward H. Jennings, and he filed an application to dissolve the writ, which was allowed. The sole question is whether the allegation in the writ that the indebtedness was fraudulently contracted by the defendants was made out. The evidence is abundant that Ward L. Jennings made false and fraudulent representations as to the standing of the defendants and as a basis for the credit which was extended at the time the goods in question were sold. It is contended, however, that the defendant Ward H. Jennings' individual property cannot be made subject to attachment by the fraud of Ward L. Jennings. This question must be determined by ascertaining whether the institution of the proceedings was justified as against the two defendants. The affidavit very properly alleges that the defendants fraudulently contracted the debt, not that one of the defendants did so. Each partner was, in the matter of the contracting of the indebtedness, the agent of the partnership; and the fraud of the agent in contracting such indebtedness is the fraud of the principal, as was held in *May v. Newman*, 95 Mich. 501. The statute in terms provides the remedy by attachment against the defendant, when it is shown "that he fraudulently contracted the debt or incurred the obligation respecting which the suit is brought." Who is to be said to have fraudulently contracted the debt or incurred the obligation? Obviously, the purchasers of the goods; not Ward L. Jennings alone. Both members of the firm incurred the obligation simultaneously, and both contracted the indebtedness. Section 8015, in my judgment, has no application. That provides that "when two or more persons are jointly indebted, as joint obligors, partners or otherwise, and an affidavit shall be made, as provided in section two of this chapter, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of attachment, then the writ of attachment shall issue against the property and effects of such as are so brought within the provisions of said section." This section gives no support for the suggestion that one partner may not, when representing the firm, fraudulently contract a firm indebtedness. Nor is the case of *Edwards v. Hughes*, 20 Mich. 290, relied upon by defendants, in point. In that case, it is true, it was said, construing the section just quoted: "It will be seen from this section that when the plaintiff is able to make a case against one of several debtors, whether they are indebted as partners or otherwise, he is not to allege a joint wrong by them all, but must set forth his case in the affidavit according to the facts. There is good reason and plain justice in this statute, since otherwise the party who has the misfortune to be joined in the same legal obligation with a dishonest person may himself be subjected, not only as to

his property owned jointly with the other, but as to his individual property also, to all the inconveniences and rigorous treatment to which he could have been made liable if personally guilty of the like dishonesty." But the misfortune of the present defendant Ward H. Jennings does not arise from his having joined in the legal obligation of Ward L. Jennings, a "dishonest person." His liability grows out of the fact that the firm of which he was a member fraudulently incurred an obligation. In *Edwards v. Hughes* the fraudulent act of the copartner consisted of transferring his individual property in fraud of the creditors of the firm. It is perfectly apparent that he could not, by an act thus disconnected from the business of the firm, subject the property of his copartner to the extraordinary process of

attachment. But in the case under consideration, the act of Ward L. Jennings was the act of the firm. Any other view of this statute results in this: that a partner having a nominal interest may incur indebtedness on behalf of the firm fraudulently, and no process can issue against either the copartnership property or the property of his copartners. The extent to which the creditor could go would be to issue his process against the interest of the nominal partner. This is plainly not the purpose of the statute, in my judgment. I think the case falls within the principle in *May v. Newman*, and the order dissolving the attachment should be reversed, with costs.

McGrath, C.A. J., concurs with Montgomery, J.

### OHIO SUPREME COURT.

Alexander M. BYERS, *Pff. in Err.*,

vs.  
Samuel SCHLUPE *et al.*

(51 Ohio St. 300.)

**1. In a civil action for the recovery of money, the plaintiff may, on the ground that the defendant is a non-resident of this state, have an attachment against the property of a defendant partnership of which all the members reside outside this state, which was formed for the purpose of carrying on business in this state, and which has a usual place of doing business in this state.**

**2. In an attachment against the property of such a nonresident partnership, it may be sued by its company name, and service may be had by leaving a copy of the summons with the indorsements thereon, at its usual place of doing business in this state.**

(April 24, 1894.)

**ERROR** to the Circuit Court for Madison County to review a judgment refusing to recognize the validity of an attachment upon the property of Samuel R. Bullock & Company. *Reversed.*

Statement by Dickman, C.A. J.:

This petition is prosecuted by Alexander M. Byers, plaintiff in error, against Samuel Schlupé, assignee of the New Philadelphia Pipe Works Company, Ezra Nicholson, the Cleveland, Lorain & Wheeling Railroad Company, Timothy Fahey, Bryan and Prendergast Brothers, W. and J. F. Prendergast, H. T. Van Fleet, Samuel R. Bullock & Company, and numerous others, defendants in error, from the circuit court of Marion county, Ohio, upon a finding of facts and conclusions of law as made by that court. The parties plaintiff and defendant were the same in the circuit court as in this court.

\*Headnotes by the COURT.

NOTE.—As to what is nonresidence for the purpose of attachment, see note to *Munroe v. Williams* (2 C.) 19 L. R. A. 668.

25 L. R. A.

The finding of facts and conclusions of law are as follows:

"This day came the parties and with their attorneys, and this cause came on to be heard upon the respective pleadings filed herein, and the evidence, upon consideration thereof and upon application of said plaintiff, the court do find from the evidence the following facts, viz.: that the funds now in the hands of the sheriff, to wit, \$5,100, arose from the sale of the personal property of the partnership firm of Samuel R. Bullock & Company, upon an order of sale for that purpose duly issued herein by consent of all parties hereto; that on the 30th day of August, A. D. 1887, the New Philadelphia Pipe Works Company, a party herein, commenced an action in the court of common pleas of Marion county against the said Samuel R. Bullock & Company in their firm name, and none other, and for the purpose of procuring an order of attachment accompanied the filing of the petition with an affidavit, alleging in said affidavit the following facts and none other: "Ezra Nicholson being duly sworn says that he is the secretary and treasurer of the New Philadelphia Pipe Works Company, an incorporated company under the laws of the state of Ohio; that the claim sued upon in the action was upon a contract for an amount of water pipe sold and delivered to said Samuel R. Bullock & Company, a partnership formed for the purpose of doing business in Ohio, that said claim was just and that affiant believes the said New Philadelphia Pipe Works Company ought to recover \$29,947.04 and interest from August 20, 1887; that the defendants are nonresidents of the state of Ohio." Upon said affidavit an order of attachment was issued to the sheriff of said county, which was received by him and was on the same day levied by him upon the personal property sold aforesaid.

"That afterwards on the same day Timothy Fahey commenced an action in said common pleas court against said Samuel R. Bullock & Company upon a claim which was not at that time due, accompanying the filing of his petition with an affidavit, alleging in said affidavit the following facts and none other:

'Timothy Fahey being sworn according to law, deposes and says that he has commenced an action against the said Samuel R. Bullock & Company in the court of common pleas of Marion county, Ohio, to recover on a certain bill of exchange, drawn by the said Samuel R. Bullock & Company; that said claim is just, and that the same will become due on the 11th day of September, A. D. 1887, and that there will then be due upon the same the sum of \$2,500, and that the said Samuel R. Bullock & Company has sold and conveyed and disposed of its property with fraudulent intent of hindering and delaying its creditors in the collection of their debts, and that said Samuel R. Bullock & Company is about to move its property out of said county of Marion, to the effect of hindering and delaying its creditors in the collection of their debts; that at the same time an order of attachment was duly allowed in said action by the Honorable John A. Price, one of the judges of said court upon the said Timothy Fahey, giving bond in the sum of \$5,000, to the satisfaction of the clerk of the court of common pleas of Marion county, Ohio, conditioned according to law; which order of allowance was duly entered upon the journal of said court; that at the same time the said Timothy Fahey executed his bond as provided in said order of allowance to the acceptance of said clerk; upon said affidavit, allowance as aforesaid, and giving bond aforesaid, an order of attachment was issued to the sheriff of said county, which was received by him and was on the same day by him levied upon the personal property sold as aforesaid.

"Afterwards, upon the same day an action was commenced by Bryan and Prendergast Bros. against Samuel R. Bullock and William S. Mercer, partners, as Samuel R. Bullock & Company, and accompanied the filing of the petition herein with an affidavit, alleging in said affidavit the following facts and none other: 'James F. Prendergast being duly sworn, says that he is one of the above-named plaintiffs who are partners doing business under the firm name of Bryan and Prendergast Bros. That the defendants are indebted to said plaintiffs on an account for goods sold and delivered to defendants at their request; that said claim is just; that the amount which said plaintiffs ought to recover from said defendants, as affiant believes, is one hundred and one dollars and ten cents, with interest from the 30th day of August, 1887, and that said defendants are non-residents of the state of Ohio.' Upon said affidavit an order of attachment was issued to the sheriff of said county, which was received by him, and was on the same day by him levied upon the personal property sold as aforesaid.

"Afterwards on the same day, W. and J. F. Prendergast commenced an action in said court against Samuel R. Bullock & Company, and accompanied the filing of the petition therein with an affidavit alleging in said affidavit the following facts, and none other: 'James F. Prendergast being duly sworn, says that he is one of the plaintiffs in the foregoing action; that the said plaintiffs are partners doing business under the firm name

of W. & J. F. Prendergast; that the defendants are a partnership firm formed for the purpose of doing business and holding property in the state of Ohio, and the usual firm name which they have assumed is Samuel R. Bullock & Company; that the said defendants are indebted to the said plaintiffs on an account for goods sold and delivered to defendants at their request; that said claim is just; that the amount which plaintiffs ought to recover, as affiant believes, is one hundred and thirty-four and 67-100 dollars, with interest from the 29th day of August, 1887; and that defendants are nonresidents of the state of Ohio;' upon said affidavit an order of attachment was issued to the sheriff of said county, which was received by him, and was on the same day by him levied upon the personal property sold aforesaid.

"Afterwards on the 7th day of September, 1887, the New Philadelphia Pipe Works Company filed an amended petition in said case and accompanied the same with an affidavit, alleging in said affidavit the following facts and none other: 'Ezra Nicholson being first duly sworn, says that he is the agent duly authorized for the plaintiff in this action, which is a corporation organized under the laws of Ohio: that the defendants who are a partnership organized for the purpose of doing business and holding property in Ohio, are indebted to plaintiff on a contract for the sale of certain personal property and goods, to wit, iron water pipe and special casting; that the amount of plaintiff's claim is twelve thousand one hundred and fifty-six dollars in addition to the amount now due to plaintiff; that said \$12,156.00 will become due September 20, 1887; that said claim is just, and that said defendants are about to make a sale, conveyance, and disposition of their property with the fraudulent intent to cheat or defraud their creditors, and to hinder and delay them in the collection of their debts; that said defendants have purchased of plaintiffs and other parties large quantities of valuable property, the ownership of which they now disclaim, alleging and pretending that all said property or the greater part thereof is owned by a certain corporation called the Marion Water Works Company, organized at the instance of said defendants, and that said attempted transfer of title to such property is undertaken by defendants while they are still indebted to plaintiff in a very large sum for the greater part of the property so attempted to be disposed of and thereby placed beyond the reach of creditors."

"And thereupon another order of attachment was issued from said court and levied upon said property; and afterwards on the 11th day of November, 1889, a second amended petition was filed by the plaintiff in said cause, and with it there was filed an affidavit, alleging in said affidavit the following facts and none other: 'Thomas C. Willard being duly sworn, says that he is the secretary of the New Philadelphia Pipe Works Company, a corporation duly organized and doing business under and by virtue of the laws of the state of Ohio; that the defendants, Samuel R. Bullock and William S. Mercer were lately partners doing busi-



ness under the firm name and style of Samuel R. Bullock & Co.; that said defendants are indebted to said plaintiff upon a contract for iron pipe and other castings; that said claim is just, and that plaintiff ought, affiant believes, to recover the sum of twenty-four thousand one hundred and three and 9-100 dollars, with interest at 6 per cent; eleven thousand nine hundred and forty-six and 70-100 dollars, from August 20, 1887; and on twelve thousand one hundred and fifty-five dollars from September 20, 1887; and that said defendants are nonresidents of the state of Ohio.' An order of attachment was issued thereon, which was also levied upon said property. That at the February term, A. D. 1889, of the court of common pleas aforesaid, the said the New Philadelphia Pipe Works Company obtained a judgment against the said Samuel R. Bullock & Co. upon the cause of action alleged in its petition and amended petition, in the sum of twenty-five thousand one hundred and eighty-seven dollars and ninety-five cents; that at the May term, A. D. 1888, the said Timothy Fahey obtained a judgment against the said Samuel R. Bullock & Company upon the cause of action alleged in his petition in the sum of two thousand six hundred and twenty-one dollars and twenty-five cents.

"That at the January term, 1888, the said Bryan and Prendergast Brothers obtained a judgment against the said Samuel R. Bullock and Company upon the cause of action alleged in their petition, in the sum of one hundred and three dollars and eighty-eight cents. That at the January term, A. D. 1888, the said W. and J. F. Prendergast obtained a judgment against the said Samuel R. Bullock & Company upon the cause of action alleged in their petition in the sum of one hundred and thirty-eight dollars and thirty-four cents.

"That prior to the October term, A. D. 1888, of the court of common pleas of Marion county, a large number of judgments were obtained by certain laborers against the said Samuel R. Bullock & Company and were each asserting liens upon the personal property sold as aforesaid, and in the case of the New Philadelphia Pipe Works Company against Samuel R. Bullock & Company by consent said laborers, represented by one H. T. Van Fleet, were made parties defendant, and between said parties such proceedings were had, that at the October term, 1888, of the said court, the court made the following order and decree:

"This day this cause came on to be heard upon the answer and cross-petition of the defendants, Jacob S. Brady and others (laborers represented by H. T. Van Fleet), and the evidence, and was submitted to the court; on consideration whereof, and the court being fully advised in the premises, find for said defendants, and that their claims are for labor performed for the defendants, Samuel R. Bullock & Company, and that they are valid liens upon the property taken in attachment in this action, and first in order of priority."

"That at the February term, 1889, of said court of common pleas, the court made the following decree: 'It was agreed by the parties, plaintiff, and said defendant, Al-

exander M. Byers, that the labor claims of the seventy-seven defendants heretofore found to be the first lien on the property attached in this case as against the said plaintiffs be and the same by agreement and confession made in open court, declared the first lien on said property so attached and in controversy in this cause, as against any claim, rights, demands, legal or equitable of said Alexander M. Byers;' that each of said orders and decrees remain in full force and effect; that on the 28th day of November, A. D. 1887, the said the New Philadelphia Pipe Works Company assigned the one undivided fourth-part of its claim against Samuel R. Bullock & Company to one Ezra Nicholson by a written transfer in the words and figures following, to-wit: 'The New Philadelphia Pipe Works Company hereby assign and transfer to Ezra Nicholson an undivided one-fourth part of all its claim against the late firm of Samuel R. Bullock & Company, which claim is now in suit in the court of common pleas of Marion county, Ohio, and also assign one-fourth part of all moneys that may be realized from or upon said claim or out of said suit, through proceedings in attachment, suit or otherwise.'

Afterwards it assigned a portion of its claim in said case to the Cleveland, Lorain & Wheeling Railroad Company; assignment was filed in the case of the *New Philadelphia Pipe Works Company v. Samuel R. Bullock*, but is now lost and was never recorded by the clerk. The amount so assigned was \$2,848.48, with interest.

Afterwards on the 8d day of August, A. D. 1888, the said company assigned the balance of its claim to Alexander M. Byers by an instrument in writing, of which the following is a copy:

"For value received, we hereby sell, transfer, and assign to Alexander M. Byers, our claim against Samuel R. Bullock & Company for pipe delivered to them at Marion, Ohio, which claim is now in suit in the common pleas court at Marion, Ohio, in an action pending, the New Philadelphia Pipe Works Company are plaintiffs, and Samuel Bullock & Company *et al.* are defendants, except so much of said claim as we have heretofore assigned and transferred to E. Nicholson for \$5,000, and to C. L. Cutter, treasurer of the Cleveland, Lorain & Wheeling Railroad Company for \$2,848.48 with interest. And we hereby authorize and empower said Byers to be substituted in our place in said action, and to prosecute, adjust, and settle the same, and having paid himself the amount now due him from us, being the sum of \$16,881.42, with interest; and having paid all costs and attorneys fees in the prosecution of said case, if there shall be any balance received by him over the amount due him as aforesaid, such balance shall be held subject to our order."

"That the said assignment to Ezra Nicholson and Alexander M. Byers were entered by the clerk of said court upon the execution docket of said court. Upon the facts there found, the court do find that the costs made in the case of the New Philadelphia Pipe Works Company against Samuel R. Bullock

& Company *et al.* (No. 4939), is the first and best lien.

"That the costs made in this action is the second best lien.

"That the judgment and costs of Timothy Fahey with interest thereon to the date of the sheriff's sale, is the third best lien.

"That the judgment and costs of Bryan and Prendergast Bros., with interest thereon to the date of the sheriff's sale, is the fourth best lien.

"That the judgment and costs of the laborers, represented by H. T. Van Fleet, with interest thereon to the date of the sheriff's sale, is the fifth best lien.

"That the judgment of the New Philadelphia Pipe Works Company, with interest thereon to the date of the sheriff's sale, is the sixth best lien.

"It is therefore ordered, adjudged, and decreed that the said sheriff should out of said fund pay:

"*First*—All costs in the case of the New Philadelphia Pipe Works Company against Samuel R. Bullock & Co., to wit, \$663.67.

"*Second*—All the costs of this action, to wit, \$344.78.

"*Third*—To Timothy Fahey, the amount of his judgment and costs with interest, to wit, \$2,933.58.

"*Fourth*—To Bryan and Prendergast Bros., the amount of their judgment and costs, with interest, to wit, \$188.82.

"*Fifth*—To H. T. VanFleet, the amount of the laborers' judgment and interest, to wit, \$3,598.29.

"*Sixth*—To the assignee of the New Philadelphia Pipe Works Company the amount of the judgment with interest, to wit, \$——."

To all of which the said the New Philadelphia Pipe Works Company, Alexander M. Byers, Ezra Nicholson, and the Cleveland, Lorain & Wheeling Railroad Company, each then and there excepted.

*Messrs. Marvin & Cook* for plaintiff in error.

*Mr. Charles C. Fisher* for defendants in error Jacob S. Brady *et al.*

*Dickman, Ch. J.*, delivered the opinion of the court:

The main question that claims our consideration is, whether the court of common pleas, by virtue of the affidavit which accompanied the filing of the petition of the New Philadelphia Pipe Works Company, on August 30, 1887, acquired jurisdiction and was authorized by law to issue the order of attachment against the property of the partnership firm of Samuel Bullock & Company. The action was commenced on the last-named day against the defendants in their firm name and none other; and the affidavit in attachment alleged the following facts, and none other: "Ezra Nicholson, being duly sworn, says that he is the secretary and treasurer of the New Philadelphia Pipe Works Company, an incorporated company under the laws of the state of Ohio; that the claim sued upon in the action is upon a contract for an amount of water pipe sold and delivered to said Samuel R. Bullock & Company, a partnership

formed for the purpose of doing business in Ohio; that said claim is just, and that affiant believes that the said New Philadelphia Pipe Works Company ought to recover \$29,947.04, and interest from August 20, 1887; that the defendants are nonresidents of the state of Ohio." The record discloses that the partnership was composed of Samuel R. Bullock and William S. Mercer, and that neither of the individual members of the firm resided in Ohio at the time the order of attachment was issued.

Section 5011 of the Revised Statutes provides that: "A partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it shall not be necessary to allege or prove the names of the individual members thereof." By section 5042 of the Revised Statutes, regulating the manner of service and return of summons, it is provided that: "The service shall be by delivering, at any time before the return day, a copy of the summons, with the indorsements thereon, to the defendant personally, or by leaving a copy at his usual place of residence, or, if the defendant is a partnership sued by its company name, by leaving a copy at its usual place of doing business."

And under section 5521 of the Revised Statutes, among the grounds upon which an attachment may issue, the plaintiff, in a civil action for the recovery of money may, at or after the commencement thereof—if the claim is a debt or demand arising upon contract, judgment, or decree—have an attachment against the property of the defendant, "when the defendant, or one of several defendants, is a foreign corporation, or a nonresident of this state."

In view of these statutory provisions, the validity of the attachment called in question must evidently depend upon whether the partnership of Samuel R. Bullock & Company, sued by the firm name only—neither of its members then residing in Ohio—was a "defendant nonresident of this state" at the time the order of attachment was issued, within the meaning of the language of the statute.

The privilege extended by the statute to sue a partnership by the usual or ordinary name which it has assumed, or by which it is known, is not to be confined to such as may be formed within this state for the purpose of carrying on a trade or business, or holding property herein. Indeed, a partnership may be formed in another state for accomplishing the same purpose in this state; its component members may all reside in the state where it is formed, and if it does business in this state, it may be sued by its company name, and served by leaving a copy of the summons at its usual place of doing business in this state. It may be thus sued and thus served, irrespective of the residence of those who compose it.

The fact, however, that such partnership engages in business in this state, that it may be sued in the company name, and that it may be served by leaving a copy of the sum-

mons at a prescribed place, are not the sole factors for fixing and determining its residence when it is sought to reach its property by attachment for the benefit of its creditors. The members of a partnership do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners. 1 Lindley, Partn. 5. It is not a creation in which the identity of the individual members is merged and lost, in seeking to enforce against them the obligations of the firm.

A partnership is not, in our judgment, a legal entity, having, as such, a domicile or residence separate and distinct from that of the individuals who constitute it. To what extent residence may be affirmed of a partnership as such, was considered by the court in *Fitzgerald v. Grimmell*, 64 Iowa, 261. In the dissenting opinion there is much force, and we cite the same with our concurrence. "Residence," says Adams, J., "in my opinion, can be predicated only of a person natural or artificial. A partnership, as distinguished from the members composing it, is neither. Besides, it appears to me that, in any view, the mere fact that a partnership maintains for the transaction of its business an established agent in a county where neither partner resides, cannot constitute the partnership a resident of such county. There is no pretense that an individual would become a resident of a county by merely transacting business therein through an established agent, and I am not able to see that a different rule should be applied to a partnership."

A principal reason for authorizing a suit against a partnership by its company name, to wit, the inability often times to find out the names of constituent partners, is applicable alike to domestic and foreign partnerships. In view of such inability—more apt to arise where the partners all reside in another state—that statute specifically provides, that when a partnership is sued by its usual or ordinary name, "it shall not be necessary to allege or prove the names of the individual members" of the firm. Whether the partnership was formed in this state or in another state, the names of the individual members are not required to be alleged; and whether a defendant partnership should be deemed a nonresident of the state in an attachment of its property on the ground of nonresidence, should depend upon the fact of the nonresidence of the constituent members, and not upon the mere mention of names of those who constitute the firm. It being conceded that the first attachment in favor of the New Philadelphia Pipe Works Company would have been valid if the proceeding had been against Samuel R. Bullock and William S. Mercer, partners, as Samuel R. Bullock & Company, with an accompanying affidavit that the defendants were nonresidents of Ohio, the failure to allege the individual names of the partnership should not, we think, render the attachment invalid, when the affidavit states the fact that the defendants were nonresidents of the state, and the statute renders it unne-

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cessary to set forth the names of the partners. As an attachment may issue on the ground that the defendant is a nonresident of the state, it would seem to be the policy of the law, when the defendants reside in a foreign jurisdiction, and their names are unknown to the plaintiff, and they are doing business in this state under a partnership name, that creditors might protect their rights by attachment proceedings against the defendants in the name by which they elect to hold themselves out to the public and obtain credit.

It may perhaps be urged that although the individual partners composing a firm reside in another state the partnership is to be deemed resident in a state where it has a "usual place of doing business." But the statute, in prescribing the manner of service and return of summons, recognizes both a place of residence and a place of business, and the one is not to be regarded as identical with the other. A person or a number of persons may be domiciled or reside in one state, and have an agent and place of doing business in another, even as a corporation domiciled within the state by which it was created, may have its agent and a usual place of doing business in another state. The principal action may exist, and the partnership under the company name, may be brought into court through actual service by leaving a copy of the summons at its usual place of business, while an ancillary proceeding by attachment to secure the rights of creditors, may be sustained by reason of the fact of nonresidence; and when the attachment issues, it is not necessary that there should be constructive service on the defendants by publication, but there may be service of process at the usual place of business which they have established in this state. *Smith v. Hoover*, 39 Ohio St. 249.

It follows from the foregoing considerations, that the affidavit upon which the first attachment was issued in favor of the New Philadelphia Pipe Works Company was adequate to give the court jurisdiction to issue the attachment, and thereby acquire jurisdiction over the property.

Subject therefore to the liens for costs as adjudged by the circuit court, the claims of the laborers represented by H. T. Van Fleet, should be held valid liens and first in order of priority upon the property taken in attachment; but, subordinate to such claims, the judgment in favor of the New Philadelphia Pipe Works Company should be the next best lien upon the property attached, or upon the funds derived from its sale.

The first attachment by the New Philadelphia Pipe Works Company being deemed valid upon the facts set forth in the record, it becomes unnecessary to consider whether objections to the attachment that may be taken advantage of by the defendants Samuel R. Bullock & Company can also be available to other creditors of those defendants.

*The judgment of the Circuit Court should be reversed, and judgment rendered for the creditors of Samuel R. Bullock & Company in accordance with the priorities of lien as stated in this opinion.*

## CALIFORNIA SUPREME COURT (In Banc).

Victor MONTGOMERY, *Resp't.*,SANTA ANA & WESTMINSTER R.  
CO., *Appt.*

(.....Cal.....)

1. A railroad for transportation of passengers and freight on a street does not impose a new burden or servitude upon the owner of the soil, although he may be entitled to damages for injury to his right of access, or light and air.

2. An ouster which will sustain ejectment by the owner of the soil of a highway is not made by constructing a railroad thereon by permission of the municipal authorities.

(September 18, 1894.)

**A**PPEAL by defendant from a judgment of the Superior Court for Orange County in favor of plaintiff in an action brought to recover possession of a portion of the street in front of plaintiff's premises, upon which defendant had constructed its tracks. *Reversed.*

The facts are stated in the opinion.

**Mr. Victor Montgomery**, respondent *in propria persona*:

If the city authorities have no power to construct and operate a steam railroad on a public street they cannot bestow such power upon any one else.

*North Beach & M. R. Co's App.* 82 Cal. 510; *Southern Pac. R. Co. v. Reed*, 41 Cal. 262.

In *Milbau v. Sharp*, 27 N. Y. 622, 84 Am. Dec. 814, the court said: "The resolution is therefore void, for the reason that it purports to create a franchise which the common council had no power to create; to vest in the defendants an exclusive interest in the streets, which the common council had no power to convey, etc."

By laying said track, appellant acquired an interest in the land.

Civil Code, §§ 14, 660.

To the extent that said track rested upon and was imbedded in said land, it was a "taking" within the constitutional provision.

As appellant had the exclusive right to run cars on said track, it was an "exclusion" of the respondent and the public from that portion of the highway covered by said railroad track.

*Weyl v. Sonoma Valley R. Co.* 69 Cal. 205; *Williams v. New York Cent. R. Co.* 16 N. Y. 100, 69 Am. Dec. 651; *Mahon v. New York Cent. R. Co.* 24 N. Y. 659; *Wager v. Troy Union R. Co.* 25 N. Y. 526; *Waterloo Presby. Soc. Trustees v. Auburn & R. R. Co.* 3 Hill, 569; *Reichert v. St. Louis & S. F. R. Co.* 51 Ark. 491.

The abutter may also maintain ejectment against a railroad company which has placed

its track upon his side of a street without paying or tendering damages therefor.

*Elliott, Roads & Streets*, 596; *Angell, Highways*, § 319; *Dovaston v. Payne*, 2 H. Bl. 527; 2 Smith, Lead. Cas. 9th ed. p. 161; *Mayhew v. Norton*, 17 Pick. 357, 28 Am. Dec. 804; *Terre Haute & S. R. Co. v. Rodd*, 89 Ind. 123; *Sedgwick & Wait, Trial of Title to Lands*, §§ 182, 185; *Carpenter v. Oswego & S. R. Co.* 24 N. Y. 655; *West Covington v. Freking*, 8 Bush, 121; *Read v. Leeds*, 19 Conn. 188; *Reichert v. St. Louis & S. F. R. Co. supra*.

An abutting owner cannot be deprived of his rights, though for a public purpose, without compensation first being made.

*Schaufele v. Doyle*, 86 Cal. 107; *Theobald v. Louisville, N. O. & T. R. Co.* 4 L. R. A. 735, 66 Miss. 279; *Ford v. Santa Cruz R. Co.* 59 Cal. 290, and cases there cited by respondent's counsel.

Municipal ordinance granting the right of way along a street is no defense.

*Fletcher v. Auburn & S. R. Co.* 25 Wend 462; *East End Street R. Co. v. Doyle*, 9 L. R. A. 100, 88 Tenn. 747; *Denver Circle R. Co. v. Nestor*, 10 Colo. 408; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146.

A steam railroad in the street was held to be an additional burden in the following cases:

*East End Street R. Co. v. Doyle, supra*; *Pappenheim v. Metropolitan Elev. R. Co.* 13 L. R. A. 401, 128 N. Y. 436; *Harmon v. Louisville, N. O. & T. R. Co.* 87 Tenn. 614; *Ford v. Santa Cruz R. Co. supra*; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216; *Starr v. Camden & A. R. Co.* 24 N. J. L. 592; *Jersey City & B. R. Co. v. Jersey City & H. Horas R. Co.* 20 N. J. Eq. 61; *Springfield v. Connecticut River R. Co.* 4 Cush. 63; *Stange v. Hill & W. D. Street R. Co.* 54 Iowa, 669; *Sears v. Marshalltown Street R. Co.* 65 Iowa, 742; *Fanning v. Osborne*, 34 Hun, 121; *Grand Rapids & I. R. Co. v. Heisel*, 47 Mich. 893; *Burlington & M. R. Co. v. Reinhardt*, 15 Neb. 279, 48 Am. Rep. 842; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268; *Denver Circle R. Co. v. Nestor*, 10 Colo. 408; *Cooley, Const. Lim.* 676; 2 Dill. Mun. Corp. §§ 680-683, also §§ 704-717; *Mills, Em. Dom.* §§ 202-207; *Pierce, Railroads*, §§ 242-246; *Washb. Easements & Servitudes*, 4th ed. § 252.

Ejectment is a proper remedy where the abutter has title to the center of the highway.

*Uline v. New York Cent. & H. R. R. Co.* 101 N. Y. 98, 53 Am. Rep. 123, 54 Am. Rep. 661; *Wager v. Troy Union R. Co.* 25 N. Y. 526; *Heard v. Brooklyn*, 60 N. Y. 242; *Graham v. Columbus & I. Cent. R. Co.* 27 Ind. 260, 89 Am. Dec. 498; *Cox v. Louisville, N. A. & O. R. Co.* 48 Ind. 178; *Harrington v. St. Paul &*

**NOTE.**—While the above case is in conflict with what a few years ago would have been the overwhelming weight of authority (see note to *Western Railway of Alabama v. Alabama Grand Trunk R. Co. (Ala.)* 17 L. R. A. 474), yet there is what seems to be a growing tendency on the part of some of the courts to depart from the old doctrine. In addition to the cases cited in the opinion attention is called to *Ottawa, O. C. & G. R. Co. v. Larsen (Kan.)* 2 L. R. A. 52, and *Nichols v. Ann Arbor & G. Street R. Co. (Mich.)* 16 L. R. A. 371, in which the Michigan court was equally divided upon a similar question.

*A. O. R. Co.* 17 Minn. 215; *Jersey City v. Fitzpatrick*, 80 N. J. Eq. 97; *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23; *Wood, Railway Law*, 821; *Mills, Em. Dom.* 2d ed. § 856; *Lewis, Em. Dom.* § 647; 1 Redf. *Railways*, 6th ed. 383; *Louisville, St. L. & T. R. Co. v. Liebfried*, 92 Ky. 407; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 67 Hun, 153; *Western Railway of Alabama v. Alabama G. T. R. Co.* 17 L. R. A. 474, 96 Ala. 272; *Washb. Easements & Servitudes*, 4th ed. § 292; *Mahon v. San Rafael Turnp. Road Co.* 49 Cal. 289; *San Francisco City & County v. Sullivan*, 50 Cal. 605; *Coburn v. Ames*, 52 Cal. 385, 28 Am. Rep. 634; *Visalia v. Jacob*, 65 Cal. 436, 52 Am. Rep. 303; *Weyl v. Sonoma Valley R. Co.* 69 Cal. 202; *Finch v. Riverside & A. R. Co.* 87 Cal. 598.

#### Per Curiam:

This is an action of ejectment to recover possession of a strip of land in the city of Santa Ana, county of Orange.

Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant appeals.

Defendant, by its answer, set up two separate defenses. In the second of these it set out (1) that it is a corporation with power to construct and operate a steam railroad for the transportation of freight and passengers from the city of Santa Ana to Westminster, across, along, and upon any street, avenue, or highway; (2) that a strip of land 80 feet in width off the entire north side of the land described in the complaint was and is a public street or highway in said city of Santa Ana, under the control of and in the possession of the board of trustees of said city; (3) that said board of trustees, by ordinance, authorized and licensed defendant to construct and operate a railroad through and over said street, for carrying freight and passengers in cars to be propelled by dummy or motor engines; (4) that it constructed its road on said street, and operated it as provided in said ordinance; (5) that it has not excluded plaintiff or others from the street, and has only used it for the purpose aforesaid, and in common with the public, and has not impaired said street, or curtailed the use thereof by others, etc. To this defense plaintiff demurred, upon the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained by the court, and defendant declined to amend as to this defense, and the action of the court in sustaining the demurrer is urged as error.

The whole proposition involved in this case may be put thus: Can the owner in fee of land abutting upon a public street in an incorporated town maintain an action of ejectment against a railroad company organized and existing for the transportation of freight and passengers from said town to a neighboring town, which company, under and by virtue of an ordinance of the trustees of the first-designated town empowering it to do so, has constructed and is using a railway track upon and over said public street and upon the side or half thereof adjoining the land of such abutting owner? The question is stated thus for the reason that, while the evidence in the case, consisting of the

deed to respondent and the city map together, show that his land abutted upon the street in question, viz., Second street, in the city of Santa Ana, yet by section 1113 of the Civil Code "a transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway to the center thereof, unless a different intent appears from the grant." There is nothing in the evidence to indicate the contrary, and hence we must presume respondent owns to the center of the highway or street, subject only to the right of the public to an easement or right of way for street purposes therein and thereto. All streets are highways, but not all highways are streets. *Indianapolis v. Orcas*, 7 Ind. 9; *Lafayette v. Jenners*, 10 Ind. 74; *Clark v. Oom*, 14 Bush, 166. In other words, there is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and, as a sequence, in the extent of the servitude in the land upon which they are located. The country highway is needed only for the purpose of passing and repassing, and as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use. In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon, and above the surface, to which in modern times urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities, and to the comfort of citizens in their more densely populated limits. It has sometimes been suggested that a distinction is to be made between cases in which streets are laid out and opened upon property belonging to the corporation, and those in which streets become such by dedication, or by condemnation proceedings under the right of eminent domain upon compensation being made; but the consensus of modern opinion seems to be that no such distinction properly exists, and that "whether the corporation be the owner of the fee of the streets in trust for the public, or whether it be merely the trustee of the streets and highways as such, irrespective of any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways." *People v. Kerr*, 27 N. Y. 202; *Cincinnati v. White*, 31 U. S. 6 Pet. 432, 8 L. ed. 453; *Thompson Highways*, p. 7; *Elliott, Roads & Streets*, p. 305. It is said by Elliott, in his work on *Roads and Streets*, at page 299, that "it is doubtful whether, of all servitudes, there is one so broad and comprehensive as that of a city in its streets." It authorizes the use of the street for the track of a street-car company under license by the city authority, without compensation to the owner of the fee. *Finch v. Riverside & A. R. Co.* 87 Cal. 598.

A "street railway" has been defined as "a

railway laid down upon roads or streets for the purpose of carrying passengers." Elliott, *supra*, 557. It is further said by the same author that "the distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers, and not of freight." It is said to exclude the idea of the carriage of freight, and that a railroad over which heavily laden freight trains are drawn cannot be considered a street railway. Street-cars are little more than carriages for transportation of passengers, propelled over fixed tracks, to which their wheels are adapted, and as a convenient, comfortable, and economical mode of conveyance, their use has become well-nigh universal in cities, and as they add, when properly constructed, little or nothing to the burdens of the servient tenement, their use is upheld without the necessity of compensation to the abutting owner. The use of a public street, however, for an ordinary railway for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street, not contemplated in its dedication, and therefore the user cannot be indulged without compensation to the abutting owner of property upon such public street. We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizen demand the former equally with the latter. If there is any difference in the burden imposed upon the street, it is in degree and not in kind. The great highways of England were constructed, not so much for the convenience of passengers as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter horse, which answered to our modern pack mule, answered all the purposes of transportation for goods, footpaths, bridlepaths, and lanes served all needed purposes; but with the growth of inland commerce, and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as a means thereto, the highway, as we know it, became a necessity. The Appian Way, commenced 812 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway 16 feet in width, constructed for the transportation of burdens, while the paths of 8 feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved. In the construction of modern highways, urban and suburban, the great difficulty and the prominent object has been to build and adapt them, by grade, width, and structure of road-bed, to the carriage of freight. Yet we are told in effect that, so far as modern methods are concerned,—so far as ease, speed, and economy are involved,—improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contem-

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plated objects in view in opening a road or street, and therefore add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure, adapted to the transportation of freight, adds an additional burden, of a different character, to the servitude, and cannot be tolerated without compensation to the abutting owner. An interminable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated. We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control, and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress, or his right to light and air, shall be interfered with.

The thirteenth subdivision of section 863 of the Municipal Government Act of this state authorizes the boards of trustees of municipalities of the sixth class, of which Santa Ana is one, "to permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon . . . in the public streets." The world moves. Legislation in recent times has kept pace with the progress of the age. The trend of judicial opinion, except where overshadowed and incrustated with *stare decisis*, is to a broader and more comprehensive view of the rights of the public in and to the streets and highways of city and country; and, while carefully conserving the rights of individuals to their property, the courts have not hesitated to declare the shadowy title which the owner of the fee holds to the land in a public street or highway, during the duration of the easement of the public therein, as being subject to all the varied wants of the public, and essential to its health, enjoyment, and progress. In *Paquet v. Mt. Tabor Street R. Co.*, 18 Or. 233, which was an action to enjoin a steam-motor railway company from constructing and operating its road upon a street in the city of Portland

and upon a county road outside the city, abutting upon both of which the plaintiff owned land, with the fee in him vested to the center of the street and road, and where no compensation had been made to plaintiff, the court in its opinion, by Thayer, *Ch. J.*, in deciding the cause against plaintiff, said: "The establishment of a public highway practically divests the owner of a fee to the land upon which it is laid out, of the entire present beneficial interest, of a private nature, which he has therein. It leaves him nothing but the possibility of a reinvestment of his former interest in case the highway should be discontinued as such. This view, I am aware, is contrary to the ancient doctrine that the owner of the fee owned the land subject only to such public uses, and that he had a right of action when the use was diverted to a different purpose. Such a doctrine may have been applicable where the ownership was merely subject to a right of way over the land; but where, as in modern cases, it is devoted exclusively to the purposes of a public thoroughfare, and the control thereof is committed to legally constituted authorities charged with the duty of maintaining it for such purpose, the doctrine becomes a vague theory, and should be laid away among the antiquities of the past age." *McQuaid v. Portland & V. R. Co.* 18 Or. 287, enunciates a like doctrine. In *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.*, 118 Mo. 808, 18 L. R. A. 389, the supreme court of Missouri held, in substance, that the construction and operation of an ordinary steam railroad at grade in a public street under municipal authority is not a new public use of the street, for which compensation may be demanded by abutting owners, as in the case of property "taken or damaged," within the meaning of the constitution. The court said: "When land is dedicated generally, and without restrictions, or condemned, for a public street, in a town or city, the owner of the abutting lots, who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction on the public use, new modes of use may be adopted, which are consistent with the proper use of the street, without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street. . . . For any damages that may be caused by an unlawful or negligent maintenance of the track in the street, or by negligent use of engines or movement of trains, defendant will be liable in an action for damages." This decision is in line with the decisions in that state. In Iowa a like doctrine prevails. In *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, which was ejection in the United States court for the district of Iowa, to recover certain premises within a public street in Keokuk, occupied with railroad tracks, buildings, sheds, etc.,—upon error to the Supreme Court of the United States, that tribunal held that

although no permanent obstruction, like a depot building, could be erected on the streets of a town, yet it is held in that state (Iowa) that they may, by public authority, be occupied by railway tracks without the consent of the adjacent proprietors, and without compensation, whether the fee of the streets, as in that case, be in him or in a third person. The court further held that there was no substantial difference between streets in which the legal title is in private individuals, and those in which it is in the public, as to the rights of the public therein. *Kucheman v. C. C. & D. R. Co.* 46 Iowa, 866. In New Jersey it is held: (1) That the legislature has power to authorize the use of a public highway for the purpose of a railway. (2) That the legislature must be the judges as to the benefit to the public, and to their authority the public and individuals must submit. (3) The authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, is not such a taking of private property for public purposes as requires compensation to the owner of the fee of the adjacent lands, as is contemplated by their constitution. (4) That the easement of the highway is in the public, although the fee is practically in the adjacent owner. "It is the easement only which is appropriated, and no right or title of the owner is interfered with." *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 352. In *Spencer v. Pt. Pleasant & O. R. Co.*, 23 W. Va. 406, which was a bill in equity to restrain defendant from constructing and operating an ordinary steam railroad over a public street, the fee of which was in plaintiff, under a license from the municipal authorities, the court used the following language: "Admitting she (the plaintiff) owns the fee to the middle of Seventh street opposite her lot, as she contends is the fact, she still owns the same, and neither her title nor possession is in any manner disturbed by the railroad company. It has always been subject to the easement of the public to pass and repass over it and to use it as a street; and, subject to this easement, she has as much the enjoyment and possession of the whole of Seventh street as she ever had. What the railroad company has taken it has taken from the town council of Point Pleasant,—a mere easement,—and it has taken nothing from the plaintiff, and therefore, under West Virginia authorities referred to, she is entitled to no injunction." In *Edwardsville R. Co. v. Sawyer*, 92 Ill. 877, the supreme court of Illinois held that the public authorities who have the superintendence and control of the public roads may authorize travel on them by the means of a railroad, and, where a railroad company has constructed its road upon and along a public road, such use and possession is a matter between the road authorities and the railroad company, and the right cannot be questioned in an action of ejection by the owner of the land over which the public road has been established.

This being an action of ejection to recover a specific piece or parcel of land, and it appearing from the stipulation of the par-

ties that the alleged ouster consisted only in the entry by the defendant upon a public street, and the construction of a railroad track thereon, no question of damage to property, other than to such public street, within the purview of section 14 of article 1 of the Constitution of this state, can arise.

We may admit that the views herein expressed are in conflict with the doctrine enunciated in *Southern Pac. R. Co. v. Reed*, 41 Cal. 256, and *Muller v. Southern Pac. Branch R. Co.* 88 Cal. 240, and it does not necessarily follow that ejectment will lie, if the facts set out in the answer are true. The cases above quoted were to recover damages. The cases of *Weyl v. Sonoma Valley R. Co.* 69 Cal. 203, and *Finch v. Riverside & A. R. Co.* 87 Cal. 597, in which ejectments were upheld, were cases in which the defendants were mere intruders upon the public street, without valid license from any authorized body. The rule, as defined in *Mahon v. San Rafael Turnp. Road Co.* 49 Cal. 270, is regarded as the true one in cases of ejectment for injuries like the one complained of here. It was said in that case: "The exclusion of the plaintiff from entering on the land, except on the payment of a toll, and then only for the purpose of passing over the same, was a disseisin." In the present case the answer to which the demurrer was sustained averred: "That this defendant has not excluded the plaintiff, or any one else, from said street, or any part thereof, nor does it claim to hold said street, or any part thereof, exclusively from the plaintiff, or any one else whomsoever; but this defendant only claims the right to use the portion of said street actually occupied by said track in common with the public, under and by virtue of said ordinances of the said board of trustees of said city, and not otherwise." The action of ejectment is a possessory action, in which the plaintiff must show himself entitled to the present possession, and that he has been deprived thereof. Anything which deprives a plaintiff of his present right of possession will deprive him of the remedy of ejectment. The case of *Redfield v. Utica & S. R. Co.* 25 Barb. 54, is on all fours with the present case; and the court there held that the claim of an easement was not a claim of title, and that the mere user of such easement by license of the public, without excluding others from a like user, did not amount to an ouster for which ejectment would lie,—intimating, but without decid-

ing, that trespass was in such a case the proper remedy. *Edwardsville R. Co. v. Sawyer*, *supra*, is to like effect. The municipal authorities, as trustees of the public, are in possession of the public streets, and hold them for the uses of the public as effectually as they do or may the public buildings of the municipality. A writ of restitution which should put the plaintiff in possession of the street, except as one of the public, would constitute him guilty as a trespasser, or of a nuisance, or of erecting a purpresture, as the facts might determine. It has been said that a writ which authorized A. to be placed in possession of real property, subject to the possession of B., is an absurdity. Where A. enters upon a public street and constructs a railroad without authority from the municipal authorities, ejectment will lie, as was held in *Weyl v. Sonoma Valley R. Co.* and in *Finch v. Riverside & A. R. Co.* This rule proceeds upon the theory that, as defendant does not justify under one having a right to possession, it matters not, as to him, that another than the plaintiff may have a better right than either of the parties to the action. A reversioner may maintain an action for an injury to his reversionary right, but cannot recover possession until the limited estate lapses. So the holder of the title to a public street, the possession of which is held for the public, may maintain an action for damages to his property therein, but, as against one who has taken no possession thereof, and is only in the exercise of an easement therein which is conferred by the municipal authorities in pursuance of their power, and which is valid as to the public, and which will expire with the easement of the public, of which it is a part, should not be permitted to maintain ejectment for a violation of his property rights, if any, but should be remitted to an injunction to restrain, or, if the injury is consummated, to an action for damages, or to proceedings to abate as a nuisance, as the case may be.

It follows that the court below erred in sustaining the demurrer to the answer of the defendant.

*The judgment is reversed*, and the court below directed to overrule the demurrer to defendant's second defense, set out in his answer.

Neither Beatty, Ch. J., nor De Haven, J., participated in the foregoing decision.

## MAINE SUPREME JUDICIAL COURT.

Mathew O'DONNELL, Admr., etc., of  
Thomas Welch, Deceased,  
v.

MAINE CENTRAL R. CO.

(.....Me.....)

1. Employees of a contractor engaged in taking earth away from cars for a

consignee, who, to facilitate the work, dump the earth from the car on request of the railroad crew, are not volunteers so as to preclude recovery from the railroad company for injury by the tipping over of a car due to defects therein and to improper loading.

2. One assisting the servants of another to facilitate his own business or that of his employer is not their fellow servant.

NOTE.—Upon the question of the master's liability for injuries to one assisting his servant, see note 26 L. R. A.

See also 28 L. R. A. 573.

to *Evarts v. St. Paul, M. & M. R. Co.* (Minn.) 28 L. R. A. 663.



**2. Eight thousand dollars is an excessive allowance for injuries resulting in the death six or seven months later of an unskilled laborer twenty-three years old, who, without any family to support, had saved nothing from his earnings, especially when \$5,000 is the statutory limit of recovery for death resulting from injuries immediately.**

(*Peters, Ch. J., Libbey and Haskell, JJ., dissent.*)

(August 17, 1894.)

**EXCEPTIONS** by defendant to rulings of the Supreme Judicial Court for Cumberland County, made during the trial, and motion for new trial after verdict in favor of plaintiff, in an action to recover damages for personal injuries resulting in death, and alleged to have been caused by negligence for which defendant was responsible. *Exceptions and motions overruled.*

The facts are stated in the opinion.

*Messrs. William L. Putnam and Drummond & Drummond*, for defendant:

In *Sherman v. Hannibal & St. J. R. Co.*, 72 Mo. 62, a boy got upon a freight train under such circumstances that the court held him to be a passenger, the brakeman requested the boy to perform a certain service on the train, which was a dangerous one, especially to a person not accustomed to railroad service; the court held that, as the brakeman had no authority whatever from the defendant, it owed no duty whatever to him while he was performing the service and that he could not recover.

To the same effect is *Eberhart v. Terre Haute & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567.

The request of one not authorized to make the request imposes no duty upon the railroad company towards the one acting upon the request.

Conversely, a man who, without pay, assists as a brakeman in making up a train, by the direction or with the express permission of a yard master, who has authority to employ necessary assistants in his department, is not a trespasser on the train, but a servant of the company, to whom it will be liable for an injury resulting from the use of a defective brake.

*Central Trust Co. of New York v. Texas & St. L. R. Co.* 32 Fed. Rep. 448; *Wischam v. Richards*, 10 L. R. A. 97, 186 Pa. 109.

The court says: A servant cannot make a request, or give a permission, that shall affect the master's rights without his authority or permission.

McKinney, Fellow Servants, p. 49.

*Messrs. Harry R. Virgin and A. A. Strout*, for plaintiff:

Defendant was obliged to see that whatever appliances they used or provided for their servants to use in their business should be constructed in a reasonably safe manner, and should be kept in a reasonably safe state of repair.

*Shanny v. Androscoggin Mills*, 66 Me. 424; *Buzzell v. Laconia Mfg. Co.* 48 Me. 113, 77 Am. Dec. 212; Beach, Contrib. Neg. §§ 124, 125, and cases there cited.

If a car becomes defective, so that it creates more danger to those required to move or

handle it, or in other words, if it is rendered less safe, then it is negligence on the part of the railroad to continue to use that car without first repairing it.

*Sweeney v. Old Colony & N. R. Co.* 10 Allen, 363, 87 Am. Dec. 644; *Heaven v. Pender*, L. R. 11 Q. B. Div. 507; *Coombs v. New Bedford Cordage Co.* 102 Mass. 595, 3 Am. Rep. 506; *Indermaur v. Dames*, L. R. 1 C. P. 285; *Thomp. Neg.* 970, and cases cited; *Guthrie v. Maine Cent. R. Co.* 81 Me. 582; *Shanny v. Androscoggin Mills and Buzzell v. Laconia Mfg. Co. supra*; *Gilman v. Eastern R. Co.* 18 Allen, 483, 90 Am. Dec. 210; *Snow v. Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Coombs v. New Bedford Cordage Co.* 102 Mass. 593, 3 Am. Rep. 506; *Cayzer v. Taylor*, 10 Gray, 280, 69 Am. Dec. 817; *Muirhead v. Hannibal & St. J. R. Co.* 19 Mo. App. 634; Beach, Contrib. Neg. § 124; *Keegan v. Western R. Corp.* 8 N. Y. 175, 59 Am. Dec. 476; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 812; *Clarke v. Holmes*, 7 Hurlst. & N. 987; *Fuller v. Jewett*, 80 N. Y. 46, 86 Am. Rep. 575.

The corporation must act by its agents or servants, and Dolan being the servant who had full charge of the train, including the loading and supervision as to setting aside defective cars, Dolan's knowledge of the defect was in law the knowledge of the defendant, as to fellow servants, and *a fortiori* as to the plaintiff, who was not a fellow servant.

*Laning v. New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Wilton v. Middlesex R. Co.* 107 Mass. 110, 9 Am. Rep. 11; *Snow v. Housatonic R. Co.* 8 Allen, 447, 85 Am. Dec. 720.

The law defines a volunteer, in general, to be one who voluntarily assists the servant of another.

2 *Thomp. Neg.* p. 1045; Beach, Cont. Neg. § 120; *Whart. Neg.* § 201.

The injured person was not a volunteer, but engaged at the request or with the permission of the railway's agents in a transaction of interest as well to himself or his master as to the railroad company, and this entitles him to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs.

*Eason v. S. & E. T. R. Co.* 65 Tex. 577, 57 Am. Rep. 606, citing and approving the principles of law laid down in *Holmes v. Northeastern R. Co.* L. R. 4 Exch. 254, L. R. 6 Exch. 128; *Wright v. London & N. W. R. Co.* L. R. 10 Q. B. 298; *McIntire Street R. Co. v. Bolton*, 84 Ohio St. 224, 54 Am. Rep. 808; *Indermaur v. Dames*, L. R. 1 C. P. 74, L. R. 2 C. P. 312.

Was the plaintiff in the exercise of reasonable prudence at the time of the accident?

This question was peculiarly a matter of fact for the determination of the jury.

*Nugent v. Boston C. & M. Railroad*, 80 Me. 62; *Plummer v. Eastern R. Co.* 73 Me. 591; *Leson v. Maine Cent. R. Co.* 77 Me. 85; *Hobbs v. Eastern R. Co.* 66 Me. 575; *O'Brien v. McGlinchy*, 68 Me. 555, and many others; also, *Thomas v. Western U. Tele. Co.* 100 Mass. 156; *Chaffee v. Boston & L. R. Corp.* 104 Mass.

108; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *Lund v. Tyngsboro*, 11 Cush. 568; *Mahoney v. Metropolitan R. Co.* 104 Mass. 75; *Clarke v. Holmes*, 7 Hurlst. & N. 987; *Laning v. New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

Is a verdict of \$8,000 excessive as a compensation for the suffering of mind and body, caused by a leg broken so that the bones protruded through the flesh, which never healed, but which grew worse, so that the bruised places on his leg sloughed off and made sores; and by a broken back and bruised places thereon that sloughed off and made sores of enormous size, finally exposing the back bone and the cartilages binding it together, and that became so offensive from the odor arising therefrom that it was well nigh impossible to stay in the room long enough to dress his wounds, the dressing of his back being so painful that it seemed to the nurse that the man would be dead when he turned him back; for such suffering, is \$8,000 too much?

"The law presumes a verdict to be correct."

Hilliard, New Trials, 16.

And until it is proved to be incorrect, the verdict will not be set aside.

*Hobbs v. Eastern R. Co.* 66 Me. 579; *Thompson v. Mussey*, 3 Me. 805, and cases cited; *Bruce v. Rawlins*, 8 Wils. 61; *Hanson v. European & N. A. R. Co.* 62 Me. 90, 16 Am. Rep. 404; *Coleman v. Southwick*, 9 Johns. 50, 6 Am. Dec. 258, citing many cases.

In *Secord v. St. Paul, M. & M. R. Co.*, 18 Fed. Rep. 221, a verdict for \$7,000 for broken collar bone and arm (the fractured bones having united) was sustained.

For contusion of scalp and chest, verdicts for \$5,000.—*Houston & T. C. R. Co. v. Boehm*, 67 Tex. 152; \$10,000.—*Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66, 86 Am. Rep. 454; \$15,000.—*Collins v. Council Bluffs*, 32 Iowa, 824, 7 Am. Rep. 200.

**Walton, J.**, delivered the opinion of the court:

It appears that the Maine Central Railroad Company, while engaged in transporting earth for its own use, undertook to deliver some earth for the use of Mr. H. N. Jose; and the evidence tends to show that the crew in charge of the gravel train requested the men employed by Mr. Jose to assist in dumping the earth out of the cars, and that, while so engaged, a broken car, unevenly loaded, tipped over, and fell upon one of Mr. Jose's men (Thomas Welch), and inflicted injuries of which he afterwards died. For these injuries, the administrator of Welch has recovered a verdict against the railroad company for \$8,000 damages. The case is before the law court on exceptions and motion for a new trial. We will first examine the exceptions.

1. It is insisted in defense that it was the duty of the servants of the railroad company to dump Jose's earth out of the cars; and that they had no authority to employ Jose's men to assist them; and that Jose's men were trespassers in attempting to do so; and that, being trespassers, the railroad company owed them no duty, and was under no obligation 25 L. R. A.

to protect them against the carelessness of its servants.

It is undoubtedly true that, if one who has no interest in the work to be performed, a mere bystander, voluntarily assists the servants of another, either with or without the latter's request, he must do so at his own risk; and the jury were so instructed in this case. But it is equally well settled that one who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. In the former class of cases, the master will not be responsible; in the latter, he will be. This distinction is sustained by every text-book to which our attention has been called, and is well sustained by adjudged cases.

Thus, in *Degg v. Midland R. Co.*, 1 Hurlst. & N. 778, where a mere bystander, without any request from the servants of the railway company, volunteered to assist them in working a turntable, and was carelessly injured by the servants of the company, the court held that he had no remedy against the company; and this case is approvingly cited in *Osborne v. Knox & L. Railroad*, 68 Me. 49, 28 Am. Rep. 16.

But in *Wright v. London & N. W. R. Co.*, L. R. 10 Q. B. 298, where the consignee of a helter assisted in moving the car in which she had been brought, in order to hasten her delivery, and was carelessly run against and hurt, the court held that he had a remedy against the company; that the rule established in the *Degg Case* did not apply. To the same effect is *Holmes v. North-Eastern R. Co.*, L. R. 4 Exch. 254, L. R. 6 Exch. 123.

So, in this country, in *McIntire Street R. Co. v. Bolton*, 43 Ohio St. 224, 54 Am. Rep. 803, where a passenger on a street-railway car assisted in backing the car onto the track at a turnout, and was carelessly run against and hurt, the court held that the railway company was responsible, because the assistance rendered tended to expedite the passenger's journey, and prevented his being regarded as a mere volunteer.

So, in *Eason v. S. & E. T. R. Co.*, 65 Tex. 577, 57 Am. Rep. 606, where, to facilitate the loading of lumber, it became necessary to move a car, and the shipper's servant, at the request of the conductor of the freight train, undertook to make the coupling, and was injured by the carelessness of the company's servants, the court held that the railway company was responsible, that the servant was not a mere volunteer, because the assistance which he undertook to render was to facilitate his own work, and thus promote the interests of his employer. The rule of exemption and its limitations are very clearly stated in this case.

The distinction running through all the cases is this: that, where a mere volunteer—that is, one who has no interest in the work—undertakes to assist the servants of another, he does so at his own risk. In such a case the maxim of *respondet superior* does not

apply. But where one has an interest in the work, either as consignee or the servant of a consignee or in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible. In such a case the maxim of *respondere superior* does apply. The hinge on which the cases turn is the presence or absence of self-interest. In the one case, the person injured is a mere intruder or officious intermeddler; in the other, he is a person in the regular pursuit of his own business, and entitled to the same protection as any one whose business relations with the master exposes him to injury from the carelessness of the master's servants.

This distinction is sustained by the cases cited, and by every modern text-book to which our attention has been called; and we are not aware of a single authority which holds the contrary. The recent case of *Wischam v. Rickards*, 136 Pa. 109, 10 L. R. A. 97, cited by defendant's counsel, is not opposed to it. It sustains it. In that case the plaintiff was hurt while assisting the defendant's servants in unloading a heavy fly wheel from a wagon. The court found, as a matter of fact, that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant's servants in performing, and, consequently, that he had no remedy against their master. The court says that the plaintiff had no interest in the delivery of the wheel; that the delivery was not completed, but was going on when the accident occurred, and the delivery was the act of the defendant; that the participation of the plaintiff was not that of an owner receiving his own goods, but was that of a servant assisting the servants of the defendant; and that this circumstance brought the plaintiff's case within the rule of non-liability. "The distinction," said the court, "is refined, but it seems to be substantial, and we feel constrained to recognize it and enforce it." The fact that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant's servants in performing, was the hinge on which the case turned, and defeated his right to recover. If the plaintiff had been sent to obtain the wheel, and, at their request or with their consent, had assisted the defendant's servants in unloading it, in order to hasten or facilitate his own work, and had been injured by their negligence, his right to recover would undoubtedly have been sustained. As already stated, the hinge on which the cases turn is the presence or absence of self-interest, or a self-serving purpose. In the one case, he is a mere volunteer; in the other, he is a person in the regular pursuit of his own business,—a distinction very obvious and substantial.

Mr. Beach, in his work on Contributory Negligence (sec. 120), says that where one assists the servants of another, at their request, for the purpose of expediting his own business or that of his master, and he is injured by the servants' negligence, the master

is liable; that in such a case the relation of fellow servant does not exist, and in case of injury the rule of "*respondere superior*" applies.

Mr. Thompson, in his work on Negligence (vol. 2, p. 1045), says that care must be taken to distinguish the case of a mere volunteer from that of one assisting the servants of another, at their request, for the purpose of expediting his own business or that of his master; for in such a case he will not stand in the relation of fellow servant to them, and, if he is injured by their negligence, the doctrine of "*respondere superior*" will apply, and their master will be responsible.

But in the present case it is urged by the learned counsel for the railroad company that the crew in charge of a gravel train have no authority to make such a request or give such consent as will authorize the servants of the consignee to remove, or assist in the removal of, earth from the cars.

We do not think that such a want of authority exists. It seems to us that the persons having the charge of freight are the very ones to give such consent or to make such a request; and it has been so held, both in England and in this country.

In *Wright's Case*, L. R. 10 Q. B. 298, it was so held. In that case *Mr. Justice Field* said that the agent to deliver freight is the proper person to give consent for the consignee to assist in its delivery. That was the helper case already referred to.

And in *Lewis v. Western R. Corp.*, 11 Met. 509, it was so held. In that case a truckman was permitted by one McCoy to assist in the removal of a block of marble from a car. The truckman was allowed to take the car to the depot of another railroad company, and there, by the use of the latter's derrick, to make the attempt to lift the block of marble from the car, and place it directly on his truck. But the attempt failed. The derrick gave way, and the block of marble fell, and was broken. This brought into litigation, directly and sharply, the authority of these two servants—one a servant of the railroad company, and the other a servant of the consignee—thus to change the place and manner of delivering freight. And precisely the same argument was urged against the authority in that case as is urged against the authority in this case. It was said that McCoy was in no sense a general agent of the railroad company; that his only authority was to receive and deliver freight; that, his authority being thus special and limited, his consent to change the place and manner of delivering the freight was not binding upon the company. But the court held otherwise. The court held that the place and manner of delivering freight may always be changed by the servants of the carrier and the servants of the consignee; that their authority to make such changes is included in their authority to receive and deliver freight; that if the consignee of a bale of goods steps into a car, and asks for a delivery there, and it is passed over to him, the delivery is complete. The rule established by the authorities seems to be this; that the persons having authority to

deliver freight and the persons having authority to receive it may always agree upon the place and manner of its delivery.

In the present case, the evidence tended to show that the railroad company, while engaged in grading a portion of its track in or near Portland, undertook to leave some earth at a point on the line of its road for Mr. Jose. Mr. Jose employed a contractor, by the name of Shannahan, to take the earth away. It appeared in evidence that, at the request of the railroad crew in charge of the gravel train, Shannahan's men had assisted in dumping the earth left for Mr. Jose out of the cars; and on the day of the accident, when Shannahan's men came for more earth, the earth had been left in the cars, and the railroad men had gone on to where they were delivering earth for the use of the railroad. Consequently, Shannahan's men were obliged to dump the earth out of the cars themselves, or wait for an indefinite length of time for the return of the railroad men. It was a cold day in December, and to wait would be neither comfortable for themselves nor profitable for their employer; and so, for their own convenience and to facilitate their own work, Shannahan's men undertook to dump the earth out of the cars themselves. The decedent was one of them. The evidence shows that he was an experienced man at that kind of work. But one of the cars was defective, and had been improperly loaded, and it tipped over, and fell upon him, and inflicted the injuries of which, at the end of about seven months, he died.

The presiding justice instructed the jury that one who voluntarily assists the servants of another cannot recover from the master for an injury caused by the negligence or misconduct of such servants; that one cannot by his officious conduct impose upon the master a greater duty than that which he owes to his own hired servants; that care must be taken, however, to distinguish a mere volunteer from one who assists the servants of another, at their request, for the purpose of expediting his own business or that of his master, for in such a case he will not stand in the relation of a fellow servant to them, and, if injured by their negligence, their master will be responsible; that if the plaintiff (Thomas Welch) consented to assist in dumping the cars, at the request of the railroad crew in charge of the train, to expedite or facilitate the work which he was engaged in performing for Mr. Jose, he could not be regarded as such an intermeddler or volunteer as to preclude him from a recovery on that ground, provided the alleged negligence and injury were made out in other respects; nor could he be regarded as a fellow servant with the employees of the railroad so as to preclude him from a recovery on that ground.

These instructions were several times repeated, and not always in precisely the same words; but such were the substance and effect of the instructions.

Counsel for the railroad company profess to be greatly alarmed at the consequences of such a doctrine. What, they ask, will be the limit of such a power? Where will the line be drawn? And they profess to believe

that, if such a power is conceded to the persons in charge of a gravel train, then the engineers of freight and passenger trains may turn over their engines to inexperienced persons and the property and lives of the whole community be put in jeopardy. To thus enlarge and magnify the consequences of a ruling may be an ingenious mode of argument, but we do not think it is sound. It does not follow that, because the crew in charge of a gravel train may allow the servants of a consignee to assist in removing earth from the cars, therefore the engineers of freight and passenger trains may turn over their engines to inexperienced hands. We give no countenance to such a doctrine. Our decision goes no further than to hold that the persons having the charge of freight may allow the servants of the consignee to remove it from the cars, and that the latter, while so engaged, have a right to be protected against the negligence of the former; in other words, that in such cases the rule of "*respondent superior*" applies. Such a doctrine seems to be well sustained by authority, and we believe it to be sound.

2. We will now consider the motion. It is the opinion of the court that the jury were properly instructed, and that the evidence was sufficient to justify a verdict for the plaintiff; but we think that the damages assessed by the jury (\$8,000) were clearly excessive. When one is negligently injured, and he dies immediately, the largest amount recoverable is \$5,000. The amount may be less, but never more. If the person injured survives for a considerable length of time, this limitation does not apply, or, rather, did not when this action was tried. What the rule may be under the recent statute (Act 1891, chap. 124) will not now be considered. But we think this statutory limitation, whether applicable to the particular case under consideration or not, is entitled to consideration in determining whether or not a verdict is excessive. The damages recoverable for negligently causing the death of a person must in every case depend largely upon what would probably have been the earnings of the deceased if he had not been killed. Other elements enter into the calculation, but the earning capacity of the deceased is always an important factor. The death of one capable of earning a large income is necessarily a greater loss to his estate than the death of one capable of earning only a small income. The earning capacity of the deceased in this case must have been small. He was not a skilled workman. His only employment had been working in sewers and shoveling gravel. This appears from his own deposition, taken before his death. And notwithstanding he was an unmarried man, and had no one dependent upon him for support, and twenty-three years of age, he had not saved a dollar of his earnings. We feel justified, therefore, in assuming that his earning capacity was small. Possibly, if he had lived, he might, later in life, have developed a capacity for more lucrative employments. Probably not. And, in estimating the loss to his estate caused by his death we must be governed by probabilities, not

possibilities. Probably if the deceased had not been injured, and had lived to the common age of men, he would have left but little, if anything, to his surviving relatives. It seems to us that in such a case the damages recoverable for the benefit of surviving relatives ought to be comparatively moderate: that if, under our law, no more than \$5,000 is recoverable for the negligent killing of a skilled workman, capable of earning a large income, when his death is immediate, a verdict of \$8,000 for the death of an unskilled

workman, capable of earning only a small income, must be regarded as clearly excessive, though, as in this case, he survives his injuries some six or seven months. Influenced by these considerations, we think *a new trial must be granted, unless the administrator remits all over \$5,000*. If such a remittitur is entered upon the clerk's docket, the entry will be, motion and exceptions overruled.

Peters, Ch. J., Libbey and Haskell, JJ., dissent.

## OREGON SUPREME COURT.

John E. WALLACE, Admr., etc., of  
Mary Bodaila, Deceased, Resp't.,  
v.  
CITY & SUBURBAN R. CO., App't.

(.....Or.....)

### 1. On a motion for a nonsuit every intentment and every fair and legitimate inference

NOTE.—Duty imposed on street railroad companies to avoid injuring children on the track.

#### I. Care required of employes.

- a. Lookout.
- b. Speed.

#### II. Negligence defined.

- a. Lookout.
- b. Speed.

#### III. Negligence a question for jury.

- a. Lookout.
- b. Speed.

#### L. Care required of employes.

##### a. Lookout.

A general rule in regard to the duty of a street railroad company in the operation of its road is, that it is required to exercise ordinary and reasonable care as to lookout ahead, speed of cars, and appliances for controlling same, so as to prevent injuring children on the track or attempting to cross the same. (Age seven years) Stanley v. Union Depot R. Co. 114 Mo. 606; (age two years) Roller v. Sutter Street R. Co. 66 Cal. 230; (age five years) Baltimore & O. R. Co. v. State, 30 Md. 47.

There are some cases in considering the question of care imposed, which require greater vigilance on the part of the driver to anticipate injuring small children likely to be on the track. Affirming the doctrine announced in WALLACE v. CITY & SUBURBAN R. Co. (Age four years) Collins v. South Boston R. Co. 143 Mass. 301, 56 Am. Rep. 676; (tender age) Schierhold v. North Beach & M. R. Co. 40 Cal. 447; (age eight years) Mitchell v. Tacoma R. & Motor Co. (Wash.) June 11, 1894.

So the degree of care required of street-car drivers by law is enhanced by a city ordinance requiring a driver and conductor of a street-car to keep a vigilant watch especially for children. (Age seven years) Fath v. Tower Grove & L. R. Co. 13 L. R. A. 74, 105 Mo. 587.

An instruction that the highest degree of care is required to prevent injury to a helpless child on the track, by a car moving slowly up hill, is error without prejudice, where the driver did not see the child until after accident, although by standers shouted to him. (Helpless) Giraldo v. Coney Island & B. R. Co. 42 N. Y. S. R. 915.

As to the degree of watchfulness required on the part of the driver some cases require that the driver should be vigilant. Mitchell v. Tacoma R. 35 L. R. A.

which can arise from the evidence must be made in favor of the plaintiff, and the court must assume those facts as true which the jury could properly find under the evidence.

### 2. The law demands greater vigilance and care in running an electric street-car over a public street crossing which is much frequented by children going to and returning from school at a time when they may reasonably

& Motor Co. and Fath v. Tower G. & L. R. Co. supra; (age four years) Mangam v. Brooklyn R. Co. 38 N. Y. 455, 98 Am. Dec. 68.

Others that he should be watchful. Humbird v. Union Street R. Co. 110 Mo. 76.

That he should be alert. (Age seven years) Block v. Harlem Bridge, M. & F. R. Co. 29 N. Y. S. R. 495.

That he should exercise constant watchfulness. (Age two years) Baltimore City Pass. R. Co. v. McDonnell, 65 Md. 534; (age six years) Schnur v. Citizens Traction Co. 153 Pa. 20.

That he should exercise a reasonable outlook. (Age two years) Onaszewski v. Benton-Bellefontaine R. Co. (Mo.) March 24, 1894; (age three years) Winter v. Kansas City Cable R. Co. 6 L. R. A. 539, 99 Mo. 509.

But in Falotio v. Broadway & S. A. R. Co. 9 Daly, 243, it was held that it was error to charge that a street-car driver is bound to exercise the greatest care in the management of the car, and that he must be vigilant in observing the track and in a position to speedily apply the brake, and that no more care was required than of drivers of other vehicles.

As to "Lookout" see also other subheads.

In Sheets v. Connolly Street R. Co., 54 N. J. L. 518, it was held that in an action for injury to a child ten years old from a street-car, the jury have no right to consider the duty of a driver to collect fares as bearing on the question of negligence when there were no passengers from whom to collect fares.

In Etherington v. Prospect Park & C. L. R. Co., 88 N. Y. 641, it was held that the failure to specifically except to the use of the word "extraordinary" vigilance that ought to be used by car drivers, will be a waiver of error.

Where a child suddenly runs in front of a car it is generally held that the driver is required to use ordinary care to prevent injury. Mt. Adams & E. P. R. Co. v. Cavagna, 6 Ohio C. Ct. Rep. 606; (age seventeen months) Chicago West. Div. R. Co. v. Ryan, 181 Ill. 474; (age six years) Welsh v. Jackson County Horse R. Co. 61 Me. 466.

In such a case in Collins v. South Boston R. Co. 143 Mass. 301, 56 Am. Rep. 676; and in Humbird v. Union Street R. Co., 110 Mo. 76 (age eight years), it was held that he should handle his car in anticipation of accident liable to children. But see further, Paducash Street R. Co. v. Adkins, *infra*.

be expected to be using the crossing than is demanded at other places.

3. It is for the jury to judge whether the failure of a school child to look or listen before attempting to cross a street-car track shows a want of that degree of care which could reasonably have been expected of such a child.

4. The presumption that a person seen on a street-car track will leave it before a street-car reaches him cannot be indulged in, when a child of tender years is seen on the track.

(July 30, 1894.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for personal injuries resulting

in death and alleged to have been caused by negligence for which defendant was responsible. *Affirmed.*

The facts are stated in the opinion.

Mr. R. Mallory for appellant.

Messrs. McGinn, Sears & Simon, for respondent:

Booth on Street Railways, section 310, says: "As we have seen, a greater degree of vigilance and caution must be observed in controlling the movements of the car to prevent injuries to children and persons who are known, or appear, to be infirm than is required for the protection of adults not laboring under such disabilities.

An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age.

#### b. Speed.

As to the speed required, some cases hold that the team or car should always be under control. *Schlerhold v. North Beach & M. R. Co.* 40 Cal. 447; *Humbird v. Union Street R. Co.* *supra*; (age five years) *Pendrill v. Second Ave. R. Co.* 2 Jones & S. 481.

See further, as to speed, other subheads.

#### II. Negligence defined.

##### a. Lookout.

The failure on the part of the driver or motorman of a street-car to exercise a reasonable degree of care in keeping a vigilant outlook on the track ahead, whereby he might have discovered an infant on the track, or attempting to cross the track, and avoided injuring him, will be held to be negligence. (Age sixteen months) *Chicago West. Div. R. Co. v. Ryan*, 81 Ill. App. 621; (age nine years) *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 389; (age six years) *Strutzel v. St. Paul City R. Co.* 47 Minn. 543; (age three years, eight months) *Bahrenburgh v. Brooklyn City, H. P. & F. P. R. Co.* 58 N. Y. 663; (age two years) *Citizens Pass. R. Co. v. Costigan (Pa.)* 5 Cent. Rep. 523; (age eleven years) *Lynch v. Metropolitan Street R. Co.* 112 Mo. 420.

And same was held where driver or motorman was careless and looking in another direction. (Age two years) *Com. v. Metropolitan R. Co.* 107 Mass. 226; (age six years) *Mason v. Atlantic Ave. R. Co.* 4 Misc. 291, affirmed, 140 N. Y. 637; (age eight years) *Dowd v. Brooklyn Heights R. Co.* 9 Misc. 279; *Stone v. Dry Dock, E. R. & B. R. Co.* 115 N. Y. 104, reversing 46 Hun, 184.

The same was held where an ordinance required a vigilant lookout. (Age six years) *Senn v. Southern R. Co.* 126 Mo. 142; (age eleven years) *Hays v. Gainesville Street R. Co.* 70 Tex. 602.

But some cases hold that there is no negligence on the part of the employees of a street railroad company where there is a reasonable outlook ahead, and an ordinary rate of speed, and a child appears suddenly in front of the car or runs on the track. This question has been determined in passing upon instructions, or motions for a nonsuit, or motions for a new trial where the evidence did not justify the verdict. (Age five years) *Pandora Street R. Co. v. Adkins*, 14 Ky. L. Rep. 426; (age three and a half years) *Schlenk v. Central Pass. R. Co.* 15 Ky. L. Rep. 406; (age three years) *Gallagher v. Crescent City R. Co.* 37 La. Ann. 283; (age nine years) *Dunn v. Cass Ave. & F. G. R. Co.* 21 Mo. App. 183; (age ten years) *Kennedy v. St. Louis R. Co.* 43 Mo. App. 1; (age twelve years) *Manahan v. Steinway & H. P. R. Co.* 38 N. Y. S. R. 812; (age ten years) *Fenton v. Second Ave. R. Co.* 126 N. Y. 623, reversing 56 Hun, 99; *Cords v. Third 35 L. R. A.*

*Ave. R. Co.* 24 Jones & S. 319; (age two and a half years) *Citizens Street R. Co. of Ft. Wayne v. Carey*, 56 Ind. 398; (age five years) *Trumbo v. City Street-Car Co.* 89 Va. 730; (age five and a half years) *Chilton v. Central Traction Co.* 152 Pa. 426; (age two years) *Bulger v. The Albany Railway*, 43 N. Y. 459.

And in *Baker v. Eighth Ave. R. Co.* 63 Hun, 39, it was held that the fact that a driver of a horse-car turns his head away from the horses or the front of the car, in the middle of a block where there is no crosswalk, and a child coming from behind a passing car is struck by the horses, is not of itself negligence. See also *Moore v. Metropolitan R. Co.* *infra*; *Mt. Adams & E. P. R. Co. v. Cavagna*, *supra*.

The mere fact of injury to a child does not create a presumption of negligence. (Age eight years) *Squire v. Central Park, N. & E. R. R. Co.* 4 Jones & S. 436; (age three years) *Mascheck v. St. Louis R. Co.* 8 Mo. App. 600; (age four years) *Jaquinto v. Broadway & S. A. R. Co.* 2 Misc. 174; and in *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. 431, 37 Am. Rep. 699, it was stated that as a matter of law it is not negligence for a driver not to stop the car if he saw a child sixteen months old in such close proximity that it might reach the track before the car passed; the question is one for the jury, and negligence cannot be inferred from the number of hours work per day required of car employees.

And in *Boland v. Missouri R. Co.*, 36 Mo. 484, it was held that there is no negligence on the part of a street-car driver where a two-year-old child was killed where the driver's attention was directed in another direction anticipating danger, driving slowly and cautiously, with his knee on the dashboard and hand on the brake, and having no reason to expect the proximity of the child, and stopping as soon as possible when its danger was discovered.

And in *Hearn v. St. Charles Street R. Co.*, 34 La. Ann. 160, it was held that a driver of a street-car is not negligent where he stops the car and in pursuance of a city ordinance drives away boys attempting to hang on the car, and returning to his post starts the car, and runs over a child twenty-two months old which had walked under the mule's neck and against the foreleg and which could not be discovered by ordinary diligence.

In Texas by statute, a street railroad company was only liable for gross negligence in causing injury to a child by the cars. (Age fourteen months) *San Antonio Street R. Co. v. Caillouta*, 79 Tex. 341; *Dallas City R. Co. v. Beeman*, 74 Tex. 261.

In *Mack v. Lombard & S. Street P. R. W. Co.*, 18 Wash. L. Rep. 807, it was held that the striking of a boy by a driver of a street-car causing him to jump in front of a passing car, was not the proximate cause of the injury, and the ques-

*Byrne v. New York Cent. & H. R. R. Co.* 83 N. Y. 620.

In a boy of ten years of age the question as to contributory negligence by crossing the track was a question to be submitted to the jury.

*Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 290; *McGovern v. New York Cent. & H. R. R. Co.* 67 N. Y. 418.

In *Stone v. Dry Dock, E. B. & B. R. Co.*, 115 N. Y. 104, it was held that a nonsuit was improperly granted; that the question of contributory negligence should have been submitted to the jury.

See also *Washington & G. R. Co. v. Gladmon*, 83 U. S. 15 Wall. 405, 21 L. ed. 114; *Mattley v. Whittier Mach. Co.* 140 Mass. 387.

In *Strutzel v. St. Paul City R. Co.*, 47 Minn.

543, the court says: "The duty of watchfulness rests upon the driver of a street-car approaching a street crossing where he has reason to suppose that young children may be engaged in coasting or sliding down a neighboring hill, and across the car track, although such conduct on the part of the children is unlawful."

When the situation at the crossing, and the manner of running the train, the number and duties of the employes in charge, the rate of speed, the extent of travel upon the street, and the opportunity for observation, were shown, it was peculiarly for the jury to determine whether the rate of speed was reasonable, and the defendant's management of the train otherwise reasonably prudent.

*Bolinger v. St. Paul & D. R. Co.* 86 Minn. 418.

tion of proximate cause is for the court as to undisputed facts.

As to other cases of lookout, see other subheads.

#### b. Speed.

Negligence on the part of the driver or motor-man is shown by undue rate of speed and the failure to keep the car well under control, or that the brakes were not in good order, especially at crossings or where a car on an adjoining track is discharging passengers. *Quincy Horse R. & C. Co. v. Gnuse*, 38 Ill. App. 212, reversed on another point 137 Ill. 264; *Hedin v. City & Suburban R. Co. (Or.)* July 30, 1894; (age eight years) *Silberstein v. Houston, W. Street & P. F. R. Co.* 23 N. Y. S. R. 452; (age two years) *Farris v. Cass Ave. & F. G. R. Co.* 8 Mo. App. 583, 30 Mo. 325; (age five years) *Barksdill v. New Orleans & C. R. Co.* 23 La. Ann. 190; *Reed v. Minneapolis Street R. Co.* 34 Minn. 537; (age six years) *Chicago City R. Co. v. Robinson*, 27 Ill. App. 25, affirmed, 4 L. R. A. 126, 127 Ill. 9; *Warner v. Railroad Co.* 6 Phila. 537.

As to speed, see also other subheads.

### III. Negligence a question for the jury.

#### a. Lookout.

The question of negligence is one for the jury if the employes in charge of a street-car fail to use ordinary care to see a small child near the track ahead, or, seeing him, fail to exercise due care to control the car and stop in time to prevent injury. (Age three years) *Shenners v. West Side Street R. Co.* 73 Wis. 322; (age five years) *Mason v. Minneapolis Street R. Co.* 64 Minn. 216; (between nine and ten years) *Mallard v. Ninth Ave. R. Co.* 27 N. Y. S. R. 301; (age five years) *Huerzeler v. Central Cross Town R. Co.* 129 N. Y. 490; (age four years) *Dahl v. Milwaukee City R. Co.* 62 Wis. 652.

And in *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32, it was held that the question of negligence is one for a jury if a street-car driver used all the diligence possible to avoid injury after a child nineteen months old was seen, or ought to have been seen, in front of the car. The driver of a street-car should exercise the highest degree of care, and is not to assume that a child of this age will see the danger and avoid it.

And so the question of proper outlook becomes very material, and where it is shown that this was not kept and a child was thereby injured, the question of negligence is one for a jury. (Age four years) *Brie City Pass. R. Co. v. Schuster*, 113 Pa. 412, 37 Am. Rep. 471; (age two years eight months) *O'Flaherty v. Union R. Co.* 45 Mo. 70, 100 Am. Dec. 243; (age seven years) *Oldfield v. New York & H. R. Co.* 14 N. Y. 810; see 3 R. D. Smith, 103; (age three years two months) *Inl v. Forty-Second Street & G. Street Ferry R. Co.* 47 N. Y. 317, 7 Am. Rep. 450; 25 L. R. A.

(age three and one half years) *Government Street R. Co. v. Hanlon*, 53 Ala. 70; (age seven years) *Moore v. Metropolitan R. Co.* 2 Mackey, 437.

So, if the employé in charge is careless, inattentive, or looking in wrong direction. (Age three years) *Anderson v. Minneapolis Street R. Co.* 43 Minn. 490; *Weissner v. St. Paul City R. Co.* 47 Minn. 493; (age five years) *Fallon v. Central Park, N. & E. R. R. Co.* 64 N. Y. 13; (age three and one half years) *Ehrman v. Brooklyn City R. Co.* 38 N. Y. S. R. 990; (age four years) *Citizens' Pass. R. Co. v. Foxley*, 107 Pa. 537; (age two years) *Weil v. Dry Dock, E. B. & B. R. Co.* 119 N. Y. 147; (age two and one half years) *Hyland v. Yonkers R. Co.* 22 N. Y. S. R. 100; (age six years) *Keenan v. Brooklyn City R. Co.* 9 Misc. 601; (age four years) *Levy v. Dry Dock, E. B. & B. R. Co.* 35 N. Y. S. R. 769; (age four years) *Rosenkrantz v. Lindell R. Co.* 108 Mo. 2.

And in *Johnson v. Reading City Pass. Railway*, 160 Pa. 647, it was held that it is a question for the jury whether or not a driver could have seen a child twenty months old on the track in time to avoid injuring. In the discharge of his duty to drive with care and look out, he may for an instant turn his head to the sidewalk to look for passengers.

And in *McMahon v. Northern Cent. R. Co.*, 39 Md. 438, it was held that the question of negligence is one for the jury if a freight train in a city, nearly a square long, standing for four hours, is moved by horses without signal or warning or brakeman in his place, and a boy about six years old is injured in crossing.

As to other cases of lookout, see other subheads.

#### b. Speed.

The question of negligence is also one for the jury where the injury to a child results from undue speed of the street-car, or failure of brakes to be in proper order. *O'Flaherty v. Union R. Co.* 45 Mo. 70, 100 Am. Dec. 243; *Oldfield v. New York & H. R. Co.* 14 N. Y. 810; see E. D. Smith, 103; *Government Street R. Co. v. Hanlon*, 53 Ala. 70; *Fallon v. Central Park, N. & E. R. R. Co.* 64 N. Y. 13; *Ehrman v. Brooklyn City R. Co.* 38 N. Y. S. R. 990; *Citizens' Pass. R. Co. v. Foxley*, 107 Pa. 537; *Weil v. Dry Dock, E. B. & B. R. Co.* 119 N. Y. 147; (age six years) *Jetter v. New York & Harlem R. Co.* 2 Keyes, 154.

As to other cases of speed, see other subheads.

The cases of injuries received in jumping on or off street-cars, and cases where children on the track were injured but the decision turned solely on contributory or imputed negligence are not included in this note.

Inasmuch as the degree of care required depends largely on the age or helplessness of the child, the age has been given as the cases were cited. I. T.

Bean, *Ch. J.*, delivered the opinion of the court:

This is an action to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant corporation in the management and operation of one of its electric street-cars on Savier street, in the city of Portland. The negligence charged in the complaint is that a car, while being run and operated recklessly, negligently, and carelessly, and without the exercise of any care and attention, and at an excessive and dangerous rate of speed, ran over and killed the plaintiff's intestate, a child about six years of age, while she was lawfully crossing the track at a public street crossing.

At the close of plaintiff's testimony the defendant submitted a motion for a nonsuit, which being overruled, the trial resulted in a verdict and judgment in favor of plaintiff, from which defendant appeals, and now insists that the court erred in overruling its motion for a nonsuit. The refusal to nonsuit was proper, unless the evidence for the plaintiff taken in its most favorable light, would not authorize the jury to find a verdict in his favor. On a motion for a nonsuit, every intendment and every fair and legitimate inference which can arise from the evidence must be made in favor of the plaintiff, and the court must assume those facts as true which a jury could properly find under the evidence. "Before a court is authorized to grant a nonsuit for insufficiency of evidence," says Lord, *Ch. J.*, "it must appear that, admitting the testimony of plaintiff to be true, and giving him the benefit of every inference that is fairly deducible from it, the plaintiff has still failed to support his action. In fact, it is enough if the evidence offered tends to show facts sufficient to sustain the action, though remotely." *Herbert v. Dufur*, 28 Or. 462. The only question we have to determine, then, is whether there was any evidence offered by plaintiff, from which the jury could lawfully find that the death of plaintiff's intestate was caused by the negligence of the defendant in operating its cars at an excessive and dangerous rate of speed.

The main facts may be briefly stated as follows: The defendant's cars run east and west on Savier street, and at or near the intersection of that street with Nineteenth street there is a parish school, which at the time of the accident was attended by the deceased and a number of other children, who were accustomed, as was known to the persons in charge of the car, to use the crossing at which plaintiff's intestate was killed, in going to and from school. A few moments after the school had adjourned for lunch, and while the children were on the street,—some engaged in playing near the track, and others on their way home,—the defendant's car came down Savier street, running, as the evidence for plaintiff tended to show, at the rate of ten miles an hour, and, without slowing down, attempted to pass the crossing; and in doing so the plaintiff's intestate was knocked down by the car, and killed. The particular incidents attending the accident are not fully disclosed, the only eyewitnesses being two boys, aged nine and thirteen years, respectively. The elder boy first stated that

he was playing marbles in the street, about ten feet from the track, and saw the car strike the deceased, and two wheels pass over her body, and afterwards testified that she was standing on the crossing, about three feet from the track, while the car was coming down from Twentieth street, and he did not see the car strike her, but saw her fall on the track. The other boy, who is brother of the deceased, says that he and his sister were on their way home from school, and that he had hold of her hand, and while they were crossing the track his sister was struck by the car, and that neither of them saw it, nor did they look to see if a car was coming, and knew nothing of its approach until it struck the girl, when he jumped back.

The contention for the defendant is that this evidence does not in any way tend to show that the excessive or dangerous speed of the car was the proximate cause of the injury, or that it would not have occurred if the car had been running at a rate of speed perfectly safe and legal. If we assume, as does the argument for the defendant, that the child, without the fault or negligence of the defendant, suddenly and unexpectedly appeared on the track immediately in front of the car, we might conclude that her death was an unavoidable accident, and that the rate of speed would be immaterial, for upon such an appearance on the track no precaution could have prevented the accident. But because these facts are not fixed and certain the case had to go to the jury, and the rate of speed properly became an element in the case. The evidence does not show how far in advance of the car the child attempted to cross the track, but it does tend to show that she was on or within three feet of the track, within plain view of the persons in charge of the car, while it was moving from Twentieth street down to the place of the accident, and, notwithstanding such fact, no attempt was made to avoid a collision. It is a well-settled principle that a wrongdoer is responsible for such consequences as might reasonably have been anticipated as likely to occur as the natural and probable result of his misconduct, and it is ordinarily the province of the jury to ascertain whether the injury in a particular case was such natural and proximate result of the wrong complained of. *Hartwig v. N. P. Lumber Co.* 19 Or. 522; *Ransier v. Minneapolis & St. L. R. Co.* 83 Minn. 331. Now, in this case, the accident occurred at a public street crossing, much frequented by children going to and returning from school, at a time when the children might reasonably be expected to be using the crossing, and therefore the law demanded the greater vigilance and care on the part of those in charge of the car. They saw, or could, by the exercise of reasonable care, have seen, the children on or near the track a sufficient length of time before reaching the crossing to have slowed down and had the car under control, but, in place of doing so, were running at a dangerous rate of speed, as we must assume. In view of the rule that what is ordinary care and what negligence are inquiries to be answered, in most cases, by the jury, we think it cannot be declared, as a matter of law, that it is not negligence in those in charge of an electric street-car,



who see, or can, by the exercise of ordinary care, see, a company of small children on or near the track at a public street crossing, and who they have reason to suppose are crossing the street, to attempt to pass them at the rate of eight or ten miles an hour. It was therefore clearly the province of the jury to ascertain the position of the child while the car was coming down the street, and whether a slower rate of speed would not have enabled the persons in charge of the car to have observed the child on the track in time to avert the accident. There was, then, sufficient evidence for the consideration of the jury, tending to show that the excessive speed of the car was negligence, and the proximate cause of the injury, unless the deceased was guilty of such contributory negligence as would prevent a recovery by her administrator. As a general rule, it is undoubtedly the duty of a pedestrian to look and listen before attempting to cross a street-car track, and a failure to do so will bar a recovery; but this rule is not to be applied inflexibly in all cases, without regard to age or circumstances. If we assume that it can be asserted, as a proposition of law, that a child of the age of the deceased is *sui juris*, so as to be chargeable with negligence, the law is not so unreasonable or unjust as to require of it the same degree of reason and consideration in avoiding the consequences of the negligence of others that is required of persons of full age and capacity; and it should be left to the jury to determine whether the child, in attempting to pass in front of the car, acted with that degree of care and prudence which might reasonably be expected, under the circumstances, of a child of her age and capacity. She was lawfully in the street, and was as much entitled to use the crossing as the defendant corporation. In attempting to do so, she was run over and killed by the car of defendant, running at an excessive and dangerous rate of speed. The negligence of the defendant must therefore be assumed, and it was for the jury to judge whether the child's conduct, in attempting to cross the track in front of the approaching car without looking or listening, was characterized by any want of that degree of care which could reasonably have been expected of a child of her age. *Unida v. Oregon R. & Nav. Co.* 14 Or. 551; *Washington & G. R. Co. v. Gladman*, 82 U. S. 15 Wall. 401, 21 L. ed. 114;

*Stons v. Dry Dock, E. B. & B. R. Co.* 115 N. Y. 104; *Byrne v. New York Cent. & H. R. R. Co.* 88 N. Y. 630; *Mattley v. Whittier Mach. Co.* 140 Mass. 337; *Philadelphia & R. R. Co. v. Long*, 75 Pa. 257; *Pennsylvania R. Co. v. Kelly*, 81 Pa. 373; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377.

Viewing, then, the case from the standpoint of plaintiff's testimony alone the motion for a nonsuit was properly overruled. Nor do we find any error in the instructions complained of. The statement that the case should receive the same consideration as if the child were living, and had brought an action herself for injuries, is in the opening paragraph of the charge, and, in view of what follows, could not have been intended or understood by the jury as asserting that the same rule for the measure of damages should be applied as if the child had lived, and brought an action for her own injuries. By paragraph 6 the court simply asserts the doctrine that, although the child may have been guilty of negligence in going on the track, yet, if the servants of defendant in charge of the car saw the dangerous position in which she had placed herself, it was their duty to have exercised all the diligence then possible to avoid injuring her. The terms "more than ordinary diligence," and "extraordinary diligence," as used by the court, were intended to define what would constitute ordinary care under the exigencies of the situation. The term "ordinary care" is a relative term, always dependent on circumstances. What would be ordinary care in one case would be the grossest neglect in another. Thus, if an adult should be seen on a street-car track, it might be assumed that he would leave the track before the car reached him, but no such presumption can be indulged in as to the conduct of an infant of tender years; and hence, when the court said that, if the servants of defendant saw this child on the track, they were required to use more than ordinary diligence to prevent injury, it was only in effect saying that the age of the child required the highest degree of care on the part of the servants of the defendant, and nothing short of that would be ordinary care, under the circumstances.

We think, therefore, the judgment must be affirmed, and it is so ordered.

## NEW YORK COURT OF APPEALS.

Henry J. NEGUS, *Respt.*,

*v.*  
Louis W. BECKER *et al.*, *Appts.*

(18 N. Y. 323.)

**1. Carrying up a party wall for a three-story building,** as contemplated by the contract under which it was built, although the other party has erected a building only two stories high, does not make the owner of the new

building an insurer against injuries which may result to his neighbor's property, or render him liable for a falling of the wall without any negligence on his part.

**2. The work of raising a party wall is neither dangerous nor extraordinary** in itself so as to make the person for whom it is done liable for negligence of an independent contractor in doing the work.

(October 2, 1894.)

**NOTE.**—As to the right of one co-owner to carry up a party wall, see note to *Harber v. Evans* (Mo.) 10 L. R. A. 41.

As to the exceptions to the rule that an employer 25 L. R. A.

is not liable for the acts of an independent contractor, see note to *Hawver v. Whalen* (Ohio) 14 L. R. A. 323.

See also 33 L. R. A. 294, 564; 36 L. R. A. 382; 37 L. R. A. 146; 40 L. R. A. 345; 44 L. R. A. 482.

**A**PPEAL by defendants from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Cattaraugus County Circuit in favor of plaintiff, in an action brought to recover damages for injuries caused by the fall of a party wall to which defendants were attempting to make an addition. *Reversed.*

**Statement by Gray, J.:**

This action was brought by the plaintiff to recover damages of the defendants for the injury occasioned to him by the falling of a brick wall, which was being erected, or carried up, upon a party wall between their premises. The plaintiff and one Krieger, being owners of adjoining lots of land, made a contract by which the former agreed to erect upon their boundary line a brick party wall with stone foundation, "of suitable size and dimensions to support a three-story brick building." When completed, Krieger was to pay to plaintiff one half of the cost of the wall, and thereafter the said wall was to be owned jointly by the parties as a party wall. The plaintiff erected a two story building, and built the party wall of corresponding height. Krieger made payment as required by the contract. Afterwards, Krieger conveyed his lot and his interest in the wall to these defendants, who made a written contract with one Robinson to erect a brick building upon their lot of three stories in height. Under this contract, Robinson was to make use of the party wall, and, to meet the requirements of the new building, was to lengthen it so as to cover a portion of the rear end of the boundary line which plaintiff had failed to build upon, and was also to carry it up to a further height, for the accommodation of the third story. During the process of its construction, that part of the wall which was being carried up fell over upon the roof of plaintiff's building, causing the damage complained of. The complaint alleged that the defendants, in extending the party wall in the rear, and in carrying it up another story, acted "without the knowledge or consent of the plaintiff." It charged no negligence to defendants or to the contractor, and the latter was not made a party to the action. The demand was for a judgment in the amount of the damage sustained by reason of the falling of the wall. Upon the trial there was no dispute about the facts. The defendants were not connected with the work of building, other than through the contract with Robinson, and there was no evidence that the falling of the wall was due to negligence in construction, or that it was not a wall suitably built, and in all respects proper for the purpose. The trial judge denied defendants' motion for a dismissal of the complaint, and granted the plaintiff's motion for the direction of a verdict for the amount of the damages proved. To these rulings defendants excepted, and subsequently appealed to the general term, where the judgment recovered by the plaintiff was affirmed. The defendants then appealed to this court, and the only question argued in their behalf relates to the correctness of the rulings referred to.

*Messrs. Henderson & Wentworth, for appellants:*  
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If there was any negligence which resulted in the falling of the wall so built by the contractor in carrying up the party wall, it was the negligence of the contractor Robinson only, and not the negligence of the defendants.

*Engel v. Eureka Club*, 187 N. Y. 100; *Moak's Underhill*, Torts, p. 39; *King v. New York Cent. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 87; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 708; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 804.

The wall was quite as much the defendant's wall as the plaintiff's. It was built at the joint expense of the adjacent lot owners. It was built for a party wall, and the defendants had the same right to build it higher in the construction of the building on their lot of which this party wall was to be a part, that they would have had if the wall had stood wholly upon their lot.

*Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545.

An injury arising from inevitable accident is but the misfortune of the sufferer, and lays no foundation for legal responsibility.

*Harvey v. Dunlop*, Hill & D. Supp. 194; *Booth v. Rome, W. & O. T. R. Co.* 24 L. R. A. 105, 140 N. Y. 267.

Defendants cannot be made liable to the plaintiff for the damages sued for unless it be shown that the defendants were themselves negligent, or unless it be shown that the work of building the party wall higher which Robinson contracted to do was intrinsically dangerous, or that the same could not be safely done by the contractor in the exercise of due care.

*Engel v. Eureka Club*, *supra*.

If the falling of the wall complained of was by the act of God,—an inevitable accident—then no foundation exists for legal responsibility to the plaintiff by any one whatever.

*Harvey v. Dunlop*, Hill & D. Supp. 193; *Center v. Finney*, 17 Barb. 94; *Bullock v. Bulcock*, 8 Wend. 391; *Booth v. Rome, W. & O. T. R. Co.* *supra*.

A person in doing that which he has the legal right to do incurs no liability to any one except for negligence.

*Bellinger v. New York Central Railroad*, 23 N. Y. 42; *Reed v. State*, 108 N. Y. 407; *Blake v. Ferris*, *supra*; *Smith v. Wagner*, 15 N. Y. Week. Dig. 264; *Brooks v. Curtis*, *supra*; *Schile v. Brokhahus*, 80 N. Y. 614.

*Mr. Hudson Ansley, for respondent:*

It was the appellant's act by or under Robinson increasing the height of this wall which caused the damage. They had contracted for it and caused it to be built, providing, "when the wall reaches the height of the Negus building, the same is to be built on top thereof to the height required," and the action was properly brought against the defendants.

*Booth v. Rome, W. & O. T. R. Co.* 44 N. Y. S. R. 9.

A party wall when built and standing becomes the joint property of the owners, and when once destroyed the easement or right is gone, and there is no easement or right in the wall until built, and all lands not used by the party wall revert to the owner.

*Hearts v. Kruger*, 9 L. R. A. 135, 131 N. Y. 366.

Either proprietor of a party wall may increase the height provided such increase can be made without detriment to the strength of the wall, or to the property of the adjacent owners. "But he does it at his peril."

*Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Musgraves v. Sherwood*, 23 Hun, 689; *McAdam, Land. & T. Supp.* 2d ed. 166.

Where one proprietor of a party wall tears it down, he is a trespasser, and liable for all damage.

*Schile v. Brokhahus*, 80 N. Y. 614.

**Gray, J.**, delivered the opinion of the court:

The direction of a verdict for the plaintiff proceeded upon the theory that in undertaking to have the party wall carried up, in order to provide for a third story of their building, the defendants assumed an unqualified liability to the plaintiff for an occurrence, in the course of construction, resulting in injury to him. There is no charge in the complaint, and there was no evidence to show, that the erection of this wall was something intrinsically dangerous, and therefore a matter which imposed upon the defendants a responsibility, in case of resulting damage to their neighbor, from which they could not escape by any plea. The gravamen of the complaint seems to be in the proposition that, because the defendants extended the party wall to the full depth of the boundary line, and carried it higher up, without the plaintiff's knowledge or consent, they did so at their peril, and became absolutely liable, or insurers, for all possible injurious results. In the opinion of the general term upon the authority of *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; and of *Schile v. Brokhahus*, 80 N. Y. 619, it was held that it was unnecessary for the claim in the complaint to be based upon negligence; that, while the defendants had the right to use the wall as they did, they "insured the safety of the operation." "The party making the change," it is said, "is absolutely responsible for any damage which it occasions." We cannot agree with the court below in their view of the question, or that it is controlled by the authorities cited. *Schile v. Brokhahus* was an action for trespass in tearing down a portion of a partition wall; and it was tried upon the theory, as *Chief Judge Church* stated, "that the defendant, in disregard of the plaintiff's rights, commenced to tear down the old wall, claiming that it stood entirely upon his own land, and intending to erect a new wall for himself, without giving the plaintiff's property any benefit from it as a party wall; and that this was a trespass which caused the injury complained of." It was upon that theory that the jury found for the plaintiff, and the judgment was affirmed. *Brooks v. Curtis* was an action to compel the defendants to remove certain alleged encroachments, which consisted in making additions to the party wall. The plaintiff was held not to be entitled to relief, so far as the carrying up of the wall was concerned; but because, as the roof of the new building was constructed, it caused water, snow, and ice to fall upon the plaintiff's building, the defendants were held to have been properly restrained from maintaining it in that condition. *Judge Rapallo*

made the following observation: "We think that the right of either of the adjacent owners to increase the height of a party wall, when it can be done without injury to the adjoining building, and the wall is clearly of sufficient strength to safely bear the addition, is necessarily included in the easement. The party making the addition does it at his peril; and, if injury results, he is liable for all damages. He must insure the safety of the operation; but when safe it should be allowed. The wall is devoted to the purpose of being used for the common benefit of both tenants." The argument is that this language formulated the rule of liability for this case. The respondent in his brief, says: "Under the principle there enunciated, the appellants had a legal right to increase the height of the wall. But this was a conditional, and not an absolute, right. The condition is that he insures the safety of the operation." We think the opinion in *Brooks v. Curtis* has been quite misapprehended in deducing from it any such rule of absolute liability, and that the language quoted, which is relied upon as furnishing the rule, should receive no such reading. In connection with the facts, it was appropriate. The "safety" there alluded to, which the building party insures, has reference to the strength of the wall to support the addition, or to the manner of its construction, as furnishing thereafter a possible source of danger or of nuisance to the adjoining owner. It did not mean safety against uncontrollable accidents or the results of some third party's negligence. This is clear from the reading of the balance of the opinion, as well as from a fair consideration of the question.

A party wall is for the mutual convenience and benefit of adjoining property owners, and the only restriction upon its use by either is that that use shall not be detrimental to the other. In this case the wall was the joint property of the parties. It was built for the purposes of a building of three stories in height, and, if the plaintiff did not avail himself of his right to erect a building of such a size, that fact was no obstacle to the defendants building it up, as it had been intended and agreed upon, in order that it might furnish a wall for their own three-story building. They were within the exercise of their legal right in what they did, and it is impossible to see that they assumed any risk in building a wall of the height originally contemplated, so long as they contracted for one of suitable strength, and so adapted as to serve, when built, the purposes of the defendants' new building, without detriment to the enjoyment by the plaintiff of his premises. The plaintiff's agreement bound him to construct a party wall foundation sufficient for the purposes of a three-story building, and he may not complain if the wall is carried up to subserve such a purpose. Had the defendants exceeded the height of three stories, it can then be seen that they might have become insurers of the safety of the wall, for they would have been without the protection of the party-wall agreement, and they would have been undertaking to do a thing which would possibly, if not probably, be hazardous, in view of the limitation as to strength under which the foundation wall was built.

The peculiarity of this case is that there is no question of negligence involved, and for his recovery the plaintiff insists upon the application of the principle that, where one of two persons has sustained damage, the one that has caused it or contributed to it must make it good; or that where an act is done for the benefit of one party, which damages another, the person to be benefited by the act insures the safety of the work, and becomes answerable as an insurer. These principles are inapplicable, and the difficulty with the position is that there is no restriction upon the lawful use by a party of his property, if he proceeds with due care in improving it. The defendants had the conceded right to carry up this wall, of which they were joint owners, for the use of their building, and they provided for its erection in a lawful, proper, and usual way. If there was negligence in the construction of the wall, and its fall could be attributed in any wise to some negligent act of commission or of omission in the process of construction, it is very clear that the party liable for the resulting damage would be the contractor. By the contract between him and these defendants, he undertook to construct the wall. It was not a matter which the defendants were competent to engage in, and in contracting with Robinson they placed themselves in a position which exonerated them from any responsibility for a negligent performance of the work. The performance of the work contracted for was neither dangerous nor extraordinary in itself, and hence the rule would apply that, for an injury resulting to another by reason of a negligent performance, the remedy would be solely against the contractor. The owners were innocent of any act contributing to the injury. We have lately discussed this doctrine in *Engel v. Eureka Club*, 187 N. Y. 100, but as it has been already observed, no negligence is charged and the case was left to stand upon the sole proposition that, however innocent the defendants of causing the occurrence, and however lawful their undertaking to build up the party wall, they must nevertheless be responsible for what happened. This cannot be, and is not correct doctrine. If the fall of the wall was through some negligence in its construction, or in securing it, the liability was the contractor's, and not the property owners'. If there was no such negligence, and the fall was occasioned through some accident,—as, for instance, by the extraordinary force of the storm, which is mentioned,—the defendants were not responsible. If, in the lawful use of one's property, injury is occasioned to an adjacent owner, which the exercise of due care could not have prevented, there is no remedy. An illustration of this rule is presented by cases of the excavation of land which deprives adjoining premises of lateral support, *Lasala v. Holbrook*, 4 Paige, 170, 8 L. ed. 391, or, more recently, by the case of *Booth v. Rome, W. & O. T. R. Co.* 140 N. Y. 367, 24 L. R. A. 106, where the damage was caused by blasting. Here there was damage, admittedly; but there was no wrong. As the complaint was framed, and as the case was tried, the fall of the wall was not laid to the fault of the defendants or of their contractor, and upon such a case plaintiff should have been nonsuited.

25 L. R. A.

It is our judgment that *the judgments below should be reversed*, and that a judgment should be entered in favor of the defendants, dismissing the complaint with costs in all the courts to the appellants.

All concur, except *Andrews, Ch. J.*, not sitting.

### Locadie A. V. CASSAGNE

s.

James M. MARVIN *et al.*, Trustees of the United States Hotel at Saratoga Springs.

(148 N. Y. 302.)

1. **Certificates representing a pro rata interest in trust property**, whether the trust is a technical statutory one or not, on which there is a blank form for transfer and a provision for issuing a new certificate to an assignee, are not, on a bona fide sale thereof, subject to any lien for expenses of litigation, beyond taxable costs, incurred by the trustees in successfully defending a suit by the owner who has paid the judgment for costs before making the transfer.
2. **Proceeding upon some erroneous legal theory** applied to the facts will not, under Code Civ. Proc., § 1807, defeat plaintiff's right to such relief as the facts may warrant, if it is consistent with the complaint and embraced within the issue.

(October 9, 1894.)

**CROSS-APPEALS** from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of a special term for Saratoga County dismissing the complaint in an action brought to compel the transfer of certain trust certificates; the plaintiff appealing from so much of the judgment as dismissed the complaint, and the defendants appealing from so much of the judgment as failed to establish the right of the defendants to recover certain disbursements made by them in defending suits regarding such certificates. *Reversed*.

The facts are stated in the opinion.

*Messrs. Matthew Hale and Edgar T. Brackett*, for plaintiff:

The plaintiff wrote to the defendant Marvin a letter. He was then called upon to speak and did speak, recognizing in the broadest manner plaintiff's right to a new certificate, and the plaintiff, in reliance on the promise, paid her money.

An estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped.

*Thompson v. Simpson*, 128 N. Y. 270.

The whole scheme by which a trust was attempted to be formed by the subscribers to the

**NOTE.**—The facts of the above case are such that others of the same class are not likely to be of frequent occurrence, but in so far as the attempt was made to hold stock liable for the expenses of an unsuccessful suit by its owner the case is likely to be a valuable authority.

so-called subscription agreement, is void and the several certificate holders take title to the property as tenants in common.

If it be a trust to sell, the duty to sell should, in order to be valid, be made imperative. If left discretionary, as it is here, it is not a valid trust under our statute.

The power to rent was merely pending the sale, and as an incident thereto and not as a principal object of the trust, and hence it was void as a trust.

*Cooke v. Platt*, 98 N. Y. 85; *Heermans v. Robertson*, 3 Hun, 464, 64 N. Y. 833.

The statute does not authorize a trust to be created for the mere purpose of the sale or the partition of real estate.

*Cooke v. Platt*, *supra*; *Heermans v. Robertson*, 64 N. Y. 840, 3 Hun, 464; *Heermans v. Burt*, 78 N. Y. 259; *Re Hall*, 24 Hun, 158.

On the purchase the bondholders thereby became owners and tenants in common of the property so purchased, and were, in respect to it, no longer creditors of anybody.

*Selden v. Vermilya*, 3 N. Y. 525; *Purdy v. Wright*, 26 N. Y. Week. Dig. 883.

The trust attempted to be created by the deed to the trustees having failed because not authorized by the statute, the deed to them became thereby valid as a power in trust and the title to the property thereupon vested directly in the beneficiaries as the owners thereof under the statute.

1 Rev. Stat. at L. p. 678m, §§ 58, 59; *Fellows v. Heermans*, 4 Lans. 280; *Cooke v. Platt*, 98 N. Y. 85; *Heermans v. Robertson*, 64 N. Y. 833, 3 Hun, 464; *Heermans v. Burt*, 78 N. Y. 259; *Holly v. Hirsch*, 185 N. Y. 590.

They, so far as related to their own shares in the said property, took an absolute title thereto, as they could not be their own trustees in such a case.

*Garvey v. McDewitt*, 72 N. Y. 556; *Hetzel v. Barber*, 69 N. Y. 1.

The attempted express trust being void, there is no ground for saying that the defendants held title under "a trust arising or resulting by implication of law."

*McArthur v. Gordon*, 12 L. R. A. 667, 126 N. Y. 597; *Hutchins v. Van Vechten*, 140 N. Y. 115.

If the claim for those extra costs and expenses would ever constitute a claim against Mrs. Roche, still such claim had not matured when this action was brought as Mrs. Roche had appealed to the general term from the judgment against her, and that appeal was still pending and undetermined when this action was tried. Hence, the defendants then had no lien or claim against Mrs. Roche herself, for said costs or expenses, and, of course, could have had none against the plaintiff as Mrs. Roche's assignee therefor.

*De Figanieres v. Young*, 2 Robt. 670; Code Civ. Proc. § 503, subdiv. 1; *Canaday v. Stiger*, 55 N. Y. 452; *Myers v. Davis*, 23 N. Y. 489; *Constock v. Buchanan*, 57 Barb. 127; *Cummings v. Morris*, 25 N. Y. 625.

*Mr. Charles S. Lester*, for defendants: No express trust such as can be enforced specifically in equity was created, because no person having authority to dispose of the estate attempted to create such a trust.

*Selden v. Vermilya*, 3 N. Y. 526; *Dempsey* 25 L. R. A.

*v. Tyles*, 3 Duer, 97; 1 Rev. Stat. 783 m, p, § 74.

The plaintiff having made the existence of an express valid trust the foundation of her claim for relief, and having demanded judgment for a specific performance of the alleged trust, cannot have judgment for a different cause of action, and the plaintiff cannot be permitted to deny the title of the trustees.

*Hudson v. Swan*, 88 N. Y. 632; *Paige v. Willet*, 88 N. Y. 28; *Tell v. Beyer*, 88 N. Y. 161; *Hall v. United States Reflector Co.* 80 Hun, 876; *Getty v. Hamlin*, 46 Hun, 1; *Orosbie v. Leary*, 6 Bosw. 812; *Platt v. Stout*, 14 Abb. Pr. 178; *Bruce v. Kelly*, 7 Jones & S. 27. See note to *New York v. Fay*, 23 Abb. N. C. 897; *Arnold v. Angell*, 62 N. Y. 508; *Williams v. Mechanics & T. F. Ins. Co.* 64 N. Y. 577; *Joselyn v. Joslyn*, 9 Hun, 888; *Burst v. Harper*, 14 Hun, 280; *Van Cott v. Prentice*, 104 N. Y. 45.

The defendants by the purchase at the foreclosure sale and the conveyance by the referee acquired an absolute title to the premises.

If there is any doubt about the proper construction of the conveyance, the acts of the parties under it may be considered, and if they all agree upon the construction such construction will control.

*Nicoll v. Sands*, 181 N. Y. 24; *Stokes v. Recknagel*, 6 Jones & S. 368; *Woolsey v. Funks*, 121 N. Y. 92; *Reading v. Gray*, 5 Jones & S. 79.

The acceptance of the certificate operated as an estoppel upon the grantee, and the plaintiff who claims under it cannot deny the truth of the recital that the legal title is in defendants.

*Atlantic Dock Co. v. Leavitt*, 54 N. Y. 85, 13 Am. Rep. 556; *Torrey v. Bank of Orleans*, 9 Paige, 649, 4 L. ed. 858.

The words "trustees under a certain subscription agreement dated April 15, 1875, executed by certain persons interested in the United States Hotel bonds," added to the names of the grantees were simply words of description.

*Towar v. Hale*, 46 Barb. 861, approved in *King v. Townshend*, 141 N. Y. 864; *Peck v. Mallams*, 10 N. Y. 509; *Moss v. Livingston*, 4 N. Y. 208; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250.

Section 51 of the Statute of Uses and Trusts, which provides that "where a grant for a valuable consideration is made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee,"—makes the title in the defendants absolute.

*Garfield v. Hatmaker*, 15 N. Y. 475; *Sturtevant v. Sturtevant*, 20 N. Y. 89, 75 Am. Dec. 871; *McCartney v. Bostwick*, 32 N. Y. 58; *Eberett v. Eberett*, 43 N. Y. 218; *Hurst v. Harper*, 14 Hun, 280; *Robertson v. Sayre*, 53 Hun, 490.

Sections 58 and 59 apply only to the case of an owner who by deed or will endeavors to create an unlawful trust, and are a declaration of the common-law rule, that property devised to executors upon a void trust does not pass by the devise, but being undisposed of, descends to the heir-at-law.

*Digby v. Legard*, 8 P. Wms. 22, note 1; *Pilkington v. Boughey*, 12 Sim. 98; *Jones v. Mitchell*, 1 Sim. & Stu. 290; *Carrick v. Errington*, 2 P. Wms. 861.

Assuming that Marvin and Hall held the absolute title to the premises, it was competent for them to recognize any equitable rights of plaintiff and secure them by a lawful declaration of trust.

*Foots v. Bryant*, 47 N. Y. 544.

But where the owner of land attempts to create an illegal trust and the claim is that this trust is illegal in that the term is not made to depend upon the duration of the life of the beneficiary (*Rice v. Barrett*, 102 N. Y. 161; *Beekman v. Bonnor*, 23 N. Y. 816, 80 Am. Dec. 269), then sections 58 and 59 of the Statute of Uses and Trusts apply and the trust not being one of the express trusts enumerated in the statute fails and no title or interest passes to the person in whose favor the trust is attempted to be created.

*Underwood v. Curtis*, 127 N. Y. 538.

The defendant Marvin is not estopped by his letter of November 26, 1883, from refusing to issue a new certificate to the plaintiff.

*Bush v. Lathrop*, 22 N. Y. 535; *Union College Trustees v. Wheeler*, 61 N. Y. 88; *Ingalls v. Morgan*, 10 N. Y. 178.

Assuming, then, that out of the facts of this case equity will apply a trust in favor of the plaintiff to the extent of the amount stated in the certificate and that the defendants hold the legal title in trust for her and others, including themselves, then the usual rights and liabilities arise out of this relation.

*Locke v. Farmers Loan & T. Co.* 140 N. Y. 135; *Hutchins v. Van Vechten*, 140 N. Y. 115; *McArthur v. Gordon*, 12 L. R. A. 667, 126 N. Y. 597.

The interest of the plaintiff is not a joint interest with others but a several interest.

The defendants are entitled to be reimbursed the expenditures they have made and incurred out of that specific interest, and not out of their own pockets or the interests of other persons.

*Young v. Brush*, 28 N. Y. 673; *Downing v. Marshall*, 37 N. Y. 380; *Davis v. Storer*, 53 N. Y. 478; *Woodruff v. New York, L. E. & W. R. Co.* 129 N. Y. 27.

O'Brien, J., delivered the opinion of the court:

In the year 1875, a mortgage of half a million dollars upon the United States Hotel at Saratoga, given to secure negotiable bonds to that amount then held by various parties, was in process of foreclosure. Judgment was entered in the action, and the property was advertised for sale by a referee for the 1st day of May, 1875. On the 15th day of April, preceding the day appointed for the sale, certain holders of the bonds, in order to prevent a sacrifice of the property, and for the purpose of protecting each other, entered into an agreement in writing with the defendants, who also held bonds, whereby the bondholders signing the instrument constituted the defendants trustees for the protection of their interest in the property. The defendants were thereby authorized as such trustees to purchase the property under the decree, and 25 L. R. A.

to hold the legal title thereto as absolute owners, and to sell and convey and incur the same by mortgage, lease, or otherwise. In case the property was purchased by the trustees, the bondholders subscribing the instrument promised and agreed with the trustees and each other that they would accept and receive the property so purchased, subject to certain chattel mortgages on the personality, in payment and satisfaction of their shares of the purchase price, and they released the trustees and the referee from all other and further payment. The subscribers also agreed to advance to the trustees sufficient funds to pay off and discharge certain liens upon the property, not extinguished by the judgment, and the interest in the proceeds of the sale of such bondholders as refused to become parties to the agreement. The trustees themselves were holders of bonds, and they were permitted by the agreement, which was not to take effect till holders of bonds to the amount of \$400,000 had executed it, to have all the rights in the property, in proportion to their interests, as the others. In pursuance of the agreement, the defendants purchased the property at the referee's sale, and took a conveyance of the same. Afterwards, and on the 10th of May, 1875, the persons who had executed the above-described instrument, including the trustees, signed another paper, ratifying and confirming the trust expressed in the former writing, expressly admitting the validity of the trust, and waiving all matters and things that could impeach or invalidate the same. By virtue of these instruments, the defendants entered upon the care and management of said property, and have ever since continued to act in that capacity. The trustees, under an arrangement with the persons interested in the property held by them, adopted the practice of issuing to each of them a certificate, transferable in form, which, upon its face expressed the interest which the person to whom it was delivered had in the property. In November, 1875, the defendants issued to one Eugenia Roche a certificate, No. 55 of the series, in which it was stated that she was entitled to a beneficial interest in the United States Hotel property at Saratoga, the legal title of which was held by them, amounting to \$997, upon the basis that the interest of all the beneficiaries amounted to \$454,505, subject to a mortgage lien of \$260,000, and that she was entitled to share *pro rata*, with the other beneficiaries in the net rents and profits, and entitled to her proportionate share of the proceeds in case of a sale. There was a printed form on the back of this certificate for the purpose of enabling the holder to transfer the same in the manner in common use with respect to certificates of stock, and a note appended to the effect that a purchaser might receive a new certificate upon the return of this to the trustees, properly assigned. Mrs. Roche was one of the subscribers to the agreement under which the defendants entered into the control and management of the property, and similar certificates were issued by the defendants to the other parties to these agreements for the purpose of showing their respective interests in the property. On No-

venember 24, 1888, Eugenia Roche assigned in due form this certificate to the plaintiff, using for that purpose the printed blank above described, and the plaintiff thereupon requested the defendants to transfer the same upon their books, and to issue to the plaintiff a new certificate upon its surrender, and the defendants, after some correspondence, refused to comply with this request. The plaintiff agreed to pay a valuable and full consideration for the certificate and more than the face value stated thereon, believing that the defendants would transfer the same on the books and issue a new certificate therefor. Some time in the year 1888, Eugenia Roche commenced an action against the trustees defendants to recover a dividend of \$79.76, payable on the certificate held by her, as her share of the rents and profits of the property for the previous year. On a trial it was found that defendants had paid the dividend to her agent, and judgment was entered on the action for the defendants, with costs, which were taxed and adjusted at \$69.72, January 17, 1884. These costs were paid by the unsuccessful plaintiff in the action. An appeal was taken from this judgment to the general term, and it was there affirmed, with \$81.62 costs, May 27, 1885. It has been found by the trial court that the defendants incurred expenses in defending this action, over and above the costs taxed in their favor, in the sum of \$254.48, and for defending the appeal, over and above costs, in the sum of \$209.60; and they insist that the certificate or interest held by the plaintiff and involved in the litigation is chargeable with such expense. The purpose of this action was to compel the defendants to transfer the interest represented by certificate No. 55, standing on defendants' books in the name of Eugenia Roche, to the plaintiff, who succeeded to her title by the transfer of the certificate on November 24, 1888, and to issue a new certificate in the name of the plaintiff.

The defense, as I understand it, rests upon two propositions: (1) That the trust attempted to be created by the instruments referred to is inoperative and invalid; (2) that the expenses of the litigation between the original owners of the certificate and the defendants, over and above the cost paid, together with the costs of the appeal which are unpaid, are in equity a lien or charge upon the interest represented by the certificate which the defendants are entitled to have paid before transferring the interest on the books or issuing a new certificate. There is no finding that the transfer to the plaintiff of November 24, 1888, was in fraud of any claim which the defendants then had against the original holders of the certificate, or which was in process of ripening into a judgment; and we must therefore assume that on that day the plaintiff, by the execution of the assignment of the certificate, and by the acknowledgment and delivery to her of the same, became vested with the title to that share of the property represented thereby. The certificate was the evidence of the interest which the holder had in the property, and its transfer and delivery by the holder to the plaintiff in the manner prescribed by the trustees trans-

ferred the interest in the property. For the purpose of collecting the dividends, and to facilitate the sale of the several interests in the market, a transfer upon the books and a new certificate might be necessary. In the absence of some sufficient reason or excuse, it was the duty of the defendants to sanction the transfer by recording the same on the books and issuing a new certificate to the party to whom the interest had been transferred. This was a duty and obligation which the defendants owed to the bondholders or persons who became severally the beneficial owners of the property which the defendants had in their charge. It was necessarily involved in the relations between the trustees and owners created by the written instruments and the course of business adopted and acted upon by all. The plaintiff agreed to purchase the certificate from the original owner on condition that she could procure a new one in her own name. The correspondence with the defendants was such as to induce her to believe that there would be no difficulty on that point, and then she paid for the certificate a sum considerably larger than its face value. Subsequently the trustees concluded to refuse to make the transfer unless the expenses of the litigation were paid. We do not think that the demand of the plaintiff can be successfully defended upon this ground. When Mrs. Roche paid the judgment for costs awarded against her, she discharged all legal obligations which the defendants had against her, or which they could enforce in any way against her property. In the absence of fraud, she had the right to transfer her interest to the plaintiff on the 24th of November. After that date the defendants' duty to make the transfer and issue the new certificate was to the plaintiff. Concededly, they had no claim of any kind against her, and, whatever their claim against Mrs. Roche might be in law or equity, it did not attach to or pass with the certificate. While it may not be necessary now to decide the question, it seems to me that the expenses of the litigation beyond the costs which the defeated party was adjudged to pay were chargeable to the fund or property in the defendants' hands, and not to the share of the person who instituted the unsuccessful suit. If a stockholder brings an action against the corporation and fails, the payment by him of the judgment for costs puts him in the same relations to it that he had occupied before. The directors could not resist his application to transfer his stock by setting up a claim that the corporation, by reason of the suit, was obliged to pay out large sums for counsel fees and expenses in the litigation which were not covered by the taxable costs.

Nor do we think that it is necessary in this case to determine the nature or character of the trust. It may or may not be a technical statutory trust, but that question does not concern the defendants in the discharge of the obligations and duties which they owe to the certificate holders. It is not material to inquire where the legal title to the property is, whether in the trustees or the bondholders. The defendants are in possession of the property, and in receipt of the rents and profits,

concededly for the benefit of the parties holding the certificates. They occupy towards them fiduciary relations. One of the obligations which they have voluntarily assumed is that they will do certain things to facilitate the transfer from one to another of the certificates which they issued in order to show what interest the holders had respectively in the property, and in order to enable themselves to properly perform the duty of management and care, which includes the distribution and payment to the parties in interest of the rents and profits in the form of dividends. This duty and obligation the defendants do not deny. They admit in the broadest terms that they hold the property and are administering it for the benefit of such bondholders as signed the agreement, and to whom the original certificates were issued, or their assignees. This was the view taken of the case by the court below. So that, whatever view may be taken in regard to the precise legal relations that the defendants bear to the purchased property now held by them, it cannot be denied that by their written agreement, and the practical construction given to it by their own acts, and the course of business adopted by them in the performance of the duties which they assumed, they were under an equitable duty and obligation to furnish to the beneficiaries the certificate containing the evidence of their right. The trustees in the care and management of the property had for many years regularly paid to the original holders of the bonds, or their assignees, dividends from the net rents and profits, and thus their several interests had become the subject of purchase and sale in the market, and the duties of the defendants, from the course of business that had been established under the written instruments, could not well be performed, in the sense that they were understood by all parties, without instituting methods for the transfer of these interests on the defendants' books and to such parties as became the owners of the shares from time to time. This manner of transacting the business, if not fairly to be implied from the agreement, was adopted immediately after the defendants entered into the possession and management of the property, and adhered to for many years; so that now it can fairly be said to be a duty imposed upon the defendants under the written instruments. In short, the relations, duties, and obligations existing between the trustees and beneficiaries at the time of the commencement of this action were analogous to those that exist between the stockholders of a corporation and its directors and officers. The learned trial judge, in his disposition of the case, felt constrained to follow the general term on a former appeal (*Casagne v. Marvin*, 1 N. Y. Supp. 590); but at the same time he recognized the fact that the plaintiff in November, 1898, became the owner in good faith, and for a valuable consideration, of the share of Mrs. Roche, and that she purchased it in reliance, not only upon the established course of business adopted by the defendants themselves, but also upon what was understood as a promise on the part of one of the trustees to make the transfer in the manner

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required. Finally, the learned counsel for the defendants insists that the complaint in this action is so framed as to give the action the form of one against trustees of an express trust to enforce the specific performance of a duty enjoined upon them as such, and, the trust being void under the statute, the action must fail. This result, we think, does not follow from the premises assumed. Whether the legal title is now in the trustees or the holders of the certificates, the defendants owe certain duties of a fiduciary nature to them, which a court of equity may properly enforce. It may be true that the plaintiff brought this action upon the theory that the trust was valid; but all the facts are alleged and found; and, if they entitle the plaintiff to any relief, the fact that she proceeded upon some erroneous legal theory applied to the facts will not defeat her right to such relief as the facts may warrant, if it is consistent with the complaint and embraced within the issue. Code, § 1207. The defendants do not deny or repudiate any of their obligations as expressed in the writings or created by the course of business. They simply claim that this particular certificate holder, on account of what had occurred before she purchased it and subsequently is not entitled to have the transfer made upon the books as to a new certificate.

As we think that this position is untenable, for the reasons stated, *the judgment must be reversed, and a new trial granted; costs to abide the event.*

All concur, except *Andrews, Ch. J.*, not sitting, and *Finch, J.*, not voting.

Ernest St. George LOUGH *et al.*, *Appls.*,

A. Emilius OUTERBRIDGE *et al.*, *Recps.*

(143 N. Y. 271.)

1. **Special freight rates for transportation by ship** which are too low to be profitable and are offered by the carrier only at particular periods when a rival vessel is loading and on the single condition of the shipper's stipulation not to ship by the rival vessel cannot be claimed by a shipper who refuses to make such stipulation, but he may be lawfully charged the ordinary reasonable rates for shipment during the same period in which the lower rates are given to those who complied with the condition.
2. **The purpose of a carrier to suppress competition** does not make it unlawful to offer low rates when a rival vessel is loading to those only who will not ship anything by the latter.

(October 9, 1894.)

**APPEAL** by complainants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of a special term for New York County in favor of defendants, in an action brought to

**NOTE.**—As to common-law right of carrier to discriminate between passengers or shippers, see *note to Louisville, E. & St. L. Consol. R. Co. v. Wilson* (Ind.) 18 L. R. A. 105.



enjoin defendants from charging plaintiffs a higher rate for carrying freight than was charged to other shippers. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Henry W. Hardon and Treadwell Cleveland*, with *Messrs. Evart, Choate & Beaman*, for appellants:

The defendants as common carriers are bound to treat the plaintiffs and all other shippers upon substantially similar terms for similar services.

*Coggs v. Bernard*, 2 *Ld. Raym.* 909; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 376, 38 L. ed. 703, 4 *Inters. Com. Rep.* 92; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 674, 28 L. ed. 294; *Union Pac. R. Co. v. Goodridge*, 149 U. S. 690, 37 L. ed. 902; *Messenger v. Pennsylvania R. Co.* 86 N. J. L. 407, 13 *Am. Rep.* 457, reaffirmed in 87 N. J. L. 581; *McDuffee v. Portland & R. Railroad*, 52 N. H. 490, 13 *Am. Rep.* 73; *Baltimore & O. R. Co. v. Adams Exp. Co.* 22 *Fed. Rep.* 404; *Menacho v. Ward*, 27 *Fed. Rep.* 529; *Samuels v. Louisville & N. R. Co.* 81 *Fed. Rep.* 57; *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.* 81 *Fed. Rep.* 652; *Kinsley v. Buffalo, N. Y. & P. R. Co.* 87 *Fed. Rep.* 181; *State v. Nebraska Teleph. Co.* 17 *Neb.* 126, 52 *Am. Rep.* 404; *Chicago & A. R. Co. v. People*, 67 *Ill.* 11, 16 *Am. Rep.* 599; *Indianapolis, D. & S. R. Co. v. Ervin*, 118 *Ill.* 255; *Illinois Cent. R. Co. v. People*, 121 *Ill.* 318; *Sanford v. Catwissa, W. & E. R. Co.* 24 *Pa.* 378, 64 *Am. Dec.* 667; *Audens Reid v. Philadelphia & R. R. Co.* 68 *Pa.* 378, 8 *Am. Rep.* 195; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505; *State v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 57 *Am. Rep.* 543; *New England Exp. Co. v. Maine Cent. R. Co.* 57 *Me.* 188, 2 *Am. Rep.* 31; *Scotfield v. Lake Shore & M. S. R. Co.* 43 *Ohio St.* 571, 54 *Am. Rep.* 846; *State v. Cincinnati, N. O. & T. P. R. Co.* 7 *L. R. A.* 319, 47 *Ohio St.* 130; *Fitzgerald v. Grand Trunk R. Co.* 13 *L. R. A.* 70, 3 *Inters. Com. Rep.* 633, 63 *Vt.* 169; *Cook v. Chicago, R. I. & P. R. Co.* 9 *L. R. A.* 764, 3 *Inters. Com. Rep.* 383, 81 *Iowa*, 551; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 18 *L. R. A.* 105, 182 *Ind.* 517.

The English statutes expressly provide against discrimination in rates for the same service.

The English statutes are not new legislation, but are merely declaratory of the common law.

*Messenger v. Pennsylvania R. Co.*, *Scotfield v. Lake Shore & M. S. R. Co.* and *McDuffee v. Portland & R. Railroad*, *supra*; 1 *Wood, Railway Law*, ed. 1894, § 195, p. 639.

In *Dinhwy Cason State Co. v. Festiniog R. Co.*, 2 *Nev. & Macn. Eng. Ry. Cas.* 73, it was held that an agreement to give exclusive patronage was not a sufficient ground for discrimination.

The rates charged to different shippers may not be the same and yet be lawful—there may be a difference which is not an unlawful discrimination, not unjust because the expense of carriage may be greater in one case than another. But the expense of carriage furnishes the final test. And so it is held that if it costs no more proportionately to carry a small quantity of goods than a large quantity, any dis-

crimination in the freight rate in favor of the larger shipper is unlawful.

*Hays v. Pennsylvania Co.* 12 *Fed. Rep.* 309; *Kinsley v. Buffalo, N. Y. & P. R. Co.* 87 *Fed. Rep.* 181; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 18 *L. R. A.* 105, 182 *Ind.* 517; *Baxendale v. Great Western R. Co.* 1 *Nev. & Macn. Eng. Ry. Cas.* 200; *Harris v. C. W. R. Co.* 1 *Nev. & Macn. Eng. Ry. Cas.* 97, *note*.

It is for the court to determine the reasonableness of any regulation.

1 *Wood, Railway Law*, § 297.

*Mr. Wilhelmus Mynderse*, with *Messrs. Butler, Stillman & Hubbard*, for respondents:

A carrier has a right to reduce its usual rates in favor of particular consignors, provided it exacts from no shipper more than a reasonable rate.

*Wood, Railway Law*, p. 566; *Fitchburg R. Co. v. Gage*, 12 *Gray*, 393; *Sargent v. Boston & L. R. Corp.* 115 *Mass.* 423; *Eclipses Trust Co. v. Pontchartrain R. Co.* 24 *La. Ann.* 1.

In declaring the obligations of the carriers the courts either base their decisions specifically upon the fact that the carrier owes a public duty through the franchises and powers acquired by him under the railway acts, or when not referring specifically to such fact they cite as the authority for their opinions those cases in which such decision was made.

*Hays v. Pennsylvania Co.* 12 *Fed. Rep.* 309; *Dinsmore v. Louisville, C. & L. R. Co.* 2 *Fed. Rep.* 465.

Even under the law applicable to carriers upon railroads and canals the plaintiffs have no foundation for their case.

*Wood, Railway Law*, 566; *Fitchburg R. Co. v. Gage*, *supra*.

Without raising the rates against any one, the defendant company made a concession to those giving their business to its company on that particular sailing in preference to the *El Callao*. The concession was made at a loss. It was a gift or a legitimate inducement, not in any way violating the rules of public policy. *Mogul S. S. Co. v. McGregor*, *L. R.* 21 *Q. B. Div.* 544, affirmed *L. R.* 23 *Q. B. Div.* 598, and affirmed by House of Lords [1892] *App. Cas.* 25.

A common carrier may justly make a reduction from its customary rates in favor of the public, at stated times and subject to stated conditions, provided it does not exact unreasonable rates from any shipper.

*Evershed v. London & N. W. R. Co.* *L. R.* 8 *Q. B. Div.* 135.

*O'Brien, J.*, delivered the opinion of the court:

The question presented by this appeal is one of very great importance. It touches commerce, and, more especially, the duties and obligations of common carriers to the public at many points. There was no dispute at the trial, and there is none now, with respect to the facts upon which it arises. In order to present the question clearly, a brief statement of these facts becomes necessary. The plaintiffs are the surviving members of a firm that, for many years prior to the transaction upon which the action was based, had been engaged in business as commission

merchants in the city of New York, transacting their business mainly with the Windward and Leeward Islands. The defendant the Quebec Steamship Company is a Canadian corporation, organized and existing under the laws of Canada; and the other defendants are the agents of the corporation in New York, doing business as partners. The business of the corporation is that of a common carrier, transporting passengers and freight for hire upon the sea and adjacent waters. For nearly twenty years prior to the transaction in question, a part of its business was the transportation of cargoes between New York and the Barbadoes and the Windward Islands, the other defendants acting as agents in respect to this business. During some years prior to the commencement of this action, the company had in its service a fleet of five or six of the highest class iron steamers, sailing at intervals of about ten days from New York to the islands, each steamer requiring about six weeks to make the trip. The steamers were kept constantly engaged in this service and sailed regularly upon schedule days without reference to the amount of cargo then received. The regular and standard rate charged for freight up to December, 1891, from New York to Barbadoes, one of the Windward Islands, was 50 cents per dry barrel of five cubic feet, which was taken as the unit of measurement, and the tariff of charges was adjusted accordingly for goods shipped in other forms and packages. In December, 1891, the regular rate was reduced from 50 to 40 cents per dry barrel. About this time the British steamer *El Callao*, which had for some years before sailed between New York and Ciudad Bolivar, in South America, transporting passenger and freight between these points, began to take cargo at New York for Barbadoes, and sometimes to other points in the Windward Islands which she passed on her regular trips to Ciudad Bolivar, sailing from New York at intervals of five or six weeks. Her trade with South America was the principal feature of her business, but such space as was not required for the cargo destined for the end of the route was filled with cargo for the islands which lay in her regular course. The defendants evidently regarded this vessel as a somewhat dangerous competitor for a part of the business, the benefits of which they had up to this time enjoyed; and, for the purpose of retaining it, they adopted the plan of offering special reduced rates of 25 cents per dry barrel to all merchants and business men in New York who would agree to ship by their line exclusively during the week that the *El Callao* was engaged in obtaining freight and taking on cargo. The plaintiffs' firm had business arrangements with and were shipping by that vessel; and in February, 1892, they demanded of the defendants that they receive 3,000 barrels of freight from New York to Barbadoes, and transport the same at the special rate of 25 cents per barrel upon one of its steamers. The defendants then informed the plaintiffs that the rate of 25 cents was allowed by them only to such shippers as stipulated to give all their business exclusively to the defendants' line, in 25 L. R. A.

preference to the *El Callao*, and that to all other shippers the standard rate of 40 cents per dry barrel was maintained; but they further informed the plaintiffs that, if they would agree to give their shipments for that week exclusively to the defendants' line, the goods would be received at the 25 cents rate. The plaintiffs, however, were shipping by the other vessel, and declined this offer. Again, in the month of May, 1892, the *El Callao* was in the port of New York taking on cargo, as was also the defendants' steamer *Trinidad*. The plaintiffs then demanded of the defendants that they receive and carry from New York to Barbadoes about 1,760 dry barrels of freight at the rate of 25 cents. The defendants notified the plaintiffs that a general offer had that day been made by them to the trade to take cargo for Barbadoes on the *Trinidad*, to sail on June 4th, at 25 cents per dry barrel, under an agreement that shippers accepting that rate should bind themselves not to ship to that point by steamers of any other line between that date and the sailing of the *Trinidad*. The defendants offered these terms to the plaintiffs, but, as they were shipping by the rival vessel, the offer was declined. Except during the week when the *El Callao* was engaged in taking on cargo, the defendants have maintained the regular rate of 40 cents to all shippers between these points; and, when it reduced the rate as above described, exactly the same rates, terms, and conditions were offered to all shippers, including the plaintiffs, and carried freight for other parties at the reduced rates only upon their entering into a stipulation not to ship by the rival vessel. After the plaintiffs' demand last mentioned had been refused, they obtained an order from one of the judges of the court in this action requiring the defendants to carry the 1,760 barrels, and the defendants did receive and transport them, in obedience to the order, at the rate of 25 cents; but this order was reversed at general term. The plaintiffs demand equitable relief in the action to the effect, substantially, that the defendants be required and compelled by the judgment of the court to receive and transport for the plaintiffs their freight at the special reduced rates, when allowed to all other shippers, without imposing the condition that the plaintiffs stipulate to ship during the times specified by the defendants' line exclusively.

Whether the regular rate of 40 cents, for which it is conceded that the defendants offered to carry for the plaintiffs at all times without conditions, was or was not reasonable, was a question of fact to be determined upon the evidence at the trial; and the learned trial judge has found as matter of fact that it was reasonable, and that the reduced rate of 25 cents granted to shippers on special occasions, and upon the conditions and requirements mentioned, was not profitable. This finding, which stands unquestioned upon the record, seems to me to be an element of great importance in the case, which must be recognized at every stage of the investigation. A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable com-

pensation, or to recover back the money paid when the charge is excessive. This right to maintain an action at law upon the facts alleged, it is urged by the learned counsel for the defendants, precludes the plaintiffs from maintaining a suit for equitable relief such as is demanded in the complaint. There is authority in other jurisdictions to sustain the practice adopted by the plaintiffs (*Watson v. Sutherland*, 73 U. S. 5 Wall. 74, 18 L. ed. 580; *Monacho v. Ward*, 27 Fed. Rep. 529; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 741, 19 L. R. A. 395; *Oss v. Louisville & N. R. Co.* 8 Fed. Rep. 775; *Vincent v. Chicago & A. R. Co.* 49 Ill. 83; *Seaford v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846), though I am not aware of any in this state that would bring a case based upon such facts within the usual or ordinary jurisdiction of equity. So far as this case is concerned, it is sufficient to observe that it is now settled by a very general concurrence of authority that a defendant cannot, when sued in equity, avail himself of the defense that an adequate remedy at law exists, unless he pleads that defense in his answer. *Cognell v. New York, N. H. & H. R. Co.* 105 N. Y. 319; *Mente v. Cook*, 108 N. Y. 504; *Ostrander v. Weber*, 114 N. Y. 95; *Dudley v. Third Order of St. Francis Cong.* 133 N. Y. 400; *Truscott v. King*, 6 N. Y. 147.

When the facts alleged are sufficient to entitle the plaintiff to relief in some form of action, and no objection has been made by the defendant to the form of the action in his answer or at the trial, it is too late to raise the point after judgment or upon appeal. So that, whatever objections might have been urged originally against the action in its present form, the defendants must now be deemed to have waived them. This court will not now stop to examine a minor question that does not touch the merits, but relates wholly to the form in which the plaintiffs have presented the facts and demanded relief, or to the practice and procedure. The time and place to raise and discuss these questions was at or before the trial, and, as they were not then raised, the case must be examined and disposed of upon the merits. The defendants were engaged in a business in which the public were interested, and the duties and obligations growing out of it may be enforced through the courts and the legislative power. *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559. In England these duties are, to a great extent, regulated by the Railway and Canal Traffic Act (17 & 18 Vict. chap. 31), and by statute in some of the states, and in this country, so far as they enter into the business of interstate commerce, by act of congress. The solution of the question now presented depends upon the general principles of the common law, as there is no statute in this state that affects the question, and the legislation referred to is important only for the purpose of indicating the extent to which business of this character has been subjected to public regulation for the general good. There can be no doubt that at common law a common carrier undertook generally, and not

as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently; and, in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive price for the services. He has no right in any case while engaged in this public employment to exact from any one anything beyond what under the circumstances is reasonable and just. 2 Kent, Com. 13th ed. 598; Story, Bailm. §§ 495, 508; 2 Parsons, Cont. 175; *Killmer v. New York Cent. & H. R. R. Co.* 100 N. Y. 395, 53 Am. Rep. 194; *Root v. Long Island R. Co.* 114 N. Y. 300, 4 L. R. A. 381, 2 Inters. Com. Rep. 676. It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. The question in this case is whether the defendants, upon the undisputed facts contained in the record, have discharged these obligations to the plaintiffs. There was no refusal to carry for a reasonable compensation. On the contrary the defendants offered to transport the goods for the 40 cents rate, and we are concluded by the finding as to the reasonable nature of that charge. The defendants even offered to carry them at the unprofitable rate of 25 cents, providing the plaintiffs would comply with the same conditions upon which the goods of any other person were carried at that rate. What is reasonable and just in a common carrier in a given case is a complex question, into which enter many elements for consideration. The questions of time, place, distance, facilities, quantity, and character of the goods, and many other matters must be considered. The carrier can afford to carry 10,000 tons of coal and other property to a given place for less compensation per ton than he could carry 50; and, where the business is of great magnitude, a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable, one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates. In this case the finding implies that the defendants at certain times carried goods at a loss, upon the condition that the shippers gave them all of their business. Whatever effect may be given to the legislation referred to, in its application to railroads and other corporations deriving their powers and franchises from the state there can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases, for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons not applicable

to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other states and countries. *Pitchburg R. Co. v. Gage*, 13 Gray, 898; *Sargent v. Boston & L. R. Corp.* 115 Mass. 423; *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. Div. 544, affirmed L. R. 28 Q. B. Div. 598, and by House of Lords [1892] App. Cas. 25; *Evershed v. London & N. W. R. Co.* L. R. 8 Q. B. Div. 185; *Baxendale v. Eastern Counties R. Co.* 4 C. B. N. S. 78; *Branley v. South Eastern R. Co.* 12 C. B. N. S. 74.

Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public, the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not reasonable. But, as in this case the reasonable nature of the price for which the defendants offered to carry the plaintiffs' goods has been settled by the findings of the trial court, it will not be profitable to consider further the propriety or effect of such discrimination. The rule of the common law was thus broadly stated by the supreme court of Massachusetts in the case of *Pitchburg R. Co. v. Gage*, *supra*. Upon that point the court said: "The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of parliament regulating the transportation of freight on railroads constructed under the authority of the government there, and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon these subjects. The principle derived from that source is very simple. It requires equal justice to all. But the equality which is to be observed consists in the restricted right to charge a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done. If, for special reasons in isolated cases, the carrier sees fit to stipulate for the carriage of goods of any class for individuals, for a certain time, or in certain quantities, for a less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without entitling all parties to the same advantage." In *Evershed v. London & N. W. R. Co.*, *supra*, Lord Bramwell remarked: "I am not going to lay down a precise rule, but, speaking generally, and subject to qualification, it is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets." The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agree-

ment, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to so stipulate, providing, always, that the charge exacted from such parties for the service is not excessive or unreasonable. The principle of equality to all, so earnestly contended for by the learned counsel for the plaintiffs, was not, therefore, violated by the defendants, since they were willing and offered to carry the plaintiffs' goods at the reduced rate, upon the same terms and conditions that these rates were granted to others; and, if the plaintiffs were unable to get the benefit of such rate, it was because, for some reason, they were unable or unwilling to comply with the conditions upon which it was given to their neighbors, and not because the carrier disregarded his duties or obligations to the public. The case of *Menacho v. Ward*, 27 Fed. Rep. 529, does not apply, because the facts were radically different. That action was to restrain the carrier from exacting unreasonable charges habitually for services, the charges having been advanced as to the parties complaining, for the reason that they had at times employed another line. It decides nothing contrary to the general views here stated. On the contrary, the court expressly recognized the general rule of the common law with respect to the obligations and duties of the carrier substantially as it is herein expressed, as will be seen from the following paragraph in the opinion of Judge Wallace: "Unquestionably, a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and, except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public."

But it is urged that the plaintiffs were in fact the only shippers of goods from New York to Barbadoes by the El Callao, and therefore the condition imposed that the reduced rate should be granted only to such merchants as stipulated to give the defendants their entire business, while in terms imposed upon the public generally, was in fact aimed at the plaintiffs alone. The trial court refused to find this fact, but, assuming that it appeared from the undisputed evidence, I am unable to see how it could affect the result. The significance which the learned counsel for the plaintiffs seems to give to it in his argument is that it conclusively shows the purpose of the defendants to compel the plaintiffs to withdraw their patronage from the other line, to suppress competition in the business, and to retain a monopoly for their own benefit. Conceding that such was the purpose, it is not apparent how any obligation that the defendants owed to the public

was disregarded. We have seen that the defendants might lawfully give reduced rates in special cases, and refuse them in others, where the conditions are different, or to the general public, where the regular rates are reasonable. The purpose of an act which in itself is perfectly lawful, or, under all the circumstances, reasonable, is seldom, if ever, material. *Phelps v. Noulton*, 72 N. Y. 89, 28 Am. Rep. 98; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 548. The mere fact that the transportation business between the two points in question was in the hands of the defendants did not necessarily create a monopoly, if the general rates maintained were reasonable and just. It is not pretended that the owners of the El Callao proposed to give regular service to the general public for any less. When the service is performed for a reasonable and just hire, the public have no interest in the question whether one or many are engaged in it. The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest, and to the detriment of the public, by exacting unreasonable charges. But when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met, and, when it disappeared, to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines. On this branch of the argument the remarks of Lord Coleridge in the case of *Mogul S. S. Co.*

v. *McGregor*, *supra*, are applicable: "The defendants are traders, with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them, rather than with their rivals. It follows that they may, if they see fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will ~~they~~ give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them dealing with other traders." The courts, I admit, should do nothing to lessen or weaken the restraints which the law imposes upon the carrier, or in any degree to impair his obligation to serve all persons indifferently in his calling, in the absence of a reasonable excuse, and for a reasonable compensation only; but to hold, as we are asked to in this case, that the plaintiffs were entitled to have their goods carried by the defendants at an unprofitable rate, without compliance with the conditions upon which it was granted to all others, and which constituted the motive and inducement for the offer, would be extending these obligations beyond the scope of any established precedent based upon the doctrine of the common law, and would, I think, be contrary to reason and justice.

*The judgment of the court below dismissing the complaint was right, and should be affirmed, with costs.*

**Finch, Gray, and Bartlett, JJ.**, concur; **Peckham, J.**, dissents; **Andrews, Ch. J.**, not sitting.

## NEBRASKA SUPREME COURT.

PHENIX INSURANCE COMPANY, of  
Brooklyn, *Plff. in Err.*,

v.  
OMAHA LOAN & TRUST CO.

(.....Neb.....)

\*1. One Crew borrowed of a trust company \$4,000, agreeing to repay it in

\*Headnotes by RAGAN, C.

**NOTE.**—Rights given by the attachment of a mortgage slip to an insurance policy.

So much uncertainty existed in regard to the rights of the parties when insurance was written upon mortgaged property that in many cases the attempt has been made to provide for such cases by means of a special clause attached to or written in the policy.

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five years, with semiannual interest. To secure the payment of this debt, Crew executed to the trust company a mortgage upon his real estate. This mortgage provided that Crew should insure the mortgaged property against loss by fire for five years, for the benefit of the trust company. About the date of the mortgage an insurance company issued to Crew a policy insuring the property against loss by fire for five years. This policy contained the following provisions: (a) "If the property be sold or transferred in whole or in part without written

In some of the states the insurance department has provided a standard form for such clause in the same way that a standard form has been fixed for the policy itself.

In New York the standard mortgage clause is as follows:

"Loss or damage, if any, under this policy, shall be payable to ———, as mortgagee (or trustee)

permission in this policy, then, and in every such case, this policy, is void." (b) "When the property shall be sold or incumbered, or otherwise disposed of, written notice shall be given the company of such sale or incumbrance or disposal; otherwise, this insurance on said property shall immediately terminate." Attached to this policy, and made part thereof, was a "mortgage slip," as follows: "It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further agreed that the mortgagee shall notify said company of any change of ownership or increase of hazard which shall come to the knowledge of the said mortgagee, and that every increase of hazard not permitted by this policy to the mortgagor or owner shall be paid for by the mortgagee on reasonable demand, according to the established scale of rates, for the whole term of use of such increased hazard. It is also agreed that when-

tee), as interest may appear, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by any occupation of the premises for purposes more hazardous than are permitted by this policy: Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided also, that the mortgagee (or trustee), shall notify this association of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of such mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

"This association reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this association shall have the right, on like notice, to cancel this agreement.

"Whenever this association shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that as to the mortgagor or owner, no liability therefor existed, this association shall to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim."

An additional clause has been inserted in the mortgage clause which is now used by some companies. It is known as the full contribution clause and is as follows:

"In case of any other insurance upon the within described property this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on 25 L. R. A.

ever, the company shall pay the mortgagee any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, may pay to the mortgagee the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt; but no such subrogation shall impair the right of the mortgagee to recover the full amount of its claim." The policy, on its issuance, was delivered to the trust company, which retained the possession and title thereof. Crew sold and conveyed the mortgaged property without the written permission of the insurance company, and of which sale the latter had no notice of any kind until after the insured property was destroyed by fire. The trust company learned of the conveyance of the property soon after it occurred, but neglected to notify the in-

said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise."

In *EDDY v. LONDON ASSUR. CO.*, post, 680, some of the policies contained the full contribution clause while others did not.

Most of the mortgage clauses in use conform quite closely to those given above.

The mortgage clause is legal. *Westchester F. Ins. Co. v. Coverdale*, 48 Kan. 444.

#### *Rights of mortgagee.*

The construction of this clause has been quite uniformly favorable to the mortgagee.

It seems to have settled the question that the mortgagee may maintain an action in his own name for the loss sustained by him. *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 449.

And the mortgagor cannot maintain an action on the policy unless the mortgage debt has been paid, or he has authority from the mortgagee to do so. *Westchester F. Ins. Co. v. Coverdale*, *supra*.

So in a case in which a bank had an agreement with the insurance company as to all policies assigned to it which was practically the same as the New York mortgage clause, the court held that under such contract the mortgagee was entitled to maintain an action on the policy in its own name. *Meriden Sav. Bank v. Home Mut. F. Ins. Co.* 80 Conn. 386.

The legal effect of this clause is that the insurer agrees that in case of loss it will pay the money directly to the mortgagee, and recognizes him as a distinct party in interest. It creates a new contract with the mortgagee. *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141.

The acts of the mortgagor will not affect the rights of the mortgagee. *Eliot Five Cents Sav. Bank v. Commercial U. Assur. Co.* 143 Mass. 142.

The mortgagee is not to be affected by additional insurance taken by the mortgagor. *Hartford F. Ins. Co. v. Olcott*, *supra*.

The mortgagee is not affected by the mortgagor's obtaining more insurance than the amount permitted, even though the policies are in his possession, or though the insurance is taken out by him at the mortgagor's request. *Mutual F. Ins. Co. of New York v. Alvord*, 61 Fed. Rep. 764.

The fact that the mortgagee proceeds to make the repairs will not prevent its recovering on the policy, if the insurer never gives notice of its intention to do so. *Eliot Five Cents Sav. Bank v. Commercial U. Assur. Co.* *supra*.

The policy as to the mortgagee is not avoided by the sale of the property by the mortgagor to a

insurance company thereof until after the fire. Prior to the destruction of the insured property by fire the trust company sold and assigned the mortgage debt, guaranteeing the collection and payment thereof, but did not assign the insurance policy, or part with its possession. The mortgage debt was unpaid and not due at the time of the destruction of the insured property. The trust company brought suit against the insurance company to recover the amount of the loss. While this action was pending the mortgage debt matured, and the trust company, in pursuance of its contract of guaranty, paid it off. *Held*: (1) That neither the sale and conveyance of the mortgaged property by Crew without the permission of the insurance company, nor his failure to give the insurance company notice thereof, voided the policy as to the trust company. (2) That the status of the trust company was not that of a mere assignee of the insurance policy issued to

Crew, nor that of a person appointed to collect the loss for him; that the policy contained a contract between the insurance company and the trust company separate and independent from the contract between Crew and the insurance company; and that the rights of the trust company could not be made to depend upon Crew's observance of his agreements with the insurance company. (3) That the neglect of the trust company to notify the insurance company of the sale of the mortgaged property did not void the policy as to the trust company.

2. That as by the terms of the insurance policy the loss was made payable to the trust company, and as it owned and held possession of the policy, and had guaranteed the payment of the mortgage debt, the suit was properly brought in its name, although the assignee of the mortgage debt was also a proper party plaintiff.

third person, nor by the latter's taking out additional insurance; nor is the mortgagee bound to pro rata with the latter policy. *City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co.* 122 Mass. 165.

The mortgagee may furnish the proofs of loss. *Graham v. Firemen's Ins. Co.* 8 Daly. 421.

But it has been held that the attachment of the mortgage clause to the policy after it has become void because of the acts of the mortgagor and after the mortgagee has entered for breach of condition, will give the mortgagee no rights under the policy. *Davis v. German American Ins. Co.* 135 Mass. 251.

The clause has no application to the case of a misrepresentation by an agent of a mortgagee as to the owner of the property. And his interest will not be protected in case of such misrepresentation. *Graham v. Firemen's Ins. Co.* 87 N. Y. 60, 41 Am. Rep. 248.

So if the mortgagee fails to notify the insurer of increase of hazard or change of ownership which came to his attention, the mortgage clause ceases to protect him. *Ormsby v. Phoenix Ins. Co.* of Brooklyn (S. Dak.) March 8, 1894.

So if the mortgagee applies for a renewal of the policy and fails to disclose increased hazard which has arisen since the original policy was issued and which is known to him, he is not protected by the mortgage clause. *Cold v. Germania F. Ins. Co.* 99 N. Y. 38.

And in *National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco*, 88 Cal. 497, although the question was not directly passed upon, it seems to be intimated that failure by the mortgagee to notify the insurer of increase of risk would take away its rights under the mortgage clause.

While the time for redemption has not elapsed, the fact that the mortgagee has bid in the property at foreclosure sale, and credited the amounts of the bid on its debt will not reduce the amount of its debt so as to reduce the amount which the insurer will be compelled to pay under the policy. *National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco*, *supra*.

#### *Rights of the mortgagor and his grantees.*

The mortgagor, after the policy has become void as to him, cannot compel the application of the amount recovered on it in satisfaction of the mortgage. *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 8 Am. Rep. 711.

After the policy has become void as to the mortgagor, he cannot acquire any interest under it by taking an assignment from the mortgagee. *Lett v. Guardian F. Ins. Co.* 62 Hun, 570, 125 N. Y. 82.

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If the mortgagor's vendee procures additional insurance with an agreement between both companies as to prorating in case of loss, the mortgagor has no interest in the original policy, because of his liability on the bond, to compel the first insurers to pay the mortgagee the face of their policy free from deduction because of the additional insurance. *Phoenix Ins. Co. of Brooklyn v. Floyd*, 19 Hun, 287.

After the mortgagor has conveyed the property in violation of the terms of the policy neither he nor his vendee can compel an application of the proceeds of the policy to the satisfaction of the mortgage. *Sterling F. Ins. Co. v. Beffrey*, 48 Minn. 9.

If the policy is avoided by the act of the owner, a second mortgagee cannot have an interest in the insurance if the insurer has paid the mortgagee's claim and taken an assignment of the mortgage in accordance with the terms of the policy. *Allen v. Watertown F. Ins. Co.* 133 Mass. 433.

#### *The subrogation clause.*

To entitle the insurer to subrogation under the terms of the clause the facts must be such that as against the mortgagor there would be by the terms of the policy an actual exemption from liability. *Traders' Ins. Co. v. Rhee*, 142 Ill. 338.

To entitle the insurer to the benefit of the subrogation clause upon tender of the amount of the mortgagee's loss so as to put the mortgagee in default for refusing to assign the mortgage to it, it must make the tender within a reasonable time and before it has compelled the mortgagee to bring suit on the policy. *Eliot Five Cents Sav. Bank v. Commercial U. Assur. Co.* 142 Mass. 142.

If the clause simply provides that no sale of the property shall affect the right of the mortgagee to recover in case of loss under this policy, without any provision as to the right of subrogation, there can be no subrogation in favor of the insurance company. *Graves v. Hampden F. Ins. Co.* 10 Allen, 281.

#### *The prorating clause.*

A stipulation that in case of other insurance the insurer shall not be liable for a greater proportion of any loss than the sum hereby insured bears on the whole amount of insurance upon the property issued to or held by any person having an insurable interest therein, whether as owner, mortgagee, or otherwise, does not apply in case the same company issues two policies on the same day, one with the mortgage clause, and the other directly to the mortgagor without such clause. *Crow v. Greenwich Ins. Co.* 66 Hun, 54.

H. P. F.

permission in this policy, then, and in every such case, this policy, is void." (b) "When the property shall be sold or incumbered, or otherwise disposed of, written notice shall be given the company of such sale or incumbrance or disposal; otherwise, this insurance on said property shall immediately terminate." Attached to this policy, and made part thereof, was a "mortgage slip," as follows: "It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further agreed that the mortgagee shall notify said company of any change of ownership or increase of hazard which shall come to the knowledge of the said mortgagee, and that every increase of hazard not permitted by this policy to the mortgagor or owner shall be paid for by the mortgagee on reasonable demand, according to the established scale of rates, for the whole term of use of such increased hazard. It is also agreed that when-

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The clause has no application to the case of a misrepresentation by an agent of a mortgagee as to the owner of the property. And his interest will not be protected in case of such misrepresentation. *Graham v. Firemen's Ins. Co.* 87 N. Y. 60, 41 Am. Rep. 348.

So if the mortgagee fails to notify the insurer of increase of hazard or change of ownership which came to his attention, the mortgage clause ceases to protect him. *Ormsby v. Phoenix Ins. Co.* of Brooklyn (8. Dak.) March 8, 1894.

So if the mortgagee applies for a renewal of the policy and fails to disclose increased hazard which has arisen since the original policy was issued and which is known to him, he is not protected by the mortgage clause. *Cold v. Germania F. Ins. Co.* 99 N. Y. 36.

And in *National Bank of D. O. Mills & Co. v. Union Ins. Co.* of San Francisco, 88 Cal. 497, although the question was not directly passed upon, it seems to be intimated that failure by the mortgagee to notify the insurer of increase of risk would take away its rights under the mortgage clause.

While the time for redemption has not elapsed, the fact that the mortgagee has bid in the property at foreclosure sale, and credited the amounts of the bid on its debt will not reduce the amount of its debt so as to reduce the amount which the insurer will be compelled to pay under the policy. *National Bank of D. O. Mills & Co. v. Union Ins. Co.* of San Francisco, *supra*.

#### *Rights of the mortgagor and his grantees.*

The mortgagor, after the policy has become void as to him, cannot compel the application of the amount recovered on it in satisfaction of the mortgage. *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711.

After the policy has become void as to the mortgagor, he cannot acquire any interest under it by making an assignment from the mortgagee. *Lett v. Guardian F. Ins. Co.* 63 Hun, 570, 125 N. Y. 62, 25 L. R. A.

If the mortgagor's vendee procures additional insurance with an agreement between both companies as to prorating in case of loss, the mortgagor has no interest in the original policy, because of his liability on the bond, to compel the first insurers to pay the mortgagee the face of their policy free from deduction because of the additional insurance. *Phoenix Ins. Co. of Brooklyn v. Floyd*, 19 Hun, 287.

After the mortgagor has conveyed the property in violation of the terms of the policy neither he nor his vendee can compel an application of the proceeds of the policy to the satisfaction of the mortgage. *Sterling F. Ins. Co. v. Belfrey*, 48 Minn. 9.

If the policy is avoided by the act of the owner, a second mortgagee cannot have an interest in the insurance if the insurer has paid the mortgagee's claim and taken an assignment of the mortgage in accordance with the terms of the policy. *Allen v. Watertown F. Ins. Co.* 133 Mass. 433.

#### *The subrogation clause.*

To entitle the insurer to subrogation under the terms of the clause the facts must be such that as against the mortgagor there would be by the terms of the policy an actual exemption from liability. *Traders' Ins. Co. v. Race*, 142 Ill. 338.

To entitle the insurer to the benefit of the subrogation clause upon tender of the amount of the mortgagee's loss so as to put the mortgagee in default for refusing to assign the mortgage to it, it must make the tender within a reasonable time and before it has compelled the mortgagee to bring suit on the policy. *Elliot Five Cents Sav. Bank v. Commercial U. Assur. Co.* 142 Mass. 142.

If the clause simply provides that no sale of the property shall affect the right of the mortgagee to recover in case of loss under this policy, without any provision as to the right of subrogation, there can be no subrogation in favor of the insurance company. *Graves v. Hampden F. Ins. Co.* 10 Allen, 231.

#### *The prorating clause.*

A stipulation that in case of other insurance the insurer shall not be liable for a greater proportion of any loss than the sum hereby insured bears on the whole amount of insurance upon the property issued to or held by any person having an insurable interest therein, whether as owner, mortgagee, or otherwise, does not apply in case the same company issues two policies on the same day, one with the mortgage clause, and the other directly to the mortgagor without such clause. *Crow v. Greenwich Ins. Co.* 66 Hun, 54. H. P. F.

an insurance of the interest of the owner of the property solely; that such owner was the assured, and the defendant only agreed to make good the loss of such owner, and inasmuch as another policy existed at the time in favor of such owner, although entirely unknown to both the plaintiffs and the defendant, the latter was entitled to the benefit of the condition contained in this policy, which declares that in case of any other insurance . . . the assured is entitled to recover no greater proportion of the loss sustained than the sum insured bears to the whole amount insured thereon. This position cannot, I think, be maintained. Prior to the time when the mortgage clause was entered upon the policy, the word 'assured' referred to the owner, and it is hardly to be assumed that the mortgagees would have accepted such a provision if there was any reason to suppose that they would be affected by any prior insurance. They would, no doubt, have demanded a separate policy as mortgagees, instead of trusting to the hazard and uncertainty of pursuing a remedy upon a policy of which they had no knowledge, and against a company to which they were strangers, and in regard to whose responsibility they had no information whatever. The legal effect of the mortgage clause was that the defendant agreed that in case of loss it would pay the money directly to the mortgagees, and they were thus recognized as a distinct party in interest. It created a new contract from that time with the mortgagees, the terms of which most clearly indicate that it had no relation to the application of the condition referred to. The insurance had been to the owner, and the additional provisions, which were incorporated in the policy by the mortgage clause, created a distinct contract with the mortgagees. It was an independent agreement, partaking in no sense of the character of an assignment of a policy of insurance, but one in which the mortgagees were recognized as a separate party, having distinct rights, and entitled to receive the full amount of insurance money, without any regard whatever to the owner of the property. The meaning of the word 'assured' has not been changed by the addition of the mortgage clause, the object of which evidently was to protect the mortgagees against the effect of the provision in which the word is employed. The interest of the latter was distinct and separate when this change in the policy was made, and the intention of the parties was, beyond question, to insure the plaintiffs under a new contract. Any different interpretation would lead to great injustice, and place the mortgagees under the control and at the mercy of the owner, by changing the character of the defendant's liability, which might operate to prevent the indemnity which the defendant intended to provide. If the condition referred to was in force either before or after the arrangement, the owner might effect other insurance, and thus jeopard the rights, if not entirely control the security, of the plaintiffs." All that is said by Miller, J., in the *Westchester Case*, is applicable to the case at bar. In this case the insurance company, by the mortgage slip, stipulated

that the rights of the trust company should not be invalidated by any act or neglect of the mortgagor or owner of the insured property. Reading the entire policy together, the only reasonable construction that can be placed upon it is that it was never the intention of the insurance company or of the trust company that the rights of the latter should be made in any manner to depend upon any act or omission of Crew, the mortgagor and original owner of the insured property.

In *Westchester F. Ins. Co. v. Coverdale*, 48 Kan. 446, a policy substantially like the one in controversy here was considered by the supreme court of Kansas; and in deciding the rights of a mortgagee to whom, by a mortgage slip attached to the policy, the loss was made payable, that court said: "The mortgage clause [slip] created an independent and a new contract, which removes the mortgagees beyond the control of the effect of any act or neglect of the owner of the property, and renders such mortgagees parties who have a distinct interest, separate from the owner, embraced in another and a different contract. The tendency of the recent cases is to recognize these distinctions and thus protect the rights of the mortgagee, when named in the policy, and the interests of the owner and of the mortgagee are regarded as distinct subjects of insurance." In *City Fire Cents Sav. Bank v. Pennsylvania F. Ins. Co.*, 123 Mass. 165, the supreme court of Massachusetts had under consideration a policy substantially like the one in suit, and, in discussing the rights of a mortgagee to recover on the policy notwithstanding the violation of its terms by the owner, said: "But the [insurance] company has made a special contract with the plaintiff, by the fair construction of which we think it is entitled to recover the whole loss proved in this case, it being less than its debt. The [insurance] company has agreed that 'no sale or transfer of the property hereby insured shall vitiate the right of the mortgagee to recover in case of loss.' A necessary consequence of a sale and transfer of the property is that the purchaser has a right to insure his interest. Such right is an incident of his ownership. The object of the special stipulation which the mortgagee took care to procure was to secure the insurance of its interest as mortgagee, and to avoid its defeat by any sale or transfer of the property; and, by a fair interpretation of the contract, it means that its right to recover shall not be vitiated by any of the natural consequences or incidents of a sale or transfer. Otherwise, the stipulation is of very slight value to the mortgagee." In *Harford F. Ins. Co. v. Olcott*, 97 Ill. 439, the facts were: The owner of property procured a policy of insurance on the buildings thereof in his own name, for his own benefit, and for the benefit of a bank to which he owed a debt secured by a mortgage on the insured property. This mortgage required the owner to insure the property for the benefit of the bank. The policy provided that in case of loss the insurance company should pay the amount of it to a trustee named in the mortgage, for the benefit of the bank or the holder of the note. The policy

also provided that the owner might procure additional insurance, but that in case he did so, and loss occurred, he should not be entitled to recover of the Hartford Insurance Company any greater proportion of the loss than the amount insured by its policy bore to the whole sum insured. The policy also provided that in case of loss, and a failure of the insurance company and the insured to agree upon the amount thereof, the controversy should be submitted to arbitration. There was a mortgage clause or mortgage slip attached to the policy, containing substantially the provisions of the mortgage slip made a part of the policy in controversy here. The owner of the property procured additional insurance thereon. A loss occurred, and the owner and the insurance company arbitrated the amount thereof. The insurance company having refused to pay the amount of loss to Olcott, the trustee in the mortgage held by the bank, this suit resulted. The supreme court of Illinois decided that the owner and the bank held distinct interests under the policy, it being in substance two contracts; that the owner, in a suit on the policy for a loss, would be limited to a recovery of a *pro rata* share of the company, when prorated with the amounts of the subsequent policies, and would be bound by his act of submitting the amount of damages to appraisal, but the bank, in a suit by it or its trustees, would not be limited to a recovery of the insurance company's prorated share, with the other companies issuing the subsequent policies, nor would it be bound by the selection of appraisers in which it did not join, and that it had no control over the acts of the mortgagor, and was not bound by his acts or neglect.

In the case at bar, if the trust company was suing simply as the assignee of Crew, then its right to recover would depend upon whether Crew could recover, or if, by the insurance policy, the trust company had been named as a party to whom the loss should be paid, as the agent or trustee of Crew, then its right to recover would depend upon whether Crew could enforce the policy. But the trust company does not stand in either of these relations in this case. It had an interest in the assured property, in that it had a lien upon it, and stands here to enforce rights of its own under the contract between it and the insurance company.

2. As already stated, one of the terms of the policy, or the mortgage slip made a part thereof, was that the trust company would notify the insurance company of any change of ownership of the insured property, or increase of hazard thereto, which should come to the knowledge of the trust company. The trust company learned of the conveyance of the property by Crew to Platter soon after it occurred, but neglected to notify the insurance company thereof. The second argument of counsel for the insurance company is that, because of the failure of the trust company to notify the insurance company of the change of ownership of the insured property, the trust company has lost its right to enforce the policy. It is not claimed that the transfer of the property in any manner

increased the hazard of the risk. So we have the question as to whether the neglect of the trust company to notify the insurance company that Crew had conveyed the property worked a forfeiture of the rights of the trust company to enforce the policy. The policy does not provide when the mortgagee shall give this notice, nor is there any provision in the policy or mortgage slip to the effect that in case the mortgagee comes into possession of knowledge that the hazard of the risk has been increased, or that the property has been conveyed, and neglects to notify the insurance company thereof, the policy shall therefore be void. We are not prepared to say that such a provision could be enforced if it was contained in the policy. There is no claim here on the part of the insurance company that it has suffered any injury or damage by reason of the neglect of the trust company in this respect. The insurance company has received a premium for carrying this risk for five years, and we do not think that it should be allowed to escape compliance with its contract because the trust company has neglected to perform an immaterial promise on its part, and which neglect of the trust company has worked no injury whatever to the insurance company. *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141.

3. The third point relied upon by counsel for the insurance company for reversing this case is that this suit was not brought in the name of the real party in interest. We have already seen that the policy contained a separate and independent contract between the insurance company and the trust company, and that the trust company had an interest in the insured property. By the terms of this contract the policy, when issued, was delivered to the trust company, and it has never parted with its possession or the title to it since. "Where, by a policy of fire insurance, the loss is made payable to a third person as his interest may appear, the language imparts an interest in the property in such third person to the extent of his interest. The insurance is for his benefit, and he or his assignee may maintain an action upon the policy in case of loss." *Pitney v. Glens Falls Ins. Co.* 65 N. Y. 6. In this case Crew, had he never conveyed the insured property, could not have maintained an action against the insurance company to recover this loss, at least without showing that he had paid and discharged the mortgage debt. *Westchester F. Ins. Co. v. Overdale*, 48 Kan. 446. At the time the suit was brought, Huey, the owner of the mortgage debt, may have been a proper party plaintiff, but that question was not raised in the court below, and is not raised here. Furthermore, Huey, by assigning the mortgage debt to the trust company during the pendency of the action, parted with all his interest, if he had any, in the subject-matter of this action and disqualified himself from being a party thereto. The trust company, by assigning the mortgage debt to Huey, did not thereby assign him the insurance policy, nor part with its interest in it, nor its right to enforce it. As the trust company guaranteed the collection

and payment of the mortgage debt, it still had such an interest in the insured property as entitled it, in case of a loss, to sue for a recovery, and at the time the judgment was rendered the only party that could have maintained this action was the trust company. *Blackwell v. Miami Valley Ins. Co.*

48 Ohio St. 533, 14 L. R. A. 481; *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619; *Wood v. Hamburg-Bremen F. Ins. Co.* 133 N. Y. 394; *Westchester F. Ins. Co. v. Overdale, supra*. There is no error in the record, and the judgment of the district court is affirmed.

## NEW YORK COURT OF APPEALS.

Fred C. EDDY, Receiver of the Syracuse Screw Company,

*v.*  
LONDON ASSURANCE CORPORATION,  
Appl.,

and  
Giles EVERSON, Resp't.  
(And Six Other Cases.)

(143 N. Y. 811.)

1. A mortgagee may properly proceed to judgment and sale in a foreclosure suit which was pending when a loss by fire occurred, unless payment of his mortgage debt is made, under a policy stipulating that his interest in the insurance shall not be invalidated by foreclosure, although it also provides for subrogation of the insurer to his rights under the mortgage with a proviso that it shall not impair his right to recover the full amount of his claim.
2. A provision that a mortgagee's interest in a policy of insurance shall not be "invalidated" by any act of the owner means that it shall not be injuriously "impaired or affected" thereby, and prevents the reduction of his recovery on account of other insurance taken without his knowledge by reason of a provision that the insurer shall be liable only in proportion that the sum insured by the policy bears to the whole amount of insurance issued to or held by any party or parties having an insurable interest.
3. Invalid insurance taken by the owner of property in violation of a policy cannot be reckoned in determining the recovery of a mortgagee, where the policy provides that his interest shall not be invalidated by any act of the owner, although it provides generally that the insurer shall be liable only for its proportion of the loss according to the whole amount of insurance on the property.

(October 9, 1894.)

**A**PPPEAL by the defendant insurance company from a judgment of the General Term of the Supreme Court, Fourth Department, modifying and affirming as modified a judgment entered in the office of the clerk of Onondaga county, in favor of defendant Everson, in an action brought to recover the amount alleged to be due on certain policies of fire insurance upon property in which Everson had an interest as mortgagee. *Affirmed*.

The facts are stated in the opinion.

Mr. A. H. Sawyer, for appellants;

The defendant insurance companies upon

NOTE.—For construction of the mortgage clause, see note to the case immediately preceding this one.

25 L. R. A.

payment to the defendant Everson of the amount due under their policies of insurance were entitled to be subrogated, to the extent of such payment, to all the rights of Everson, as mortgagee, under all securities held by him as collateral to the mortgage debt, as such securities existed on the day when the loss occurred.

*Springfield Fire & Marine Ins. Co. v. Allen*, 48 N. Y. 389, 3 Am. Rep. 711; *Ulster County Sav. Inst. v. Leake*, 78 N. Y. 161, 29 Am. Rep. 115; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544; *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 343, 14 Am. Rep. 271; *Kip v. Mutual F. Ins. Co.* 4 Edw. Ch. 88, 6 L. ed. 807; *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399, 29 Am. Rep. 171; *Dick v. Franklin F. Ins. Co. of Philadelphia*, 81 Mo. 103.

The agreement on the part of the insurance company to pay in case of loss is concurrent with the agreement upon the part of the mortgagee to subrogate the company, on such payment, to the extent thereof, to all his rights under securities held by him for the payment of the mortgage debt, and the defendant Everson the mortgagee, having by foreclosure of the mortgage and the sale of the property subsequent to the fire, put it out of his power to subrogate the insurance companies to the rights which he had under such securities at the time of the fire, he cannot recover in this action against the defendants, the insurance companies.

*Lett v. Guardian F. Ins. Co.* 52 Hun, 570, affirmed, 125 N. Y. 82; *Fayerweather v. Phenix Ins. Co.* 6 L. R. A. 805, 115 N. Y. 324; *Dilling v. Draemel*, 80 N. Y. S. R. 435, 16 Daly, 104; *Niagara F. Ins. Co. v. Fidelity Title & Trust Co.* 123 Pa. 516; *Carstairs v. Mechanic's & Traders' Ins. Co. of New York*, 18 Fed. Rep. 473; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541; May, Ins. 2d ed. § 458; *Thomas v. Montauk F. Ins. Co.* 43 Hun, 213.

The contract of insurance being one of indemnity merely where the interest of a mortgagee is specially insured as such, the insurer would on payment of the loss to the mortgagee, be entitled by law, irrespective of any agreement, to be subrogated to that extent to all securities held by the mortgagee for the payment of the debt.

*Sussex County Mut. Ins. Co. v. Woodruff, supra*; *Etina F. Ins. Co. v. Tyler*, 16 Wend. 897, 80 Am. Dec. 90.

Where the language of a contract is susceptible of two interpretations, that interpretation must be adopted that will give force and validity to the contract.

*Archibald v. Thomas*, 3 Cow 384.

The language employed in a contract of in-

insurance must be taken in the ordinary, popular sense unless it appears to have been used in a technical sense or custom or usage has impressed a different meaning upon it.

*Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 394, 3 Am. Rep. 711.

*Mr. Watson M. Rogers*, with *Messrs. Waters, McLennon & Waters*, for respondent:

The mortgage clause provides for the payment of the loss to Everson as his interest may appear, "and this insurance as to the interest of the mortgagee (or trustee), only, thereon shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property." This furnishes a complete answer by him to the defense mentioned.

*City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co.* 122 Mass. 165.

The "other insurance" with which the mortgagees must share is such as runs to and is upon the insurable interest held by him; not insurance upon other interests and in favor of other parties.

*Adams v. Greenwich Ins. Co.* 9 Hun, 45; *Crow v. Greenwich Ins. Co.* 66 Hun, 54; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410; *Lowell Mfg. Co. v. Safeguard F. Ins. Co.* 88 N. Y. 591.

The mortgagee clause constitutes an independent contract between the insurance company and the mortgagee, and enables him to recover, notwithstanding a violation of the conditions of the policy by the owner.

*Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141; *Eddy v. London Assur. Corp.* 65 Hun, 807.

The mortgagee may make any contract with the insurer for the protection of his interests so far as they do not impair the rights of the mortgagor.

*Ulster County Sav. Inst. v. Leake*, 73 N. Y. 161, 29 Am. Rep. 115; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544.

He may collect the amount due on the policy, notwithstanding the property undestroyed is sufficient to pay the mortgage debt.

*Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 844, 14 Am. Rep. 271.

Under the subrogation clause the company is only entitled to subrogation when it "shall pay the mortgagee."

The mortgagee must in any event be paid "the full amount of his claim."

Independently of the contract, the insurer has only an equitable right to be subrogated *pro tanto* to such rights as the insured himself has in respect to the mortgagee after receiving payment of the loss.

*Kernochan v. New York F. Ins. Co.* 17 N. Y. 428.

There must first be complete compensation. *Beach, Mod. Eq. Jur.* § 818; *Wood, Ins.* § 496, p. 1073, and cases cited.

If the insurance companies desire the benefit of subrogation, either upon the principles of the common law or upon the agreement contained in the policy, they must first pay the mortgagee's debt, assert their right of subrogation, and themselves enforce the judgments which they have thus paid and as to the mortgagee, extinguished.

*First Nat. Bank of Buffalo v. Wood*, 71 N. Y. 25 L. R. A.

*Y. 405*, 27 Am. Rep. 66; *Platt v. Brick*, 35 Hun, 121, and cases cited at p. 124.

Cases where the mortgagee has merely pursued the prescribed remedy to collect, and has obtained only part of his debt, come within the rule that neither omission of an act not specially enjoined by law, nor the commission of an act expressly authorized by law, is a discharge.

5 Wait, *Act. & Def.* 227; *Lamden v. Leonard*, 55 Ga. 374; *Brandt, Suretyship*, § 200.

**Peckham, J.**, delivered the opinion of the court:

The plaintiff commenced the above action against the corporation defendant upon a policy of fire insurance issued by the company by which plaintiff, as receiver, was insured against loss or damage by fire on certain property situated in Syracuse, and formerly owned by the screw company, of that city. The defendant Everson was insured in the same policy as mortgagee, as his mortgage interest might appear. He was joined as defendant, in order that the whole controversy might, as between all the parties, be settled at once. Actions were also commenced against several other insurance companies by the plaintiff, as receiver, at the same time, and to recover upon policies covering substantially the same premises. The questions arising affect generally all the insurance companies, although one or two of such questions are not raised in all the policies. The plaintiff failed to recover, and his complaint was dismissed in the courts below because of the violation of provisions in the policies in regard to procuring other insurance without the companies' consent, and also because of the plaintiff's permitting foreclosure proceedings to be commenced to foreclose certain mortgages upon the insured premises. The plaintiff has not appealed. The defendant Everson and the corporations defendant served cross-answers upon each other, Everson contending that he should be allowed to recover from the companies to the extent of his policies upon his mortgage interest in the premises, while the companies set up several defenses to such claim, which will be noticed hereafter. The cases were referred for trial, and the referee reported in favor of Everson as against the insurance companies, and the judgments were affirmed at the general term of the supreme court after a slight modification as to the amounts of the recovery, and the insurance companies have appealed to this court.

The only questions to be determined arise between defendant Everson and the companies. By the judgment entered upon the report of the referee it is provided in all cases that the insurance companies on making payment of the loss are entitled to be subrogated to the rights of the mortgagee, but such subrogation is not to impair the mortgagee's right to enforce the collection of his claim in full against the principal debtor, nor by means of any collateral security he may hold. This was placed in the judgments in accordance with the reports of the referee.

1. The companies urge that defendant

Everson, the mortgagee, having foreclosed the mortgages upon the premises, and sold the same under his judgment of foreclosure and sale subsequent to the time of the fire, has thereby put it out of his power to subrogate them to the rights which he had under the securities held by him at the time of the fire, and he therefore cannot recover in this action against them. It appears that the Syracuse Screw Company was the original owner of the premises, and it had given three several mortgages thereon,—one dated August 18, 1881, for \$4,500; one dated November 3, 1883, for \$14,000; another dated June 30, 1885, for \$10,000. The defendant Everson, on the 9th day of June, 1888, was the owner of all of these mortgages, and on that day commenced one action against the screw company to foreclose them. On the 23d of June, 1888, the screw company was dissolved, and Eddy was appointed the receiver. The company was wholly insolvent, and had no property other than the mortgaged premises. In July, 1888, Eddy, as receiver, duly appeared in the foreclosure action, and served an answer setting up a defense to the \$10,000 mortgage. On the 4th of December, 1888, a fire occurred by which the property covered by the policies was damaged, and appraisers were appointed on the 18th of December, and on the 21st of December, 1888, they made their award by which they determined the damage resulting to the property from the fire to have been \$10,102.90. The companies refused to pay Eddy on the grounds already stated. Everson severed his foreclosure action after Eddy put in his answer setting up a defense as to one of the mortgages, and on the 17th of December, 1888, obtained judgment by default for the foreclosure of the \$4,500 and \$14,000 mortgages, and decreeing a sale of the premises in satisfaction thereof. Subsequent to the fire, and on the 9th of January, 1889, the property was sold under the foreclosure judgment for the sum of \$15,400, leaving a deficiency on those two mortgages, including interest and costs, \$4,921.86.

Each of the policies of insurance had a provision therein known as the "New York Standard Mortgage Clause," and under it the loss, if any, was made payable to defendant Everson, as his mortgage interest might appear. The clause contained a provision that the insurance of Everson's interest should not be invalidated by any act or neglect of the mortgagor or owner of the property, nor by any foreclosure or other proceedings or notice of sale relating to the property. The clause also contained the further provision that "whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a

full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim." The companies did claim that, as to the owner of the premises, no liability existed. They never in any manner consented to the institution of foreclosure proceedings. At the time when they were commenced—June, 1888—no fire had occurred, and the defendant Everson was acting strictly within his legal rights when he commenced them. It must be assumed that the commencement of the foreclosure proceedings terminated any interest which Eddy might have had in the policies up to that time. There was, however, a separate and wholly distinct insurance of the interest of Everson in the property, and by the terms of that contract of insurance it was not to be affected by any act or neglect of the mortgagor or owner of the property, or by any foreclosure or other proceedings, or notice of sale relating to the property. The act which forfeited the interest of the owner in a policy was not to affect the interest of the mortgagee. Consequently the mortgagee violated no contract on his part when he commenced the proceedings to foreclose his mortgage, and thus endeavored to collect his debt. Before he had proceeded so far as a judgment of foreclosure, a fire occurred. What was he to do? Was he bound to stay further proceedings, and accept payment of the amount of his insurance, and then assign to the extent of such payment his rights in the mortgages to the companies? We think not. Such is not the meaning of the clause when read as a whole. Foreclosure proceedings were not to affect his rights. This was expressly provided for and agreed to. Although there was an agreement to subrogate, yet that agreement was also upon the condition that subrogation should not impair the mortgagee's right to recover the full amount of his claim. The two rights must be considered together, and, though subrogation, under certain circumstances, may, under the agreement, be insisted upon, yet, unless payment of his mortgage debt is made, the mortgagee must have the right to proceed with the foreclosure and to a sale of the premises, for otherwise it could not be seen whether a subrogation prior to a sale would not impair his right to recover the full amount of the claim of the mortgagee.

If the insurers desired an immediate subrogation, then they had a right, by the terms of their contract, to pay the whole debt, and take an assignment of the bond and mortgage and whatever other securities the mortgagee might have for the payment of his whole claim, otherwise the insurers must wait if the mortgagee desire to continue the foreclosure. The right of the mortgagee to recover his full claim might be pretty sadly impaired if he had to subrogate at once, or, in other words, permit the insurers to collect out of his securities the very amount which they had paid him upon the policies issued to increase his security. It is not the mere right to prosecute which is not to be impaired, but the right to payment in full of

his claim. This is not to be impaired by any claim of subrogation. Here is a very apt case in which to illustrate the point. The mortgagee sustains a loss upon the sale under the foreclosure decree of the two mortgages of nearly \$5,000. There is the third mortgage, upon which judgment of foreclosure was obtained, and the amount found due thereon was \$12,474, and interest runs on that sum from January 15, 1890. The argument of the companies, if allowed, would lead to their sharing in the amount realized upon the foreclosure sale to the extent of the payments made by them on their policies, some \$10,000, and the balance, some \$5,000, only would be realized by the mortgagee. In other words, he would receive no benefit whatever from the insurance, for the companies would take out of the proceeds of the foreclosure sale precisely the amount they paid him upon the policies of insurance. What meaning is given to the words in the mortgage clause that no subrogation shall impair the right of the mortgagee to recover the full amount of his claim, if subrogation can be insisted upon under such circumstances? Insurance is taken for the purpose of increasing the security of the mortgagees. By the construction contended for by the companies there is really no such insurance. If the sale under foreclosure amounts only to the total of the insurance, but does not reach the full sum of the mortgagee's claim, the latter recovers nothing but the insurance money, while the companies are reimbursed their outlay from the proceeds of the foreclosure sale. They lose nothing, and only the mortgagee loses. This consequence is avoided, and, I think, was intended to be avoided, by the provision in question, which makes the right of subrogation dependent upon the fact that its exercise shall not in any manner impair the right of the mortgagee to full payment of his claim. Where the contract provided that it should not impair the mortgagee's right to recover the full amount of his debt, the right to recover meant the right to demand and to receive full payment of his debt or claim. If that right is not impaired by the insurers' right of subrogation, as claimed by them, it is impossible to say under what circumstances it would be impaired. We cannot recognize the correctness of this claim on the part of the insurers.

2. Another question arises in regard to the so-called "contribution." It seems that the plaintiff, Eddy, without the consent of these defendant insurers, procured other insurance upon the property. This additional insurance thus procured rendered the policies of these insurers invalid as to the plaintiff. They contend, nevertheless, that in arriving at the proportion of the loss payable by each of them to the mortgagee, this other insurance should be reckoned as part of the insurance on the property. It was procured by plaintiff without the consent or knowledge of the mortgagee, and was not made payable in any event to him, and did not insure his interest in the property. If the claim of these defendant insurers be allowed, the effect is to reduce the amount which each is

liable to pay to the mortgagee, and thereby to lessen his total recovery, as he has no claim under the other and additional policies. The clause under which this claim is made provides in the body of the policy that the insurer "shall not be liable for a greater proportion of any loss on the described premises than the amount thereby insured shall bear to the whole insurance, whether valid or not." I think the courts below were right in rejecting this claim of the insurers. Taken in connection with the language in the mortgage clause, the contract is quite plain. The provision in the latter clause that the insurance of the mortgagee should not be invalidated by any act or neglect of the owner of the property applies, among others, to a case of other insurance of his own interest by the owner without the knowledge or consent of the mortgagee. The effect of the mortgage clause hereinbefore set forth is to make an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the company, free from the conditions imposed upon the owners. Where the company agreed that the mortgagee's insurance should not be "invalidated" by any act or neglect of the owner of the property, it was not intended to limit the application of that word to a case where the whole policy would otherwise be rendered invalid. The plain and obvious meaning of the language is that the insurance of the mortgagee should not be affected or in any wise impaired or lessened by any act or neglect of the owner. Although contained in the same policy issued to the owner, yet the insurer and the mortgagee were nevertheless entering into a perfectly separate contract of insurance, by which the mortgagee's interest alone was to be insured, and it would be most natural to provide that no act or neglect of the owner should invalidate—that is, impair—any portion of the insurance thus separately secured. Can it for a moment be supposed that a mortgagee would otherwise ever consent to such a contract? His desire is to obtain security, and to that end he insures his interest in the property. Would he knowingly consent that this security should be liable to be wholly frittered away and made valueless by the action of the owner, unknown to him, in procuring insurance upon the owner's interest in the property? Would any sane man agree to hazard his security in such a way? Would he agree that the value of his security should depend upon the acts of a third party over whom he had no control, and of whose acts he might be wholly ignorant? The statement of the proposition is its best refutation. These views are supported by both of the opinions in the case of *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141. There is some difference in the verbiage of the clause in the reported case and that to be found in the clause under examination here. In the *Hastings Case* the clause as to contribution contained the proviso that, in case of other insurance, the assured should recover only a proportionate sum from defendant company. The owner of the property had mortgaged it to plain-

tiff's testator, and had subsequently obtained an insurance upon his own interest as owner, and subsequent to that time the indorsement in favor of the mortgagee was made, and it was in the body of the policy issued to the owner that the language was used as to the assured. In the clause here under consideration it is seen that the word "assured" is not there, and the condition is that in case of other insurance the company shall not be liable under the policy, etc. The court in the *Hastings Case* thought the word "assured" referred to the person who was first insured when the policy was issued, and was not transferred to the mortgagee when he subsequently, by a minute placed in the policy, was made an assured also. This is very true, but a perusal of the whole case shows that the controlling idea was a separate insurance of the mortgagee, freed from the conditions attached to the insurance of the owner, and not to be impaired or weakened by any act or neglect of such owner. Force must be given to this positive language of the contract, and no act or neglect of the owner can be permitted to invalidate—*i. e.* impair or weaken (78 N. Y. 149)—the validity of the agreement for the full amount named in the policy. By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy which from their nature would properly apply to the case of an insurance of the mortgagee's interest would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee must be regarded as ineffective and inapplicable to the case of the mortgagee. So when the agreement in regard to contribution, contained in the body of the policy issued to the owner, is compared with the specific statement in the mortgage clause that his insurance shall not be invalidated by any act or neglect of the owner, we can only give the latter due force by holding that the insurance of the mortgagee is not, in effect or substance, to be even partially invalidated,—*i. e.* reduced in amount,—and to that extent impaired and weakened by any act of the owner unknown to the mortgagee. In such case the general agreement in the body of the policy as to contribution does not, and was not intended to, apply. If it did, then the special and particular contract in the mortgage clause would be of no effect. If the two are inconsistent, the special contract, particularly relating to the mortgagee's insurance, must take precedence over the general language used in the policy issued to the owner. For these reasons the claims of the insurers for a deduction in the amount of their liability cannot be allowed.

8. As to three of the policies, the mortgage clause itself contained the provision that the company was only to be liable in the proportion which the sum it insured should bear to the whole amount of insurance on the property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise. What

meaning is to be attached to this provision after taking into consideration the language heretofore quoted that the insurance of the mortgagee will not be invalidated by any act or neglect of the owner of the property? The act of obtaining this additional insurance was the act of the owner, and it was unknown to the mortgagee, and of course not consented to by him. The additional insurance could by no possibility benefit him, as it was not upon any interest of his in the property. He could not, therefore, resort to any of these additional policies for his indemnity. It is not a case of contribution in any sense, but simply one, on the insurers' theory, of diminution of their liability, caused by the act of the owner and unknown, and with no possible corresponding benefit to the mortgagee. As a general principle, it is settled that, before this apportionment of the loss between different companies can be demanded, the different policies must have been upon the same interest in the same property or some part thereof. *Lowell Mfg. Co. v. Safeguard F. Ins. Co.* 88 N. Y. 592. Has this principle been changed by this contract? Can it be that the mortgagee would knowingly consent to a diminution of this liability to an extent which might leave it of no value, consequent upon a secret act of a third party, and where by no possibility could he protect his security from such danger? All the reasoning given under the head last above discussed applies with equal force here, at least so far as the probabilities of entering into such a contract by the mortgagee are concerned. It is clear that the only object of the mortgagee is to obtain a security upon which he can rely, and this object is, of course, also plain and clear to the insurer. Both parties proceed to enter into a contract with that one end in view. In order to make it plain beyond question, the statement is made that no act or neglect of the owner with regard to the property shall invalidate the insurance of the mortgagee. When, in the face of such an agreement, entered into for the purpose stated, there is also placed in the instrument a provision as to the proportionate payment of a loss, we think the true meaning to be extracted from the whole instrument is that the insurance which shall diminish or impair the right of the mortgagee to recover for his loss is one which shall have been issued upon his interest in the property, or when he shall have consented to the other insurance upon the owner's interest. This may not, perhaps, give full effect to the strict language of the apportionment clause, but, if full effect be given to that clause, and it should be held to call for the consequent reduction of the liability of the insurers in such a case as this, then full effect is denied to the important and material, if not the controlling, clause in the contract, which provides that the insurance of the mortgagee shall not be injuriously "impaired or affected" by the act or neglect of the owner. As used in these mortgage clauses, this is the meaning of the word "invalidate." *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 149. We must strive to give effect to all the provisions of the contract, and to enforce the actual



meaning of the parties to it, as evidenced by all the language used within the four corners of the instrument. We are also at liberty to consider the purpose for which the contract was executed, where that purpose plainly and necessarily appears from a perusal of the whole paper. That construction will be adopted in the case of somewhat inconsistent provisions which, while giving some effect to all of them, will at the same time plainly tend to carry out the clear purpose of the agreement; that purpose which it is obvious

all the parties thereto were cognizant of and intended by the agreement to further and to consummate. There is no equity in this claim on the part of the insurers, and we think, from a perusal of the whole clause in the policy, that it was not intended to, and that it does not, cover such claim.

*The judgment of the Supreme Court must be affirmed, with costs in each case.*

All concur, except **Andrews, Ch. J.**, not sitting.

## DISTRICT OF COLUMBIA COURT OF APPEALS

James Leo MCGRAW, Admr., etc., of Harry Leo McGraw, Deceased, *App't.*

v.

DISTRICT OF COLUMBIA.

(3 App. D. C. 405.)

1. A municipality, upon which a statutory duty has been imposed of establishing and maintaining a bathing beach, is not responsible for its safety, and the safe use of it by those likely to have recourse to it in the same manner as streets and highways, or even as parks and grounds kept for entertainment and amusement, without profit, are to be rendered safe.
2. A municipality, required by statute to establish and maintain a free bathing beach upon the margin of a river is not bound to warn the public against change in the bed of the stream, or to mark in any way the depth, or relative depth, of the water so as to guard the ignorant bather from venturing too far.
3. If a municipality, required by statute to establish and maintain a free bathing beach, is liable for its unsafe condition after the beach is opened, the detail of a policeman to preserve the peace and good order at such beach before the work of construction is completed, where boys and young men are in the habit of congregating and have for many years, is not an opening of the beach to the public and invitation to the public to use it.
4. A municipal corporation, required by statute to establish and maintain a free bathing beach, if liable for the condition of such beach, cannot be held responsible until it has completed the work of construction and thrown the beach open to the public for the uses contemplated.

(June 4, 1894.)

**A**PPPEAL by plaintiff from a judgment of a Special Term of the Supreme Court for the District of Columbia in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by the negligence of defendant. *Affirmed.*

The facts are stated in the opinion.

**NOTE.**—The above decision seems to be without any direct precedent. As to the liability of a private proprietor of a bathing resort, see *Boyce v. Union Pac. R. Co. (Utah)* 18 L. R. A. 509, 25 L. R. A.

See also 33 L. R. A. 598.

**Mr. J. H. Ralston** for appellant.  
**Messrs. S. T. Thomas and A. B. Duvall**, for appellee:

In the absence of statutory provision no action can be maintained against a municipality for neglect of a public duty imposed upon it as the agent of the public, for the benefit of the public, and for the performance of which the corporation receives no profit or special advantage.

*Dill. Mun. Corp.* 4th ed. §§ 965a, 975; *Benton v. Boston City Hospital Trustees*, 140 Mass. 18, 54 Am. Rep. 436; *McDonald v. Massachusetts Gen. Hospital*, 190 Mass. 432, 21 Am. Rep. 529; *Murtaugh v. St. Louis*, 44 Mo. 480; *Richmond v. Long*, 17 Gratt. 373.

The free bathing beach did not originate with the commissioners of the District of Columbia, and the act of congress providing for it imposed no duties upon the municipality.

Where a municipality elects or appoints an officer in obedience to a statute, to perform a public service, in which the corporation has no private interests, and from which it derives no special interest or advantage in its corporate capacity, such an officer cannot be regarded as an agent or servant of the municipality for whose negligence or want of skill it can be held.

*Mazmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 463; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Hayes v. Oakkosh*, 83 Wis. 814, 14 Am. Rep. 760.

A municipal corporation is not answerable for damages for the negligence of its officers in the execution of such powers as are conferred upon the corporation or its officers, for the public good.

*Kiley v. Kansas*, 87 Mo. 103, 56 Am. Rep. 443; *Cutwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154; *Elliott v. Philadelphia*, 75 Pa. 347, 15 Am. Rep. 591; *McKay v. Buffalo*, 74 N. Y. 619; *Curran v. Boston*, 8 L. R. A. 243, 131 Mass. 505.

**Morris, J.**, delivered the opinion of the court:

By an act of congress approved September 26, 1890, entitled "An act establishing a free public bathing beach on the Potomac river, near Washington Monument," it was provided as follows:

"Be it enacted, etc., That the commissioners of the District of Columbia are hereby authorized and permitted to construct a beach

and dressing houses upon the east shore of the tidal reservoir, against the Washington Monument grounds, and to maintain the same for the purpose of free public bathing, under such regulations as they shall deem to be for the public welfare; and the secretary of war is requested to permit such use of the public domain as may be required to accomplish the object above set forth.

"Sec. 2. That the sum of three thousand dollars is hereby appropriated from the revenues of the District of Columbia, to be immediately available for the purposes of this act." 26 Stat. 490.

The commissioners of the District had given their approval to the measure in advance upon reference of the bill to them by congress; and the beach and bath houses were thereupon constructed, under the superintendence of William X. Stevens, the enthusiastic person who had procured the enactment of the law, and were thrown open to the public on the 7th day of September, 1891. Four days before this last-mentioned day, namely, on the 3d of September, 1891, Harry Leo McGraw, a boy of the age of thirteen years and five months, together with a number of other boys, stated to have been about seventy-five in all, went in to swim at the beach. McGraw went in about 11 o'clock in the morning, and remained in the water until about 1 o'clock in the afternoon, when he was drowned. It is testified that he was unable to swim, although he went in near where there was a springing board for diving, which indicated deep water; and the body was found on the next day in deep water not far from the end of the springing board, where he seems to have gone down. There was a policeman on duty at the beach; but it does not appear that he saw McGraw go into the water, or had observed his movements at all. But few, if any, of the bath houses were open; and McGraw, as well as some of the other boys, undressed in the woods. One of the witnesses testified that he himself asked the policeman whether it was permitted to go in that morning, and that the officer replied that those who had bathing suits might go in. It does not appear whether young McGraw had a bathing suit or not.

The immediate cause of the drowning was that there was a deep gully at the place, where the ground under the water shelved very suddenly, and there was a steep and dangerous descent. There were no lines at that time to mark the limits of the beach.

This suit was thereupon instituted by James Leo McGraw, the father of the unfortunate boy, as administrator of the deceased, to recover damages from the District of Columbia for the loss of the services of his son, for the funeral expenses of the latter, and for expenses incurred in curing the boy's mother, the wife of the plaintiff, of ill health resulting from the drowning of her son. At the trial, the plaintiff adduced testimony to prove the facts hereinbefore stated, and others not deemed important to be here specified. Besides this, there was proof that the boy had earned some money, which he gave to his mother for the support of the family; that he was a strong and healthy boy at the time of

his death; and that his funeral expenses amounted to something upwards of \$100. There was no proof offered of any expenses incurred, as alleged, in consequence of the ill health of the plaintiff's wife resulting, as claimed, from the death of the son, and it would have scarcely served any useful purpose to adduce such proof, notwithstanding the allegation of the fact in the declaration.

No proof was offered on behalf of the defendant. But defendant's counsel, upon the close of the plaintiff's case, prayed the court to instruct the jury to return a verdict for the defendant, on the twofold ground that the district was not liable in the case as matter of law, and that the ill-fated boy, on account of whom the suit had been instituted, had been himself chargeable with contributory negligence. The court gave the instruction, over the plaintiff's objection; and the jury rendered their verdict in accordance therewith, upon which there was judgment for the defendant. From this judgment the plaintiff appealed.

Two questions are suggested by the bill of exceptions, and the assignments of error: (1) Whether there was any liability in this case on the part of the District of Columbia to the plaintiff; and (2) whether there was contributory negligence on the part of the deceased.

1. It may well be doubted whether the act of congress that has been cited in this case was intended to impose any duty upon the District of Columbia, such as is sought to be enforced in the present suit. The act is permissive in its character, and not mandatory. It is not mandatory either upon the secretary of war to permit the use of the public grounds for the purpose in question, or for the commissioners of the District of Columbia to carry the purpose into effect. And even if it should be assumed that there was a duty imposed by it, from which a liability might accrue, it is not at all clear that the District of Columbia is chargeable with that duty, which was laid by express terms, not on the district as a municipality, but upon the commissioners of the district as a superadded obligation.

But however this may be—and we desire not to be understood as distinctly deciding this point—we cannot accept the theory that the municipality, even if the duty has been imposed upon it of establishing and maintaining this beach, can be held responsible for its safety, and the safe use of it by those who are likely to have recourse to it in the same manner as streets and highways are to be rendered safe, or even as parks and grounds kept for entertainment and amusement, without direct profit or advantage to the municipality, might have to be maintained in a condition of safety. Land covered by water is necessarily more or less beyond the ordinary control of man; and the margins of streams, rivers, and lakes, as well as of the ocean, are subject to a power which the ordinary operations of man may neither determine nor direct. To hold that the margin of a great river, with the mighty volume of water that constantly comes down to disturb its configuration, should be kept level and smooth,

free from holes and depressions, and equally safe for the use of adult man and the child of tender years, would be to demand the impossible. It is common experience that the bed of a river is in course of constant change; and that in places the sand and earth are accumulated, in other places excavated or depressed and holes and ravines formed even in a single night. It cannot be that there is any duty imposed upon the municipality that charges it with knowledge of these mutations and requires it to warn the public against them. Neither do we understand that, in the establishment of a free bathing beach, there is any duty imposed upon it to mark in any way the depth or relative depth of the water, so as to guard the ignorant bather from venturing too far. This is a case in which the bather must rely upon his own senses and his own caution; and he has no right to have the municipal authority substituted for the exercise of his own judgment.

If there was a duty imposed in this instance upon the municipal authorities of the District of Columbia, it was: (1) "To construct a beach and dressing houses;" and (2) "To maintain the same." These are the terms used in the statute. Now, towards individuals certainly no liability could accrue under the statute until the municipality had completed the work of construction, and thrown the beach open to the public for the uses contemplated. No one was entitled to use this beach as a bathing beach, so as to hold the municipality liable for any negligence in its construction, if any such there was, until in some manner the municipality made known to the public that the work was completed and invited them to the use of it. By the testimony uncontroverted and undisputed of the plaintiff's own witness, the beach was not thrown open to the public until the 7th day of September, 1891; and the misfortune that deprived this boy of his life occurred on the 8d day of September, 1891. The boy was there furtively, as a trespasser, without invitation and without right, so far as the municipality was concerned; and it would be the grossest injustice to hold the latter responsible for an injury which it did not occasion and against which, in the nature of things, it could not have guarded. This circumstance we regard as decisive of the case, and conclusive against the plaintiff's right to recover.

But it is argued in the face of this direct and positive testimony given by the plaintiff's own witness, that there are other circumstances from which the jury might properly have inferred a license from the municipality to the public to use the bathing beach even before the 8d of September, 1891, such as the presence of a policeman there, the fact that many of the boys were permitted to go in without objection, the statement of the policeman that those boys might go in who had bathing suits, and the statement of the boy's father, the plaintiff in this case, that "he had not made any personal examination of the beach to see if it was safe, and only knew about it from the fact of reading in the Star that it was open; they advertised that it was open." But we cannot regard the de-

tail of a policeman to be present to preserve the peace and good order at a place where it was known that boys and young men were in the habit of congregating and had probably congregated for half a century and upwards, as any evidence whatever that the municipality had complied with the provisions of an act of congress, and was prepared to incur liability to the amount of \$10,000 to every individual that thought proper to go into the Potomac river at that point. And of course the statement of the plaintiff as to what he saw in the Star, or thought he saw there, cannot be accepted for a moment as testimony in this case. There is absolutely no testimony whatever and nothing to go to the jury, with reference to the time at which this beach was opened to the public, and the liability of the district for its safe condition began, if it ever began, other than the statement of the plaintiff's witness, Stevens, who had the best opportunity possible to know, as he was the originator of the scheme and the superintendent of the work, that it was not thrown open to the public until the 7th of September. And as we have said, this statement is, in our opinion, conclusive of the plaintiff's case.

2. We do not consider that the question of contributory negligence arises in this case inasmuch as we find no evidence of negligence on the part of the defendant. The accident was the result wholly either of the boy's own recklessness, or was his misfortune—most probably the latter.

3. It seems important to us that we should not fail to notice another question that is involved in this case, although no point was made of it in the court below, and none was made in argument before us. This suit is instituted under the provisions of the Act of Congress of February 17, 1885 (23 Stat. 807), entitled "An act to authorize suits for damages where death results from the wrongful act or neglect of any person or corporation in the District of Columbia," which is one of the numerous statutes, now believed to be quite general in this country, based upon what is known as *Lord Campbell's Act* in England. We greatly doubt whether this statute authorizes such a suit as that which we have before us here. The statute evidently contemplates actions for the benefit of those who have been deprived of the protection and support of husbands, parents, and others standing in analogous relations; and was scarcely intended to include administration upon the estates of children and suits by such administrators. The earnings, present and prospective, of the boy in this case belonged in law to his father, as such, and not to any administrator, and the expenditure for his funeral was an expenditure incumbent on the parent for which that parent might sue the wrongdoer who caused the death, if such there was. It is unnecessary for us to decide this question here; and we do not decide it. But we do not wish it to be passed in silence, in such manner that the case may hereafter be cited as a precedent on that point.

From what we have said, it results that the judgment of the court below must be affirmed with costs; and it is accordingly so ordered

## CONNECTICUT SUPREME COURT OF ERRORS.

Albert M. WOOSTER, *Appt.*,v.  
Frederick C. MULLINS *et al.*

(.....Conn. ....)

**A tie vote on which the mayor may give a casting vote** for each of two official newspapers to be chosen is presented by a vote of twelve aldermen, in which three newspapers received four votes each, where the charter provides that two shall be chosen, but that each alderman shall vote for one only, and a general charter provision gives the mayor a casting vote in case of a tie. (*Andrews, Ch. J., and Hamersley, J., dissent.*)

(May 20, 1894.)

**A PPEAL** by plaintiff from a judgment of the Court of Common Pleas for Fairfield County in favor of defendants in an action brought to enjoin the payment of the contract price for publishing city notices for the city of Bridgeport on the ground that the contract was illegal. *Affirmed.*

A clause of the city provided that:

"In all cases wherein matter is by the charter of the city of Bridgeport required to be published in newspapers published in said city, such publication shall be in two daily newspapers published in said city, to be designated by the common council of said city, and in making such designation no member of either branch of said common council shall vote for more than one of said newspapers."

The board of councilmen of the city of Bridgeport designated the Bridgeport Evening Farmer and the Bridgeport Evening Post as their choice of newspapers to publish the proceedings. The resolution was then transmitted to the board of aldermen for action. This board consisted of twelve members. A vote was taken which resulted in four votes each being given in favor of the Bridgeport Evening Farmer, the Bridgeport Evening Post, and the Bridgeport Evening News. Thereupon the mayor declared the vote to be a tie and cast a vote for each of the two papers which had been designated by the board of councilmen.

Further facts appear in the opinion.

*Messrs. A. B. Beers and Stiles Judson, Jr.*, for appellant:

The proceeding for the selection of official newspapers is not within the operation of section 7 of the charter, which provides as follows: "The common council of said city shall consist of two separate bodies, namely: the board of aldermen, composed of all the aldermen, and the board of councilmen, composed of all the councilmen, which bodies shall meet separately, except as hereinafter provided. The mayor shall preside at the meetings of the board of aldermen, and shall have a casting vote only in case of a tie."

The "casting vote," at common law, "signifies sometimes the single vote of a person who

ordinarily does not vote, and in case of an equality of votes, sometimes the double vote of a person who first votes with the others and upon an equality creates a majority by giving a second vote."

Anderson's Law Dict.

That condition only is contemplated which can be determined by a vote on the part of the mayor; not such condition as would require a succession of votes, upon the subject-matter before the board, in order to dissolve the tie.

It was the plain duty of the mayor to require the members of the board to continue to vote upon the subject-matter before the board, until such result was accomplished by any one ballot as lawfully designated two different newspapers.

Can the doctrine of election by plurality be applied in any conceivable manner to the proceedings prescribed by the charter for the designation of the official newspapers?

It cannot when the vote on which the tie was disclosed is treated as one subject-matter, and as one vote thereon.

By what process of reasoning can it be demonstrated that while the members were confined to one effective vote on the subject, the mayor shall have two votes, and which, if true, must be predicated upon the theory that there have been two different matters before the board for their action.

The designation of these papers is in its nature, not an election of a person to an office or position within the gift of the common council, but is merely a certain prescribed method of contracting with said newspapers.

Designations of this character have always been treated as mere contracts with the newspapers thus selected.

*Re Phillips*, 60 N. Y. 26; *Re Astor's Petition*, 50 N. Y. 868.

The charter plainly prescribes a certain procedure as a condition precedent to the power to make these contracts.

*Peterson v. New York*, 17 N. Y. 449; 1 Dill. Mun. Corp. §§ 449, 468; *Sloughton Third School Dist. v. Atherton*, 12 Met. 118; *Francis v. Troy*, 74 N. Y. 840; *Weiss v. Des Moines Independent Dist.* 79 Iowa, 428; *Russell v. Gilson*, 36 Minn. 687; 2 Beach, Pub. Corp. §§ 252, 821; *Crutchfield v. Warrensburg*, 80 Mo. App. 456.

An unauthorized act can be ratified by a municipal corporation only where such act could have been authorized in the first instance, and even then the subsequent approval will not have the effect of making good the original defect where the mode of contracting operates as a limitation upon the power to contract.

1 Beach, Pub. Corp. §§ 251, 696, p. 696, and cases cited in note 1, 718; *Hodges v. Buffalo*, 2 Denio, 110; *Halstead v. New York*, 8 N. Y. 487; *Logansport v. Dykeman*, 116 Ind. 17; 1 Dill. Mun. Corp. § 463.

The rights, powers, and duties of the mayor

**NOTE.**—A novel extension of the rule as to casting votes by presiding officers is made by the above decision. As to what constitutes a majority which will carry a measure voted on including the case of 25 L. R. A.

a casting vote, see note to *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 308. See also *Magenau v. Fremont* (Neb.) 9 L. R. A. 796; *State v. Vanosdal* (Ind.) 15 L. R. A. 682.

of the city are plainly prescribed by law, and every person entering into business relations with him is presumed to know the scope of his authority upon any given subject.

*Dibble v. New Haven*, 56 Conn. 201; 1 Dill. Mun. Corp. §§ 447, 459, 528, 542; *Francis v. Troy*, *supra*.

The law will not permit of a recovery for services rendered on a quantum meruit.

*Stidger v. Red Oak*, 64 Iowa, 486; *People v. Flagg*, 17 N. Y. 584; *Crutchfield v. Warrensburg*, *supra*; 1 Beach, Pub. Corp. § 692.

**Baldwin, J.**, delivered the opinion of the court:

The main question in this case is whether the vote of the aldermen was a tie vote, within the meaning of the city charter. The word "tie," as applied to an appointment by election, signifies a state of equality between two or more competitors for the same position. Cent. Dict. in verb. The provision that two newspapers shall be designated by a vote in which no member of either branch of the common council shall vote for more than one evidently contemplates the selection of one, and permits the selection of both, by the action of less than a majority of each board. "In elections in which the principle of plurality is adopted, the candidate who has the highest number of votes is elected, although he may have received but a small part of the whole; and, where several persons are voted for at the same time for the same office, those (not exceeding the number to be chosen) who have respectively the highest number of votes are elected. But where two or more persons have equal numbers of votes there is no election, and a new trial must take place, unless some other mode of determining the question is provided by law. In some of the states where the votes are thus divided, the returning officers are authorized to decide between them, and to return which they please; but, unless thus expressly authorized by law, the returning officers have no casting vote." Cushing, Law & Practice of Legislative Assemblies, § 118. "By a 'casting vote' is meant one which is given when the assembly is equally divided, and when the question pending is in such a situation that a vote more on either side will cast the preponderance on that side, and decide the question accordingly; and not merely a vote which, if given on one side, will produce an equal division of the assembly, and thereby prevent the other side from prevailing. This principle extends to cases of election by bal-

lot. In these cases the speaker does not vote by ballot, but waits until the votes are reported, and then votes orally, not for whom he pleases, but for one, or for the requisite number, of the candidates voted for, who have received an equal number of votes. This principle applies equally in those cases where a less number than a majority is permitted, or a greater is required, to decide a question in the affirmative. Thus, if one third only is permitted or required, and the assembly, on a division, stands exactly one third to two thirds, there is then occasion for the giving of a casting vote, because the presiding officer can then, by giving his vote, decide the question either way." Id. § 806. An apt illustration of this method of procedure, as applied to cases of more than two contestants for the same position, is afforded by the practice of balloting for select committees in the British house of commons. "The majority necessary to an election is not an absolute majority of all the persons voting, but only a plurality; and if there are several persons, who all have the same number of votes, and the whole would make more than the number fixed for the committee, the speaker gives a casting vote for the election of the requisite number." Id. § 1882. A tie is that which is tied. It is a knot. And when provision is made, in regulating legislative procedure, for a casting vote by the presiding officer in case of a tie, the object is to allow him to untie this knot. The charter of Bridgeport evidently looks to the designation of the two official newspapers by one and the same vote, each member of the respective boards voting for one alone. The mayor is a component part of the common council, but he is not a member of either of the two branches or boards, which, with him, constitute that body. He is therefore not forbidden, in the selection of the official newspapers, to vote for more than one of these. The ballot taken by the aldermen, resulting in four votes for each of three different newspapers, presented the case of a tie, and to dissolve it the mayor's casting vote was properly and necessarily given for two of them, for the charter required the simultaneous designation of two. It follows that the demurrer to the complaint was properly sustained.

*There is no error in the judgment appealed from.*

**Torrance and Fenn, JJ.**, concurred; **Andrews, Ch. J.**, and **Hamersley, J.**, dissented.

## NEW YORK COURT OF APPEALS.

### Re ESTATE OF Cornelius V. S. ROOSEVELT, Deceased.

(.....N. Y.....)

1. The statute in force at a person's death governs the decision as to a collateral inheritance tax on his estate.

2. Life annuities contingent on survivorship are not subject to a collateral inheritance tax until they vest by the termination of the life on which they are contingent.

3. A contingency affecting the value of a vested remainder under a will so long as it continues will prevent the charge of a collateral inheritance tax upon the remainder.

**NOTE**—For a collection of authorities upon the construction of the statute imposing a tax upon 26 L. R. A.

successions or collateral inheritances, see *note* to *Re Romaine* (N. Y.) 13 L. R. A. 401.

(October 9, 1894)

**A**PPEAL by the Comptroller of the City of New York from an order of the General Term of the Supreme Court, First Department, reversing an order of the New York County Surrogate's Court, which fixed the amount of the collateral inheritance tax to be paid by the estate of Cornelius V. S. Roosevelt, deceased. *Affirmed.*

The facts are stated in the opinion.

**Mr. Edward Hassett**, for appellant:

The remainders devised to the nephews and nieces are "vested remainders" and are now subject to the payment of the tax.

4 Rev. Stat. p. 2516; *Cook v. Lowry*, 95 N. Y. 108; *Beardsley v. Hotchkiss*, 96 N. Y. 201; 4 Kent, Com. 202, Comstock's 11th ed. p. 228; *Delafield v. Shipman*, 18 Abb. N. C. 297, 808; *Weed v. Aldrich*, 2 Hun, 581; *Williamson v. Field*, 2 Sandf. Ch. 535, 7 L. ed. 698; *Kelso v. Lorillard*, 85 N. Y. 177; *Blanchard v. Blanchard*, 1 Allen, 227; *Sheridan v. House*, 4 Abb. App. Dec. 218; *Everitt v. Everitt*, 29 N. Y. 39; *Teed v. Morton*, 60 N. Y. 502; *Campbell v. Stokes*, 143 N. Y. 23.

A valuation most favorable to the remaindermen has been fixed, and as such valuation is based upon proper evidence it is equivalent to a finding of fact by a court or a verdict by a jury and will not be disturbed on appeal.

*Re Knoedler's Will*, 140 N. Y. 379.

The tax upon vested remainders is due and payable immediately upon decedent's death.

Laws 1887, chap. 713, § 2; *Dos Passos*, Collateral Inheritance Tax, p. 168, citing *Re Vinot's Estate*, 26 N. Y. S. R. 610; *Van Benselaer's Estate*, N. Y. L. J. May 23, 1889; *Re Cogswell*, 4 Dem. 248; *Re Lefever*, 5 Dem. 184; *Re Higgins*, N. Y. Daily Reg. Dec. 7, 1889.

Where the interest of the life beneficiary is not taxable and that of the remaindermen is, it has been held that the amount of the remaindermen's tax is lawfully payable out of the principal, notwithstanding the tax on the remainder will reduce the capital, and so affect the income of the life tenant.

*Re Johnson*, 6 Dem. 146; *Re Leavitt's Estate*, 4 N. Y. Supp. 179; *Re Peck*, note, 24 Abb. N. C. 865; *Re Woolsey*, note, 19 Abb. N. C. 234; *Re Enston*, 118 N. Y. 185; *Re Stewart's Estate*, 14 L. R. A. 836, 181 N. Y. 274.

The annuitants are beneficially entitled in expectancy to an interest in or income from the property of the testator transferred by his will, and the tax thereon is immediately due and payable.

Each of said annuities is an interest in property or income therefrom within the meaning and intent of the statute.

*Dos Passos*, Collateral Inheritance Tax, p. 164; *Biapham's Estate*, 24 W. N. C. 79; *Thompson's Estate*, 5 W. N. C. 19.

The right to the collateral inheritance tax accrues at the date of the death of the testator or intestate, and not at that of its actual imposition, and is not affected by intervening legislation.

*Re Prime's Estate*, 18 L. R. A. 718, 186 N. Y. 847.

**Messrs. George H. Yeaman, John E. Roosevelt, and George C. Kobbe** for respondents.

25 L. R. A.

**Bartlett, J.**, delivered the opinion of the court:

The question presented on this appeal is whether the interests of annuitants and remaindermen under the will of the late Cornelius V. S. Roosevelt are liable to pay presently the collateral inheritance tax. The surrogate's court for the county of New York determined this question in the affirmative, and its order to that effect was reversed by the general term of the first department. The comptroller of the city of New York appeals to this court.

The testator died September 30, 1887, and his will was admitted to probate in the county of New York March 17, 1888. After certain specific legacies to his wife, the testator disposes of his residuary estate as follows, viz.: The entire amount to be held by the executor and the executrix in trust, to pay the income thereof to his wife during her life. At her death seven life annuities are given,—to two persons, \$1,000 each; to two persons, \$500 each; and to three persons, \$5,000 each, with interests in these latter in the nature of cross-remainders contingent upon survival *inter sese*, the will providing as follows: "In case any one of the three last-named annuitants . . . shall die either before or after the death of my said wife, I direct my executors to pay, and I bequeath, to each of the two survivors of them, an annuity of \$7,500; and, in case any two of them shall die either before or after the decease of my said wife, I direct my executors to pay, and I bequeath, to the last survivor of them, an annuity of \$15,000." On the decease of the wife the estate is given, subject to the payments of the annuities, to twelve nephews and nieces. Two of these remaindermen died before the testator, and the appraiser, upon the theory that there was no lapse, and that the survivors would take the whole remainder, has made his estimate accordingly. The appraiser reported in the first instance as follows: "The persons who will become entitled to the annuities mentioned in the will cannot now be determined, until the death of the wife; and for that reason also the value of decedent's estate, which is devised at her death to his nephews and nieces, and subject to such annuities, cannot now be ascertained." The surrogate sustained objections to this report, and the matter was sent back to the appraiser. The surrogate requested the superintendent of insurance to ascertain the value of the annuities, and, acting upon his information, the appraiser reported the values of the annuities and the estates in remainder. The matter was then duly sent back to the appraiser for the third time, to enable the superintendent of insurance "to correct manifest errors." The third report of the appraiser increased the value of the compound survivorship annuities, and considerably diminished the value of the estates in remainder, as contained in his second report. This report was confirmed, and was followed in due course of procedure by the order now here for review. We are of opinion that this case must be decided under the Law of 1887, in force at the time of testator's death.

Two questions are presented for our determination, viz.: First. Are the annuities created by the will such property, in a legal sense, as to be presently taxable, and can their fair and clear market value at the time of the death of the testator be ascertained? Second. Is the fair and clear market value at the time of testator's death, of the estates in remainder, ascertainable, and is the tax thereon due at once? In deciding both of these questions, we are to reasonably construe the statute, and give effect, if possible, to all its provisions. As to the annuitants, the appellant's counsel contends that they are entitled to an interest in or an income from the property of the testator, and the statute requires the tax to be paid immediately. He goes on to say, in his printed argument: "It may, of course, be considered as a hardship to compel the annuitants to pay a tax upon an interest that they may never receive; but that is the fault of the statute, and under its wording the payment of the tax can only be postponed by giving a bond." This concession admits away the entire case of the state. It is not to be assumed that the legislature intended to compel the citizen to pay a tax upon an interest he may never receive, and the reasonable construction of this statute leads to no such unjust result. It does not follow, because the legislature taxes persons beneficially entitled to property or income, in possession or expectancy, that a tax was thereby imposed upon an interest that may never vest. Until that time arrives the power to tax does not exist. The testator has created seven life annuities, if the annuitants survive his wife, and there can be no vested interest in any of them until the happening of that event. All may survive; a portion may be living; every one may be dead. To hold such a possibility presently taxable, and its value capable of immediate computation, shocks the sense of justice.

This brings us to the remaining question, as to the taxation of the estates in remainder. The testator has, on the death of his wife, given his entire estate to twelve nephews and nieces, subject to the payment of the annuities. Two of these remaindermen, as already stated, died before the testator. It is contended by the respondents that it is impossible to ascertain the fair and clear market value of these remainders at the time of the death of the testator, for the reason that the annuitants represent estates or interests un-

vested and contingent, which, taken in connection with the life estate of the widow, renders the present value of the ultimate remainders unascertainable. The amount that will ultimately be paid to the remaindermen is contingent, depending on future events. Whenever the tax on the annuities is payable, the estate must pay it. What the amount of that tax will be depends upon the survivorship of annuitants, and the number of life annuities, if any, that shall vest on the death of the widow. This court has recently decided that it is not the vesting of remainders that renders them contingent taxable interests under the law. *Re Curtis*, 142 N. Y. 219. In the case cited it was held that the nominal fee might never become a taxable estate, for the reason that, if the nephews and nieces in whom it was claimed to have vested died without issue before the termination of certain trusts, the fee would pass to lineals not taxable. This was the uncertainty which postponed the payment of the tax. In the case at bar there is a contingency affecting the value of the estate, as already indicated, which brings it strictly within the principle of the *Curtis Case*.

The learned counsel for the respondents has pointed out questions that they may present on the death of the widow. One involves the legal effect of the death of two remaindermen in the lifetime of the testator, and the other the correctness of the mode adopted by the superintendent of insurance in ascertaining the value of the compound survivorship annuities. These questions will become important on the falling in of the life estate, but we express no opinion in regard to them at this time.

In affirming the order of the general term, we not only give to the Act of 1887 a reasonable construction, but carry out the obvious intent of the testator that his widow should enjoy, during her life, the entire income of his estate. The legislature, in the Act of 1892, has given a practical construction to its previous legislation on this subject, when it provides that, where the fair market value of the property or interest cannot be ascertained at the time of the transfer, the tax shall become due and payable when the beneficiary shall come into actual possession or enjoyment. Laws 1892, chap. 899, § 8.

*The order should be affirmed, with costs.*

All concur, except *Andrews, Ch. J.*, not sitting.

## PENNSYLVANIA SUPREME COURT.

Samuel HARDIE

v.

Lydia B. HARDIE, *App't*.

(102 Pa. 227.)

**1. Willful and malicious desertion, as cause for divorce, is not shown by the**

**NOTE.**—As to divorce for desertion, see also *Herald v. Herald* (N. J.) 9 L. R. A. 698, and *note*; also *Williams v. Williams* (N. Y.) 14 L. R. A. 220; *Jones v. Jones* (Ala.) 18 L. R. A. 96.

For refusal of marital intercourse as desertion, see *Fritts v. Fritts* (Ill.) 14 L. R. A. 686, and *note*. 25 L. R. A.

See also 47 L. R. A. 750.

fact that the wife, in a passion roused by a single blow by her husband, leaves the house without intending to remain away permanently, and on reflection returns to find the home barred against her and then seeks by violence to enter, for which she is prosecuted by the husband, and thereafter does not return.

**2. A single blow given in anger by husband to wife is not necessarily cruel and barbarous treatment constituting cause for divorce.**

(July 11, 1894.)

**A** PPEAL by defendant from a judgment of the Court of Common Pleas for Chester

County in favor of plaintiff in an action for divorce on the ground of desertion. *Reversed.*

The court gave a binding instruction in favor of plaintiff on the ground that willful desertion was proved, and refused to grant defendant's request that if the jury believed that plaintiff struck his wife, or was guilty of cruel or barbarous conduct toward her, she was justified in leaving and your verdict must be for the defendant. To that request the following answer was given:

"That point is a little ambiguous in our estimation, and, as I have already suggested to you, there might be an occasion when if the husband struck the wife once it would justify her in leaving. But, as we have said to you, the evidence in this case does not show such an act. We cannot say, therefore, that if the jury believe that the plaintiff struck his wife, it was a justification of her leaving, but we can say, or would say, that if he was guilty of cruel or barbarous conduct towards her, she would be justified in leaving the plaintiff, and your verdict would be such as to justify her in that case. Such is the law, if the conduct is of such a cruel and barbarous character as I have already suggested, such as to endanger her life. As you will see I can scarcely affirm or disaffirm the point, but I pass it with the suggestions which I have already made."

Further facts appear in the opinion.

**Mr. Charles H. Pennypacker** for appellant.

**Mr. Thomas W. Pierce** for appellee.

**Dean, J.**, delivered the opinion of the court:

Plaintiff and defendant are libellant and respondent in a suit by the husband for divorce from the bonds of matrimony. The issue was tried before a jury, who, under peremptory instructions from the court, gave a verdict for the husband. From the judgment on the verdict the wife brings this appeal.

The ground for divorce averred in the libel is willful and malicious desertion by the wife. She admitted absence from his house, and separation; but that there was willful and malicious desertion she denied. She further set up the counter averment that her husband, by his cruel and barbarous treatment, had driven her from his home. The parties were married in August, 1867, and lived together as husband and wife until the 12th of November, 1890, the day of separation. They were childless. Both were caterers and cooks, and by their joint industry during more than twenty years of married life had accumulated some property, real and personal. The legal title to the real estate was in the husband, though the wife had contributed from her earnings a considerable part of the purchase money. Some time before the separation, disputes and quarrels arose between them. He suspected she was not as strong a prohibitionist as he was, or professed to be. She suspected his fidelity in the marriage relation. The suspicions of both were apparently groundless, but they were sufficient to arouse a sort of domestic animosity on part of each towards the other, which culminated in his striking her, and

she, smarting under the indignity, left his house. That this was the immediate cause of her leaving is hardly disputed. The learned judge of the court below assumed that this single blow was the only instance of cruel and barbarous treatment; and this, under the law, not being sufficient to justify or excuse her desertion, the plaintiff was entitled to a verdict. If this had been the only question in the case, the instruction was correct. But there is another view of the evidence applicable to the pleadings which the jury had a right to consider. Both agree she left the house on the 12th of November. She testifies she left "to go to work." Although they had a quarrel on that day, and probably the day before, she says she did not intend, by leaving it, to give up her home; that she went back the next day, and "put away her things,"—did not take them away; then went back on the third day, when she found the locks had been changed, and she gained an entrance only by breaking the window. She declares she never had left the house intending to remain away; that she could not get in, unless by a forcible entrance, afterwards, and for breaking this window the husband had instituted a prosecution against her. This is the substance of her testimony. The charge on which the husband based his right to divorce was willful and malicious desertion. If the wife, in a passion, aroused by the single unmanly blow of the husband, leaves his house, in a mere spirit of resentment, not intending to permanently desert him, then, on reflection, returns, and finds her home barred against her, then by violence seeks to enter, then is prosecuted by the husband, and thereafter does not return, this in no legal sense of the words is a "willful and malicious desertion." Such desertion is a departure without adequate cause, but not a willful absence, regardless of her marital duty. Such a blow as she testifies he gave her, some wives, of physical courage and strength, would have resented by giving the husband another, and there probably the quarrel would have ended. This wife resented it by leaving his presence, going out of the house. She was probably too weak or too timid to retaliate in any other way; but she testifies that in so doing she did not intend to "give up her home." Then, when she did return, his conduct enforced upon her further absence. Such desertion as this is not willful and malicious, even if he struck her but a single blow before she left. If her testimony be believed, his conduct, after she left, indicates an intention to prevent her return. The instruction that it was not the duty of the husband to persuade the wife to return was correct; but the jury should also have been told that, if she left the house, under the provocation of a blow, and soon after returned, it was his duty to receive her; and that if he, in anticipation of her return, locked the doors against her, he cannot be heard to say that her absence thereafter was willful and malicious desertion. In *Grove's App.*, 87 Pa. 448, we held that the wholly inexcusable departure of the wife from her husband's house did not justify him in refusing to receive her when she returned; that



such conduct on his part was a virtual turning her out of doors.

The evidence tending to show cruel and barbarous treatment, such as would justify her in leaving the husband, is mainly that of the wife. She testifies to repeated assaults and indignities; but, with the exception of the personal violence immediately before the separation, no dates are given. Most of this conduct appears to have been afterwards. Her testimony is disconnected, and in some material particulars, such as dates, or even approximate dates, vague; and, although it covers more than a dozen printed pages of the paper book, the examination does not seem to have been aimed at eliciting a specific statement of facts. It is therefore impossible to attempt a satisfactory review of the alleged error of the court in the refusal to affirm defendant's first point. The law applicable to the facts as the court assumed them to be proven is correctly stated. The court says: "I can scarcely affirm or disaffirm the point, but I pass it with the suggestions already made." The suggestions already made were, in substance, that the evidence of a single blow would have been insufficient to warrant, on her application, a divorce of the wife from her husband on the ground of cruel and barbarous treatment, and therefore was insufficient to justify her desertion of him. If there was a willful desertion,—that is, a departure with the intention not to return,—it was malicious, unless justified by such cruel and barbarous treatment as endangered life or health and rendered cohabitation unsafe. Cruel and barbarous treatment is not established by a single blow of the character of this one, given in anger. If the several acts of violence and threats alleged occurred before the separation, the burden was on defendant to prove that fact; if they were after she left him, clearly they did not prompt her to that act, whatever bearing they might have on the question as to whether a desertion at first causeless, afterwards, by reason of his conduct, ceased to be willful. We can very well discern how, on the character of the evidence on this point, it was as difficult for the court to affirm or disaffirm it as for us to say he erred in not affirming it. The evidence was not specific enough to warrant a specific answer. But we think the court, in not submitting the evidence on the first question to the jury, erred, for, even although it would not have entitled her to a divorce from her husband on the ground of cruel and barbarous treatment, yet, if believed by the jury, there was not willful and malicious desertion.

The judgment is reversed, and a *venire facias de novo* awarded.

John E. PRICE *et al.*

William L. SCHAEFFER, *Appt.*

(161 Pa. 580.)

#### Absence of service of process in the

NOTE.—As to impeachment of foreign judgment, see *note* to *Dunstan v. Higgins* (N. Y.) 20 L. R. A. 668.

25 L. R. A.

original suit may be shown in defense of a suit upon a judgment procured in another state, although service is recited as a fact in the record upon which the judgment is based.

(May 21, 1894.)

**A PPEAL** by defendant from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of plaintiffs, in an action brought to enforce payment of a judgment recovered against the defendant in the state of Maryland. *Reversed.*

In his affidavit of defense, defendant alleged that at the time the suit was brought he was not a resident of the county in which the suit was brought, but of another county; and that he had never been a resident of the county where the suit was brought; that he was never served with any summons or paper of any kind in the suit; that the other defendants in the original suit were residents of the county where the suit was brought and were actually summoned; that the summons ran to all the defendants in that suit, and the sheriff made a simple return "summoned" to the writ; that defendant filed a bill in equity in Maryland to have the judgment canceled and set aside, but the court refused to interfere, upon the ground that defendant had a good defense to the action in Pennsylvania, provided he was not actually served with summons in Maryland.

Further facts appear in the opinion.

*Mr. A. E. Stockwell*, for appellants:

Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the acts of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which the judgment offered in evidence was rendered.

*Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897.

The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

*Knowles v. Logansport Gas Light & Coke Co.*, 86 U. S. 19 Wall. 58, 22 L. ed. 70; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Pennyroyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Weaver v. Boggs*, 88 Md. 255; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 66 Md. 511; *Fairfax Forreast Min. & Mfg. Co. v. Chambers*, 75 Md. 614; *McDermott v. Clary*, 107 Mass. 501; *Gilman v. Gilman*, 126 Mass. 26, 80 Am. Rep. 646; *Guthrie v. Lowry*, 84 Pa. 588; *Motter v. Welty*, 2 Pa. Dist. Rep. 39; *Whart. Conf. L.* § 811; *Story, Conf. L.* § 609.

The question of jurisdiction may be inquired into although the judgment is binding and conclusive in the state in which it was rendered.

*Steel v. Smith*, 7 Watts & S. 448; *Guthrie v. Lowry*, *Thompson v. Whitman*, and *Weaver v. Boggs*, *supra*; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 66 Md. 517; *Bazley v. Linah*, 16 Pa. 241, 55 Am. Dec. 494; *Veils v. McFadden*, 3 W. N. C. 63.

The Maryland courts enforce the just prin-

eiple that, when a judgment is carried from a sister state into the state of Maryland for enforcement, the state of Maryland has a right to question the jurisdiction of the court where judgment was obtained.

*Weaver v. Boggs*, 38 Md. 255; *Hanley v. Donoghue*, 59 Md. 245, 43 Am. Rep. 554; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 66 Md. 517; *Fairfax Forrest Min. & Mfg. Co. v. Chambers*, 75 Md. 614.

*Messrs. William C. Durer and Horace M. Rumsey*, for appellees:

The record shows the appellant was summoned and appeared. The judgment is therefore conclusive.

*Wetherill v. Stillman*, 65 Pa. 105; *Reber v. Wright*, 68 Pa. 471; *Guthrie v. Lowry*, 84 Pa. 537; *Mink v. Shaffer*, 124 Pa. 280.

It will be presumed in the absence of an averment to the contrary, that the courts of a sister state have the authority they assume to exercise, and that the mode of procedure pursued by them, though different from that established by this state, was in accordance with the law and practice of such state.

*Freem. Judgm.* 8d ed. § 565; *Mills v. Duryee*, 11 U. S. 7 Cranch, 481, 8 L. ed. 411, 2 Am. Lead. Cas. 647.

If the record of a judgment of a sister state shows on its face that the court had jurisdiction of the appellant through a service of its process, its judgment must be taken by the courts of this state as *juris et de jure* and an affidavit of defense setting forth that deponent was not served or notified by the process in the original suit will not prevent the courts of this state from entering judgment.

*Lance v. Dugan*, 23 W. N. C. 182; *Wetherill v. Stillman*, *supra*.

**Mitchell, J.**, delivered the opinion of the court:

How far section 1 of article 4 of the Constitution of the United States, and the Act of Congress of May 26, 1790, passed to carry it into effect, operate to preclude a defendant from offering evidence against the judgment of one state when sued upon it in another, has been the subject of much discussion and difference of opinion. A distinction has always been made, however, between facts going to the jurisdiction of the court and those relating to the merits, and the tendency has been strong to open the door to evidence upon the former. The earlier view was that the mere presumption in favor of jurisdiction might be contradicted, but that evidence could not be received against the affirmative recitals of jurisdictional facts in the record. In *Hampton v. M'Connel*, 16 U. S. 3 Wheat. 234, 4 L. ed. 378, Chief Justice Marshall said: "Whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." And a similar view is indicated by the decisions in *Mills v. Duryee*, 11 U. S. 7 Cranch, 481, 8 L. ed. 411 (as to which see the remarks of Bradley, J., in *Thompson v. Whitman*, 85 U. S. 18 Wall. 462, 21 L. ed. 899), and *Landes v. Brant*, 51 U. S. 10 How. 348, 371, 18 L. ed. 449, 459. "It was undoubtedly the purpose [of the constitutional provision] to give to the judi-

cial proceedings of each state the same faith and credit in every other state to which they were entitled in the state in which they took place." Story, Const. § 1810, *note*. In *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897, however, the question came directly before the Supreme Court of the United States, and Justice Bradley, admitting that there was no previous express decision on the point, made an elaborate review of all the authorities, and announced for the court the conclusion that jurisdiction was always open to question, even upon facts affirmatively asserted in the record. This decision was affirmed and followed in *Knawles v. Logansport Gas-Light & Coke Co.* 86 U. S. 19 Wall. 58, 23 L. ed. 70, and *Pennoyer v. Jeff*, 95 U. S. 714, 24 L. ed. 565, and has been considered as settling the law, by the highest court, on the subject. The great weight of authority in the state courts is to the same effect, and so are the text-books. *McDermott v. Clary*, 107 Mass. 501; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Wright v. Andrews*, 130 Mass. 149; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 66 Md. 511; *Fairfax Forrest Min. & Mfg. Co. v. Chambers*, 75 Md. 614; *Eager v. Stover*, 59 Mo. 87; *Napton v. Leaton*, 71 Mo. 358; Whart. Conf. L. § 823; Story, Conf. L. § 609; Story, Const. (M. M. Bigelow's ed. 1891) § 1310, *note a*; 12 Eng. Encyclop. Law, 1482, and cases there cited.

Our own cases have not been in entire harmony. In *Wetherill v. Stillman*, 65 Pa. 105, the earlier doctrine was enforced with great strictness, and, the record reciting an appearance by counsel, it was held—Sharswood, J., dissenting—that an affidavit by defendant that he had never been served with process, or authorized any one to appear for him, was not sufficient to prevent judgment; *Thompson, Ch. J.*, saying: "The recital shows conclusively the jurisdiction of the parties; . . . consequently the defendant's affidavit in this particular amounted to nothing against the record to which it referred." In *Noble v. Thompson Oil Co.*, 79 Pa. 354, 21 Am. Rep. 66, however, it was held that, notwithstanding the recital in the record of an attachment *in rem* in New York, it might be shown that the property was not there, and the court therefore acquired no jurisdiction. And in *Guthrie v. Lowry*, 84 Pa. 553, it was distinctly held that, "whatever doubts may have been at one time entertained, it is now an incontrovertible position . . . that the record may be contradicted by evidence of facts impeaching the jurisdiction of the court;" citing, among others, the cases in 18 and 19 Wall., *supra*, though in the particular case the foreign court was held, as a matter of law, to have had jurisdiction. This would seem to be a formal recognition and adoption, even if partially *obiter*, of the later and presently prevailing doctrine. But in *Lance v. Dugan*, 23 W. N. C. 182, the court again reverted in a brief *per curiam* to the old rule, saying that, as the record showed a service on defendants, the judgment was conclusive, notwithstanding an affidavit in denial. In this condition of the law we have the point in the present case for final settle-

ment. Whatever our individual views upon the true spirit of the constitutional provision, we have no hesitation in conforming to the prevailing rule. It would be sufficient to say that it is now the established rule in the supreme court, which is the ultimate authority on all questions depending on the constitution and statutes of the United States. But, in addition to that, the same rule now prevails in the courts of a majority of the states, and it is a question on which uniformity is desirable. It would be contrary to sound policy to deny to our own citizens a defense against judgments obtained in other states out of a comity which such states refused to us. An apt illustration is afforded by the present case, in which it appears that

the court of chancery in Maryland denied the appellant relief against the original judgment on the ground that the same defense would be open to him here. The affidavit of defense avers that the appearance recited in the record of the judgment sued on was merely constructive, and that in fact the appellant was not served with process, did not appear, and had no knowledge of the suit until recently, when demand was made upon him for payment. These being facts going to the jurisdiction of the court, the record could be contradicted in regard to them. The affidavit presented a prima facie defense, and was sufficient to prevent judgment.

*Judgment reversed, and procedendo awarded.*

### MISSOURI SUPREME COURT (In Banc).

Louisa M. WALTON *et al.*, Appts.,  
v.

Mary Katherine KENDRICK *et al.*,  
Repts.

(.....Mo.....)

1. Declarations by a testator after the execution of his will are not admissible to show due execution.

2. Some evidence that a testator's will was signed in his presence as well as by his direction so as to comply with the statute in a case where the testator does not affix his own signature is furnished by proof that he stated to the witnesses whom he asked to attest it that it was his will and that he had it written, while it appears that he was fully acquainted with all the formalities required by the statute.

(MacFarlane, J., dissents from proposition 2.)

(June 4, 1894.)

**A**PPEAL by contestants from a judgment of the Circuit Court for Chariton County in favor of defendants, in a proceeding brought to contest the validity of an instrument purporting to be the last will and testament of John W. Price, deceased. *Reversed.*

The facts are stated in the opinions.

*Messrs. Crawley & Son*, for appellants:

The trial court erred in admitting the subsequent declarations of John W. Price, made to the witness, Sarah S. Kendrick, as proper evidence by which to establish the execution of the writing in controversy.

In the first place it was not proven, nor is it even fairly inferable from her testimony, that the paper to which Judge Price referred in the supposed conversation with Mrs. Kendrick, is the same paper now propounded as his will.

In the second place, though the identity of the paper be conceded, still, no subsequent declaration of the supposed testator in regard to it is admissible upon the issue of its due execution.

Schouler, Wills, 2d ed. § 817a; *Johnson v.*

*Hicks*, 1 Lans. 150; *Jones v. McLellan*, 76 Mo. 49; *Gibson v. Gibson*, 24 Mo. 237; *Canthorn v. Hoynes*, 24 Mo. 237; *Tingley v. Cowgill*, 48 Mo. 291; *Spoonemore v. Cables*, 66 Mo. 579; *Rule v. Maupin*, 84 Mo. 587; *Bush v. Bush*, 87 Mo. 480; *Jones v. Roberts*, 87 Mo. App. 181; *Kennedy v. Upshaw*, 64 Tex. 411; *Runkle v. Gates*, 11 Ind. 95; *Couch v. Eastham*, 37 W. Va. 796, 55 Am. Rep. 846; *Davis v. Davis*, 123 Mass. 590; *Casman v. Van Harken*, 83 Kan. 833; *Kitchell v. Beach*, 85 N. J. Eq. 446; *Hayes v. West*, 37 Ind. 31.

The statement of the supposed testator to the persons who subscribed as witnesses, that the paper was his "will," cannot supply or dispense with proof that the previous signature was placed there in one of the only two ways pointed out by the statute.

Mo. Rev. Stat. 1889, § 8870; Mo. Rev. Stat. 1879, § 3962; *Catlett v. Catlett*, 55 Mo. 330; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85, 4 L. ed. 896; *Lewis v. Lewis*, 11 N. Y. 220; *Mitchell v. Mitchell*, 16 Hun, 97, 77 N. Y. 596; *Baker v. Woodbridge*, 66 Barb. 261; *St. Vincent de Paul Sisters of Charity v. Kelly*, 87 N. Y. 409; *Re Mackay*, 1 L. R. A. 491, 110 N. Y. 611; *Re Booth*, 28 N. Y. Week. Dig. 248; *Re Dale*, 56 Hun, 169; *Burruell v. Corbin*, 1 Rand. (Va.) 181, 10 Am. Dec. 494; *Asay v. Hoover*, 5 Pa. 21, 45 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. 441; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Barr v. Graybill*, 13 Pa. 306; *Waite v. Friable*, 45 Minn. 861; 2 Greenl. Ev. 18th ed. § 676.

Where the entire document is written or the name of the testator is signed, by him, in his own handwriting, or where another indites the paper, and there is direct proof that it was signed for the testator, by his direction, in his presence, by a disinterested scrivener, then, if he acknowledges the genuineness of the signature to the subscribing witnesses, the authorities very justly hold this to be sufficient prima facie proof of the execution, notwithstanding none of the subscribing witnesses were present when the testator's name was actually signed.

*Cravens v. Faulsener*, 28 Mo. 19; *Grim v. Tittman*, 118 Mo. 56; *Way v. Brown*, 80 Ga. 808; *Ragan v. Ragan*, 83 Ga. Supp. 106; *Hol-*

NOTE.—As to signing will by proxy, see note to *Lewis v. Watson* (Ala.) 22 L. R. A. 297.  
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*loway v. Galloway*, 51 Ill. 159; *Scoules v. Plowright*, 10 Moore, P. C. C. 440; *Clarke v. Dunnivant*, 10 Leigh, 18; *Hall v. Hall*, 17 Pick. 878.

But where there is no positive proof that the paper was signed either by the direction, or in the presence, of the supposed testator; where no subscribing witness saw the act of signing, or heard the supposed testator declare that he had signed, or had directed another to sign for him; where the scrivener not only "writes herself an heir," but being an heir, signs as well as writes the paper under which she claims a lion's share of the supposed testator's property, something more is required to establish the "due execution" of the paper, than the mere acknowledgment or declaration of the supposed testator to subscribing witnesses that said paper is his "will."

*Hughes v. Meredith*, 24 Ga. 325, 71 Am. Dec. 127; *Gerrish v. Nason*, 22 Me. 488, 89 Am. Dec. 589; *Jones v. McLellan*, 76 Me. 49; *Delafield v. Parish*, 25 N. Y. 9; *Purdy v. Hall*, 184 Ill. 308; *Barry v. Butlin*, 1 Curt. Eccl. Rep. 637; *Panton v. Williams*, 2 Curt. Eccl. Rep. 530; *Barry v. Butlin*, 2 Moore, P. C. C. 480; *Scoules v. Plowright*, *supra*; *Lee v. Dill*, 11 Abr. Pr. 214; *Lake v. Ranney*, 38 Barb. 49; *Baker v. Woodbridge*, 66 Barb. 261; *St. Vincent de Paul Sisters of Charity v. Kelly*, 67 N. Y. 409; *Houland v. Taylor*, 53 N. Y. 627; *Re Bartholick*, 35 N. Y. S. R. 730; *Waite v. Frisbie*, 45 Minn. 361; *Re Booth*, 23 N. Y. Week. Dig. 248; *Riddell v. Johnson*, 26 Gratt. 162; *Harvey v. Sullens*, 46 Mo. 147; *Schouler, Wills*, 2d ed. § 245.

**Messrs. Tyson S. Dines and C. Hammond & Son**, for respondents:

The evidence of the execution of the will in this case shows full compliance with the statute.

*Adams v. Field*, 21 Vt. 256; *Lemayne v. Stanley*, 3 Lev. 1; *Knight v. Crockford*, 1 Esp. 190; *Dudleys v. Dudleys*, 8 Leigh. 436.

Not only did the testator state to Dr. H. H. D. Moorman, one of the attesting witnesses that "he had written," but he acknowledged the signed instrument, signature and all to be his will; and the witness saw his name written there. This was sufficient.

*Baskin v. Baskin*, 86 N. Y. 416; *Saunderson v. Jackson*, 2 Bos. & P. 238; *Schneider v. Norris*, 2 Maule & S. 286; *Sarah Miles' Will*, 4 Dana, 1; *Ellis v. Smith*, 1 Ves. Jr. 11; *Carlton v. Griffin*, 1 Burr. 549; *Roberts v. Welch*, 46 Vt. 164; *Knight v. Crockford*, and *Lemayne v. Stanley*, *supra*.

The question of the due execution of the will was a question of fact to be determined by the jury from the evidence. It was a fact that could be established by circumstances as well as direct proof; and there was ample evidence upon which to submit this question to the jury.

*Grimm v. Tittman*, 118 Mo. 56.

Where a testator declares to two subscribing witnesses that a paper to which his name is already signed is his will, and then requests them to sign as witnesses, he sufficiently acknowledges his signature. "Nor is it necessary that the testator should say in express terms 'That is my signature.' It is sufficient if it clearly appears that the signature was existent on the

will when it was produced to the witnesses and was seen by the witnesses when they subscribed the will."

*Blake v. Knight*, 8 Curt. Eccl. Rep. 547; *Keigwin v. Keigwin*, Id. 607; *Re Ashmore*, Id. 756; *Jarman, Wills*, 5th ed. p. 81; *Re Trenor's Estate*, 4 N. Y. Supp. 466; *Re Austin's Will*, 45 Hun. 1; *Clarke v. Dunnivant*, 10 Leigh, 18; *St. Louis Hospital Assn. v. Williams*, 19 Mo. 609; *Cravens v. Paulconer*, 23 Mo. 19; *Grimm v. Tittman*, *supra*; *Dudleys v. Dudleys*, 8 Leigh, 145; *Hall v. Hall*, 17 Pick. 878; *Nickerson v. Buck*, 12 Cush. 353; *Grayson v. Wilkinson*, 1 Dick. 158; *Grayson v. Atkinson*, 2 Ves. Sr. 454; *Addy v. Griz*, 8 Ves. Jr. 505; *Morrison v. Turnon*, 18 Ves. Jr. 188; *Howloway v. Galloway*, 51 Ill. 159; *Crowley v. Crowley*, 80 Ill. 469; *Re Langtry's Will*, 24 N. Y. S. R. 472; *Baskin v. Baskin*, 86 N. Y. 416; *Re Bernes's Will*, 71 Hun. 27; *Re Klett's Will*, 3 Misc. 885; *Devey v. Devey*, 1 Met. 849, 35 Am. Dec. 387; *White v. British Museum*, 6 Binz. 310; *Hogan v. Grosvenor*, 10 Met. 54; *Gamble v. Gamble*, 89 Barb. 878; *Romer v. Franklin*, 6 Gratt. 1; *Paramore v. Taylor*, 11 Gratt. 220.

A will is sufficiently attested when subscribed by the witnesses in the presence and at the request of the testator, although none of them saw the testator sign, and only one of them knew what the instrument was.

*Devey v. Devey*, *White v. British Museum*, *Hogan v. Grosvenor*, and *Gamble v. Gamble*, *supra*.

In this connection we desire to call attention to the change in our statute of wills, and the decisions of the supreme court before and since the change.

Rev. Stat. 1845, chap. 185, § 5; *McGee v. Porter*, 14 Mo. 611, 55 Am. Dec. 129; *Northcutt v. Northcutt*, 20 Mo. 266.

That the draughtsman of a will takes a legacy under it, is suspicious only in connection with other circumstances indicating fraud or undue influence.

*Coffin v. Coffin*, 23 N. Y. 2, 80 Am. Rep. 235; *Barry v. Butlin*, 1 Curt. Eccl. Rep. 637.

The deposition of Mrs. Sarah S. Kendrick was certainly admissible in evidence under the issues of fraud by the pleadings.

The declarations were admissible in determining whether testator fully comprehended and approved the will.

*Maxwell v. Hill*, 89 Tenn. 584; *Beadles v. Alexander*, 9 Baxt. 604; *Linch v. Linch*, 1 Lea, 528.

They are admissible to show intention, purpose, mental peculiarity, and condition.

*Shailer v. Bumstead*, 99 Mass. 112; *Herter v. Herter*, 123 Pa. 239; *Harris v. Rhode Island Hospital Trust Co.* 10 R. I. 813; *Langham v. Sanford*, 19 Ves. Jr. 649, 31 Cent. L. J. p. 454.

The instruction is erroneous because it excludes evidence of the deponent which was of her own personal knowledge and not derived from the declarations of the testator.

31 Cent. L. J. p. 454.

**Brace, J.**, delivered the opinion of the court:

This is a statutory proceeding instituted in the circuit court of Charlton county to contest the validity of an instrument of writing

purporting to be the last will and testament of John W. Price, late of said county deceased, duly admitted to probate in said county on the 28th of May, 1890, prosecuted by some of his heirs against a daughter of said deceased and her husband; the petition charging in substance that said paper writing so admitted to probate as the last will of the said deceased "was not written or signed by the said John W. Price, and was not signed by any other person for him, by his direction, in his presence, as provided by law: and that the said paper writing, by reason of the matter aforesaid, is not the will of John W. Price." Upon this allegation issue was joined by answer, and the case came on for trial at the October term, 1891, of said circuit court. After the jury had been impaneled and sworn, and the statutory issue framed by the court, the defendants produced said instrument of writing, which is in words and figures as follows, to wit:

"I, John W. Price, of the county of Chariton, and state of Missouri, being of sound and disposing mind, and knowing that I have to leave this world, as all mortal flesh is doomed to do, I feel anxious to dispose of my entire estate after my death. In accordance with my well matured determination I do hereby make, publish, and declare the following to be my last will and testament, viz.: In the first place, I bequeath my entire estate (except what I have already disposed of) to my wife, Mary E. Price, to use for the support of herself and the two youngest children, Mary Katherine Price and Wallace Powell Price. To my daughter Mary L. Harper I will one dollar, having advanced to her her portion of my estate. To my daughter Louisa M. Walton I will one dollar, having advanced to her her portion of my estate. To my daughter Harriet A. Vergin I will one dollar, having advanced to her and her children their portion of my estate. To my son Elmer D. Price I give the south half of my Huss farm, and to my son John Walter Price I will the north half of the Huss farm. To my daughter Aurelia Harding I will 160 acres of land on Yellow creek, the numbers of which can be found in my tax receipts. To my son William W. Price I will one dollar, having advanced to him his portion of my estate. My home residence, which I have given my wife, Mary E. Price, a lifetime control and possession, I give to my two youngest children, M. K. Price and W. P. Price, to be equal heirs of all my land estate that I have not given away in this, my will, and also all the land I may purchase before my death. I will my stock, household furniture, farm utensils, and all the money I have not disposed of to remain as they are, for the use of the homestead as long as my wife lives; after her death to be divided between the two youngest children. I give Mary Katherine Price the home residence in an equal division of all my land that may be attached to the home tract or not otherwise disposed of, which I have heretofore stated my wife, Mary E. Price, is to control her lifetime. I give my wife one third of my money after paying all my debts and what I have ordered in my will. I also appoint my wife executrix of my

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estate. I will that the probate court have nothing to do with my estate. Written this 18th of November, 1886. John W. Price. Witness: F. K. Venable. H. H. D. Moorman. John A. Broaddus. James D. Ingram."—And in support thereof introduced the attesting witnesses, who testified in substance as follows:

James D. Ingram testified that he lived in Chillicothe, and in the winter of 1886 or 1887 he was at the residence of Mr. Price as a visitor. "In the morning, after breakfast, Mr. Price said: 'I am very glad that you came. I have been wanting to see you. I wanted you to witness my will.' And he produced that paper; just handed it to me. I did not read it. He said that was his will, and, looking at it, I said, 'You have already several names.' He said he wanted me also. I signed it, and he stated that was his will. The paper is in same condition now as then, with same names upon it. The name of John W. Price was to it then. I signed it as a witness. The other names are above mine. I signed it as a witness at Mr. Price's request." This witness on cross-examination testified that he was acquainted with the hand writing of John W. Price. The paper was not written in the handwriting of Mr. Price, nor was it signed in his handwriting. Witness thought both the body of the writing and the signature were in the hand of Mrs. Kendrick. When Mr. Price handed him the paper to sign as a witness he said it was his will. He signed it in the presence of Mr. Price.

F. K. Venable, another attesting witness, testified that he lived within half a mile of John W. Price, and knew him well. "Some time about the latter part of the year 1886,—I don't remember the month,—I was called upon to witness a paper presented to me as Judge Price's will. [Paper here exhibited to witness]. This is my signature attached to that paper. I did not read it. I only know that is my signature there. I only know this to be the same paper by the fact that I identify my signature. That is the only paper I ever signed for Mr. Price. I could not say whether the name of John W. Price was signed to it. I witnessed the paper he handed me and told me was his will. He told me that was his will, and I signed it." "Could not identify it only by my signature. If I am not mistaken, when he handed the paper to me he raised it up, and let it fall over, and told me that was his will, and that he wanted me to sign it as a witness, I believe. A day or two—probably three or four days—before that, he sent for me to come to his house when I had leisure. I went there, and he told me what his business was,—signing as a witness his will. I put my name there as a witness at his request, and in his presence. Did not see paper when written. Did not see him sign it. Did not know his handwriting.

J. A. Broaddus testified: "In the fall of 1886—I don't remember the month—I was called upon to witness Judge Price's will. [Here paper exhibited to witness]. This is the document I signed. Judge Price presented it to me. He said it was his will, and

he would like for me to sign it as one of the witnesses. I signed it in his presence. I was there perhaps thirty or forty minutes. When I signed the paper I didn't see anything. It was folded up, and handed to me to sign. I didn't read it. I didn't look at it at all. I think one or two names were there, perhaps, when I signed it. Dr. Moorman was one of the witnesses. This is my signature." Don't remember whether members of the family were there or not. Did not see Mr. Price sign the paper or write it. Was not present when it was written, nor when it was signed by him or by any one for him.

H. H. D. Moorman testified: "Am a physician. Practiced my profession at Dalton, Charlton county, for four years, commencing in the spring of 1884. Was well acquainted with the late John W. Price. During my practice at Dalton, was often called to visit him and his family professionally. Am one of the persons whose names appear as attesting witnesses to the paper recently probated as his will in the Charlton county probate court. I signed the paper at Price's request, and in his presence, but did not see him sign it, nor was his name signed to it by any other person in my presence. His name was already written at foot of paper when I first saw it. He handed me the paper, and said, 'This is my will, and I want you to sign it as a witness.' He said he had it written, but I don't remember that he said by whom. He was then of sound mind."

The proponents then introduced in evidence the deposition of Sarah S. Kendrick, which so far as it bears upon the present inquiry, is as follows: "Am sixty years old. Knew John W. Price well. He stayed a week here (at my house) a good many times, and I spent as much as two weeks with him a good many times. His wife was my step-daughter. I knew him for eighteen years. Q. I will get you to state if, about the year 1886, or some time after that you ever had any conversation with him about this will. A. Yes, sir, I was there. I do not know how long after he made his will. I could not say. He came in, and said, 'Mrs. Kendrick, I have made my will.' I said to him, 'Did you sign the will, Mr. Price?' He said: 'No, I didn't sign it. I told Katie to write it, and I saw her do it.' Q. You [he] said, when you asked him whether he signed it or not, that he told Katie to write it? A. Yes, sir; but he saw her do it. He told her to write his name. The condition of his mind was good, very good, at the time of these conversations. He knew everything he had, just as well as I. Was a remarkably smart man, Mr. Price was. You don't often see just such a man." Cross-examined: "Q. Can you fix the date of your conversation? A. I could not, sir. Q. At the time of this conversation with Judge Price about his will, when he told you he had made a will, how long before that did he tell you he executed a will? A. He did not say. Q. Did he say how long the will had been executed? A. No, sir; just as I told you. Q. How long before Judge Price's death was it that this conversation occurred? A. I could not tell you, to save my life. Q. What was the con-

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dition of his health at that time? A. Pretty good. He came in from his work in the garden. Q. What was the exact language he used to you about the writing of the will? A. I asked Mr. Price who wrote the will, and he says, 'I wrote the will, but Katie copied it.' Q. Then what else did you ask him? A. I says, 'Mr. Price, they will break your will.' He says 'They cannot do it; I have given every one something.' I says, 'Mr. Price, did you sign the will?' He says: 'No, I did not sign the will. Katie wrote my name, and I saw her do it.' Q. Is that all he told you about the writing of the will? A. All that I have stated to you is all that he stated, as near as I can give it. Q. As I understand, then, he wrote it, Katie copied it, and Katie signed it? A. He told her to do it, and he saw her do it. Q. Are you positive he said he told her to do it? A. Yes, sir; I have sworn to that, and could do it again. Judge Price met with a railroad accident some years before that. Katie did most of his writing. Don't think he consulted anybody about his business much. He was a man of fine sense. Don't think he relied on the advice of any member of his family in regard to business. Won't say that he transacted his business himself. Don't know exactly. Never saw him call on anybody to transact business. Have seen him call on Kate to put his name to a paper or write an article. Never heard him call on anybody to consult. He thought himself as capable as anybody. At times he was a great sufferer; an invalid. Had neuralgia very bad. Several times his side rose. He had a rising in one of his sides, and was a great sufferer. About this time I was at his house sometimes once a month, sometimes once in two months. Could not tell the exact time. My visits were sometimes for a day or two, sometimes two weeks and more. Judge Price used narcotics, whiskey, like any other man. Sometimes he used it to relieve pain. Do not know as to his taking opiates. Never saw him take any. Q. Was he not frequently in a semi-unconscious condition, so that he would scarcely notice anything going on around him? A. I have seen him on two occasions when they gave him too much whiskey. Q. Were there not other occasions when he paid no attention to what was taking place? A. I could not say. I do not know. Q. Who was the attendant who brought these stimulants and gave them to him? A. His wife and his daughter. Q. At the time you speak of when he had too much whiskey, and was in the condition you describe, do you know who gave it to him? A. I suppose it was either Bettie [his wife] or Katie. I do not know. One of the two, Nobody else did. Judge Price kept his valuable papers in the drawer of a bureau in his house. I do not think every one had access to the drawer. I do not know whether it was locked or not. Think it was. He was a money lender. Had no office except his home. Do not know who transacted for him the business of loaning money, receiving interest, and giving receipts. Never saw any of his business transacted when I was there. To the introduction of so much of this

deposition as contained declarations made by the testator in regard to the execution of the will, the contestants objected, and, their objection being overruled, they excepted. Upon the proof thus made proponents offered in evidence the instrument of writing as the last will of said deceased, and over the objection of the contestants the same was permitted to be read to the jury, to which action and ruling they excepted. Thereupon the proponents rested. The contestants introduced no evidence, but asked the court to give the following instructions: "(1) The court instructs the jury that it has not been proven that the paper writing read in evidence was signed by John W. Price, the supposed testator, or by any other person for him at his request, or by his direction, and in his presence; and you are therefore instructed that your verdict must be that said paper writing is not the will of John W. Price. (2) The court instructs the jury that the testimony of Mrs. Sarah Kendrick, contained in her deposition read in evidence, should not be considered by you for any other purpose than to show the mental condition and state of the affections of John W. Price, and that the said testimony is not competent for the purpose of proving that the said John W. Price executed the paper propounded as his will,"—which the court refused. The contestants excepted, and the case was submitted to the jury, who found the issue for the proponents, and upon this verdict the said instrument of writing was by the judgment of the court established as the last will of said Price, from which judgment the contestants appeal.

The errors assigned are substantially: First. That the court erred in overruling the objections to all that part of the deposition of Mrs. Kendrick relating to declarations concerning the execution of his will made to said witness by John W. Price after the date of the supposed execution thereof, and in refusing the second instruction in regard to her evidence. Second. That the court, upon the proof made, permitted the will to go to the jury, and refused to give the first instruction.

1. The errors under the first head are disposed of in a satisfactory manner by Macfarlane, J., in the first paragraph of the opinion handed down in division one, as follows: "(1) Since the decision of *Gibson v. Gibson*, 24 Mo. 234, it has been the settled law in this state that declarations of the testator made subsequent to the execution and publication of the will are not admissible as evidence of the fact stated. In his able and exhaustive opinion in that case Judge Leonard sums up the law in reference to such declarations as follows: 'The just result of the whole matter, we think, is that these declarations, so far as they are relied upon to furnish evidence of the facts they contain, are mere hearsay, and that there is no ground, either of authority or reason, to exempt them from the rule of law excluding all such testimony. We repeat, however, what we have before remarked, that as mere verbal facts, external manifestations of what is passing within, they are always evidence of the testator's intellect and affections for the time

being, provided they are of such a character, either by themselves or in conjunction with other evidence, and are so connected with the making of the will in point of time, as to furnish any reasonable ground of judgment in reference to the testator's mental condition at that time.' This opinion is so conclusive and satisfactory that it has been adopted and followed in this state without question or comment wherever the question has been raised. *Tingley v. Cowgill*, 48 Mo. 293; *Rule v. Maupin*, 84 Mo. 589; *Bush v. Bush*, 87 Mo. 485; *Spoonev v. Cables*, 66 Mo. 587. In the case last cited Judge Napton contents himself by saying, 'We have nothing to add to what was there said.' Schouler, in his work on Wills, disposes of the subject in one brief section as follows: 'The declarations of a testator before or after making a will are inadmissible on the issue of its execution.' Section 317a. To the same effect, see *Jones v. McLellan*, 76 Me. 49; *Kennedy v. Upshaw*, 64 Tex. 411; *Runkle v. Gates*, 11 Ind. 95; *Davis v. Davis*, 123 Mass. 590; *Kitchell v. Beach*, 35 N. J. Eq. 446; *Herster v. Herster*, 116 Pa. 612; *Caeman v. Van Harks*, 38 Kan. 833; *Johnson v. Hicks*, 1 Lans. 150; and *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 846. In the case last cited, the court, after exhaustive review of the authorities, says, 'We have not found a single case that warrants the introduction of such evidence.' Under the law, thus well settled, we can but conclude that the declarations of John W. Price, as testified to by Mrs. Kendrick, bearing upon the execution of the will, were inadmissible." The declarations of the deceased being excluded from the deposition, there was nothing in the case calling for an instruction upon that subject; consequently the second instruction, which should have been confined to those declarations, was properly refused. This brings us to the real difficulty in the case, which arises under the second head of the assignment of errors.

2. Our statute requires that "every will shall be in writing, signed by the testator, or by some person by his direction, in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator." Rev. Stat. 1889, § 8870. That this statute is imperative, and that no instrument can be established as a will without a substantial compliance with its requirements, is beyond question. *Callett v. Callett*, 55 Mo. 330. Whether they have been complied with or not is a question of fact to be determined by the jury upon legal evidence in a proceeding under the statute to contest the validity of a probated instrument, when a jury is required, as in the present case. Rev. Stat. 1889, §§ 8888, 8889. The province of the court before whom the issue was tried, and whose action alone is subject to our review, was not to determine the sufficiency of the evidence to establish the facts essential to a due execution of the will, or the credibility of the witnesses giving it,—this belonged exclusively to the jury,—but to submit that issue to the jury when a prima facie case was made by competent legal evidence tend-

ing to prove that all the requirements of the statute had been complied with. And the immediate question before us is, Was the evidence hereinbefore set out, minus the declarations made to Mrs. Kendrick, sufficient to make out a prima facie case of proper execution of the instrument, and to warrant the court in submitting that issue to the jury? The case made by that evidence, briefly, is that Judge John W. Price, aged about seventy-four years, of sound mind, a money lender, an intelligent man, of property, and conversant with affairs, but who had some years before met with a railroad accident, and was suffering from neuralgia and "risings" in one of his sides, and had to rely upon his daughter Katie, one of the respondents, to do most of his writing, was in the fall of 1896 living with his family at his home in Chariton county, and had then in his possession the instrument of writing propounded as his last will, which, upon its face, bears evidence that it was prepared under the direction of a mind familiar with such matters. This instrument, in apt language and in due form, with his name signed in the proper place at the bottom of it, all, including the signature, in the handwriting of his daughter Katie, he first presents to his near neighbor Venable, whom he had requested to call for that purpose, to whom he said in substance: "This is my will. It is not necessary that you should read it. I want you to sign it as a witness." The witness attests it, and departs. On a subsequent day he presents the same instrument, also at his home, to Moorman, his family physician, and says: "This is my will. I had it written, and I want you to sign it as a witness." That witness attests it, and departs. Subsequently he presents the same instrument, at the same place, to another neighbor, Broadus, whom he had called to witness his will, to whom he said it was his will, and he would like him to sign it as one of the witnesses, and that witness attests it. Subsequently, his old friend and relative Ingram, being at his house on a visit, he presents the same instrument to him, tells him that it is his will, and that he wants him to witness it, and he attests it. These repeated declarations of Judge Price, who may reasonably be inferred from the evidence to have known the requirements of the statute, made in the most solemn manner, in performing the most solemn act of his life, when considered in the light of all the circumstances by which he was surrounded when they were made, and when the instrument was written, and his name signed thereto, surely, in reason, must afford some evidence that his name was signed to the instrument by his direction, and in his presence. Yet in the face of the case thus made counsel for contestants contend that there is in this record no proof whatever that the name of John W. Price was so signed. The cases to which we are cited in support of this proposition from other jurisdictions, except *Burwell v. Corbin*, 1 Rand. (Va.) 181, 10 Am. Dec. 494, are under variant statutes, differing from ours, as are many of those cited for the proponents, and shed but little light upon the controversy. The single case

cited from this court—*Cadlett v. Cadlett, supra*,—gives it no support whatever, for in that case the instrument propounded was not signed at all, and the point ruled was simply that the signing required by the statute was the affixing of the testator's name at the bottom of the will, either in his own handwriting or in that of some one else in his presence, and by his direction. The Virginia case of *Burwell v. Corbin*, under a statute like ours, which is almost a literal transcript of 29 Car. II., in respect of the matter in hand, does give support to plaintiffs' contention but this was the decision of a divided court upon a special verdict, vigorously dissented from by Judge Roan, and virtually overthrown, after being much thrashed over in subsequent cases, in the Virginia court of appeals, all of which are cited in the notes to 8 Lomax, Dig. (2d ed.) pp. 44-49, §§ 14-16, where the cases are reviewed, and the doctrine of the Virginia cases under that statute, so far as it is pertinent to the present inquiry, correctly stated by Judge Lomax to be: "That the instrument, whether signed by the testator himself or by another person for him, is sufficiently attested upon the acknowledgment of the testator that such instrument is his will; that proof of such an acknowledgment is evidence from which a court of probate or a jury may infer the fact that the instrument was signed by the testator, or was signed by another person for the testator in his presence, and by his direction, as the case may be." The question in hand early came under the consideration of the supreme court of Kentucky, under a like statute (3 Dig. Ky. Stat. 1832, p. 1242), in the case of *Cochran's Will* (decided in 1814), 3 Bibb, 491, in which that court held: "The subscribing witnesses all prove the acknowledgment of the testator that this instrument was his will, and in his presence attested the same. This is a substantial compliance with the law. A will written and signed by the testator himself, attested by the proper number of witnesses, who can prove its execution only from the acknowledgment of the testator at the time of their attestation, though they did not see him sign it, and his handwriting could not be proved, yet, it is believed, would be held sufficient. And it is conceded that proof of the testator's name being signed by another under his direction, who proves that fact, cannot operate more unfavorably to the validity of the will than when proof of the signature or by whom it was written cannot be made, provided the requisite number of witnesses have attested it, and prove the acknowledgment of the testator, at the time of their attesting it as his will." The doctrine here announced has been uniformly maintained in the subsequent decisions in that state under the statute. *Shanks v. Christopher* (1820) 3 A. K. Marsh. 144; *Sarah Miles's Will* (1836) 4 Dana, 1; *Upchurch v. Upchurch* (1855) 16 B. Mon. 102. The Virginia statute seems to have been the common source from which the Kentucky statute of wills (1797, *supra*) and that of Missouri were originally taken (2 Mo. Laws 1825, p. 790), and all are substantially enactments of the English statute.



While the precise question under consideration has never been directly and authoritatively passed upon in this state, yet the principles decisive of it seem to have been well settled in harmony with the rulings in the English courts and those of Virginia and Kentucky. In *Cravens v. Faulconer* (1859) 28 Mo. 19, this court, speaking through Richardson, J., said: "It is manifest that the provision of our act in question was borrowed from the British statute, which has so often been under the consideration of their courts that it has become well settled by a long continued and uniform construction, which we cannot disregard. The witnesses must subscribe their names in the presence of the testator, in order that they may not impose a different will on him; but it is not necessary that they shall attest the very act and factum of signing by the testator. Though he must do some act declaring it to be his will, no particular form of words is required, and it is uniformly held that it is not necessary that the testator shall actually sign his name to the will in the presence of the attesting witnesses, but the acknowledgment by a testator that the name signed to the instrument is his, or that the paper is his will, is sufficient. 1 Jarman, Wills, 79; 1 Pow. Dev. 88; 4 Kent, Com. 576; 2 Greenl. Ev. § 676." To the same purport is the recent case of *Grimm v. Tittman*, 113 Mo. 57. The principle announced in all these cases is simply a recognition and affirmance of the doctrine laid down in *Ellis v. Smith*, 1 Ves. Jr. 11, decided in 1754 by the high court of chancery of England, after a review of all the precedents, and which was thereafter uniformly followed in the English courts so long as the Statute of Charles II. on this subject remained unchanged. From the authorities on this statute, English and American, but one deduction can be logically drawn, and that is that an instrument of writing purporting to be the will of a person of sound mind and lawful age, signed at the bottom with the name of the testator, and attested by the requisite number of witnesses in his presence, may be established as his last will and testament on the evidence of such attesting witnesses that he acknowledged before each of them, separately or together, that such instrument was his will, without further proof. The application of this principle does not depend upon the physical fact of signing. It applies all the same whether the instrument was signed by the testator by his own hand, or by that of another at his request and in his presence. The acknowledgment has just the same probative force in the one case as in the other, and the removal of that probative force as to either mode by other proof that it was not signed in one of these ways does not and cannot destroy the probative force of the acknowledgment that it was signed in the other way, and to prove that the signature to a will thus acknowledged was not in fact made by the hand of the testator has no more tendency to prove that the will was not signed by another at his request, in his presence, than proof that it was not so signed by another has to prove that it was not signed by the testator in his

own proper hand. This is not "consequence built upon consequence," but an inevitable and immediate deduction from the premises. It is not the mere physical act of signing that the witnesses attest; it is that the instrument signed with the name of the testator is his will. *Withinton v. Withinton*, 7 Mo. 589; *Cravens v. Faulconer*, *supra*; *Harris v. Hays*, 58 Mo. 90; *Norton v. Paaton*, 110 Mo. 456; *Grimm v. Tittman*, *supra*. That fact they are warranted in attesting upon the declaration of the person whose name is signed to the instrument (he being of sound mind and lawful age) that the instrument so signed is his last will and testament, although they neither saw him subscribe his own name to it in proper person, nor another subscribe his name thereto at his request, and in his presence. Proof of this acknowledgment by the deceased before the required number of attesting witnesses, made by them, that he was of lawful age and sound mind, and that they signed their names as witnesses to the instrument in his presence and at his request, under our law, makes a prima facie case, entitling the instrument to go to probate in the first instance, and upon a contest under the statute makes a case entitling the instrument to go to the jury as prima facie the will of the testator. To them is then intrusted the solemn duty of finally determining upon the whole evidence whether the instrument is the will of the testator, which it cannot be unless signed in one or the other modes designated by the statute. That it was so signed, however, need not be proved by positive and direct testimony, but may be established, as any other fact, by circumstances from which it may be legitimately inferred, of which the acknowledgment must always be one of the most convincing that it was in fact signed in one or the other of the modes provided for by the statute. For a decade in the history of Missouri the law in regard to wills signed by another for the testator was different, requiring additional proof in such cases. In the Revision of 1845 (chap. 185, § 5) a new section was adopted, requiring that "every person who shall sign the testator's name to any will by his direction, shall subscribe his own name as a witness of such will, and state that he subscribed the testator's name at his request." It was under this statute that the cases of *McGee v. Porter*, 14 Mo. 615, 55 Am. Dec. 139; *St. Louis Hospital Assn. v. Williams*, 19 Mo. 609; and *Northcutt v. Northcutt*, 20 Mo. 266,—were decided; and even under that statute it was held that there need not be an express direction, but that such direction might be proved by circumstances. 19 Mo. 612. It needed, however, but a brief experience of the dangers of innovation upon well-established and well-understood rules for the government of persons who in contemplation of death desired to make disposition of their property by will, as illustrated in those cases, to induce our lawmakers to return to the well-approved methods of their fathers, and this section was dropped from the Revision of 1855, and never since has found a place among our statutes.

From the evidence in this case there is rea-

sonable ground for the inference that Judge Price was familiar with the statute, and knew its requirements. There can be no doubt that he intended the instrument to be his last will and testament, and thought it was executed in accordance with its requirements; and all the evidence in the case tends to show that it was. His testamentary intentions ought not to be defeated by a narrow and technical construction of the statute, and cannot be defeated by evidence which tends to prove that his will was not signed in one of the ways provided by the statute, but which in no way tends to prove that it was not signed in the other, but tending strongly to prove that it was so signed. We therefore conclude that the trial court committed no error in refusing contestants' first instruction, nor in permitting the instrument to go to the jury on the prima facie case of its proper execution made by the evidence introduced by proponents. So that the only error we find in the trial was the admission of the declarations of the testator as to the manner in which the will was signed. As the acknowledgment of the testator is not conclusive evidence that the instrument was executed in the mode provided by the statute, but only evidence from which the jury would be warranted in inferring that the instrument was so executed, and as in this case they might not have drawn such inference but for this evidence, notwithstanding the acknowledgment was strengthened by the other facts and circumstances in evidence, *the judgment, for this error, will have to be reversed*, and the cause remanded for new trial, and it is accordingly so ordered.

All concur, except **Barclay, J.**, absent and **Burgess, J.**, not sitting. **Gantt**, and **Sherwood, JJ.**, concur in this opinion; **Black, Ch. J.**, and **Macfarlane, J.**, each in separate opinions.

**Black, Ch. J.**, concurring:

As said by this court when speaking of our statute concerning wills: "It is uniformly held that it is not necessary that the testator shall actually sign his name to the will in the presence of the attesting witnesses; but the acknowledgment by the testator that the name signed to the instrument is his, or that the paper is his will, is sufficient;" nor is it necessary that the witnesses shall sign in the presence of each other. *Cravens v. Faulconer*, 28 Mo. 19. As to the attestation, it can make no difference whether the will is signed by the testator himself, or by some other person by his direction and in his presence. In either case the attestation is good and sufficient if the testator acknowledges the instrument to be his will, and the witnesses sign it in his presence. In short, the witnesses attest a signed will, and not necessarily the various steps leading to its execution. This, it seems to us, is the necessary result of the rulings of the courts, often repeated, that the witnesses need not attest in the presence of each other, or attend the ceremony of signing by the testator. A will may be well attested though the attesting witnesses cannot depose to all the facts essential to a good signing by

or for the testator. This is especially true in cases like the one in hand, where the name of the testator was not signed by himself, but was signed by another. Where the testator produces an instrument purporting to be his will, and declares that it is his will, and requests the witnesses to attest it, the declaration to them that the instrument is his will is evidence that he signed it; and, should it appear that he did not sign it himself, but that his name was signed thereto by another, the declaration is still evidence that his name was signed thereto by his direction; but in such case we do not see how his declaration, standing alone, can be any evidence that the name of the testator was signed in his presence. To so hold is to build up a presumption from a presumption. In the case in hand it clearly appears the testator did not sign his name to the paper propounded as his last will. His name was signed by another. He, however, presented it thus signed to the several attesting witnesses, and declared to each of them that the paper was his will, and the witnesses attested it at his request. This declaration of the testator that the instrument was his will, as shown by the testimony of the attesting witnesses, is evidence tending to show that his name was signed thereto by his direction; but, standing by itself, it does not, in our opinion, show or tend to show that the testator's name was signed in his presence. The question, then, is whether there is any other evidence in the case which justified the court in submitting the issue to the jury. The other circumstances in evidence are these: The will, including the name of the testator, was written by his daughter Katherine. The will bears date the 18th November, 1886, and was attested about the same date. Some of the attesting witnesses signed it in the presence of the wife of the testator and other members of the family as well as in the presence of Mr. Price. It was in the possession of the testator from the date thereof until his death, in April, 1890. One attesting witness says: "He said he had it written, but I don't remember that he said by whom." Another witness in the case, though not an attesting witness, testified: "Have seen him call on Katie to put his name to a paper or write an article." The will was evidently dictated from first to last by the testator himself, and there can be no doubt but he intended it to take effect as his last will. Taking these circumstances all in all, we think there is evidence from which a jury might properly draw the conclusion that the daughter signed the name of her father to the will in his presence. The testator possessed more than ordinary business capacity. The will was the result of his own judgment, and his name was written thereto by his direction. He intended the instrument should take effect as his will. There is no evidence tending to show that his name was not signed in his presence. Under these circumstances, the will ought not to be rejected, as a matter of law, if there is any evidence tending to show that his name was signed in his presence. We think the fact that this will was prepared according to his dictation at his own house, by

his daughter, who signed his name to other papers when requested to do so, is some evidence that she signed her father's name to this instrument in his presence. The case made is therefore one for the jury, in the opinion of the writer.

**Macfarlane, J., dissenting:**

It is not insisted that the formalities required by the statute in order to the due execution of a will can be dispensed with, and the mere acknowledgment of the testator substituted therefor. In order, therefore, to give effect to the statute in case the name of the testator is subscribed by another for him, it is essential to the perfection and validity of the instrument that it be signed by the direction of the testator, and in his presence. That being so, it follows that a writing not so signed cannot be given validity by adoption, however solemnly made. If the name of Col. Price was not, in fact, written in his presence, and at his request, it was not his will; and no declaration afterwards made by him to the contrary would change its legal character or effect. I understand the majority of the court agree to these propositions. It is also well settled that the burden of proof is on the proponents of the will to prove its due and legal execution. *Norton v. Puxton*, 110 Mo. 456; *Gay v. Gillilan*, 92 Mo. 255; *Schouler, Wills*, § 289. I agree that the sole question on this branch of the case is whether there was competent, legal evidence, offered by proponents, sufficient to make *prima facie* proof that the instrument in question was executed in the manner prescribed by the statute. I agree that the declarations of the testator, made at the time of the attestation of the will, were admissible as part of the *res gestæ*. When witness Moorman attested the writing, Col. Price stated that he had it written. This declaration, I may admit, tended to prove that the instrument was both written and signed by the direction of the testator, but I think no one can fairly claim that it, taken alone, had the remotest tendency to prove that the name was subscribed thereto in his presence. When we undertake to make the simple declaration of Col. Price that the instrument was his will evidence that it was executed under all the formalities required by the statute, we virtually throw aside the statute altogether, and make a will by mere adoption. We could with equal propriety dispense with the attestation of witnesses. The evident design of the statute, in requiring these formalities, when the name of a

testator was written by another, was to prevent, as far as possible, the perpetration of frauds and impositions upon the ignorant and illiterate. But the statute does not confine its requirements to that class of persons. The requirements apply equally to the educated and intelligent business man. Nor are the rules of evidence, or its weight, given flexibility to suit the intelligence or ignorance of the testator. I have no doubt that the paper declared by Col. Price as his will made a disposition of his property according to his intention and wishes. Had he been unable to read or write, and barely competent to make a will, and had the daughter who wrote the will and signed his name to it been the principal legatee, to the substantial disinheritance of brothers and sisters, no more and no less evidence of its execution would have been required. More weight would doubtless be given to the declarations of an intelligent than to those of an ignorant person, but the competency of the evidence of each would be the same. I am unable to see that the declaration of Col. Price had the least tendency to prove that his name was signed to the writing in his presence, notwithstanding his intelligence, his business capacity, and his strong will. These could only give weight to declarations, which would have been evidence if spoken by the most illiterate. If a declaration does not tend to prove a fact, the character of the person making it is wholly immaterial.

The other circumstances shown by the evidence are that the testator, from bodily affliction, was unable to write with ease, and his daughter Mrs. Kendrick generally acted as his amanuensis. They lived in the same house. The will was written some years before the death of the testator, and during the time was kept in his possession. This evidence tends to prove that the will was written and signed by direction of the testator, and that he was satisfied with the disposition he had attempted to make of his property; but I am at a loss to see the least tendency it has to prove the fact that the will was signed by Mrs. Kendrick in his presence. The circumstances were as consistent with one theory as the other. They tended to prove neither. The burden of proof was on the proponents. I think there was no evidence tending to prove the due execution of the will, and therefore I do not concur in the second paragraph of the majority opinion, or in the concurring opinion of the learned chief justice.

## MARYLAND COURT OF APPEALS.

NORFOLK & WESTERN R. CO., *Appl.*,  
v.

William HOOVER.

(.....Md.....)

1. The master's knowledge of the bad reputation for intemperance of a person employed as brakeman on a train is not necessary to render him liable for injuries caused by the brakeman's unfitness, if he was negligent in not knowing of such reputation.
2. Evidence of the general reputation for intemperance of a railroad brakeman is admissible on the question of the negligence of the master in employing or retaining him.
3. A train dispatcher with power to employ and discharge flagmen and brakemen, and having general charge of the trainmen of one division, and movement of trains thereon, but without power to employ engine-men and firemen,—is the fellow servant of an engineman who is injured in consequence of

the train despatcher's negligence in sending incompetent or unfit brakemen with the train.

4. In the absence of a special exception signed and sealed by the judge, an objection that there is no evidence to support an instruction will not be considered on appeal.
5. An instruction that the master is liable for negligence in employing unfit trainmen, if an injury results from the incompetence of a brakeman, is erroneous, as it is not limited to a case of negligence in the employment of the brakeman.

(June 19, 1894.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Washington County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Reversed.*

The facts are stated in the opinion.

*Mr. Hy. Kyd, Douglass* for appellant.  
*Messrs. M. L. Keedy and W. C. Griffith* for appellee.

**NOTE.**—*Liability of master for injuries caused to one servant by the incompetency of a fellow servant.*

1. *Employment generally.*
2. *Retention in employ.*
3. *Incompetency through use of liquor.*
4. *Pleading incompetency.*
5. *Evidence.*
  - a. *Generally.*
  - b. *Specific acts.*
  - c. *Notice to company.*
  - d. *Burden of proof.*

1. *Employment generally.*

A master is required to furnish to his employes competent fellow servants, and a failure to perform this duty through want of reasonable care on the part of the master is negligence on his part, and a master is liable to a servant for injuries received through the incompetency of a fellow servant, if the master did not use reasonable care in the employment of such servants causing the injury. This liability is an exception to the general rule that a master is not liable to his servants for the negligence of a fellow servant. (Brakeman injured by act of engineer) *Tyson v. South & North Ala. R. Co.* 61 Ala. 554, 32 Am. Rep. 8; (brakeman injured by act of brakeman) *Chicago, St. L. & P. R. Co. v. Champion* (Ind.) Jan. 10, 1894; (brakeman injured) *Sweat v. Boston & A. R. Co.* 156 Mass. 284; (brakeman injured by act of flagman) *Bossout v. Rome, W. & O. R. Co.* 33 N. Y. S. R. 884; (brakeman injured by act of telegraph operator) *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 606; (carpenter injured through act of pile driver engineer) *Texas Mexican R. Co. v. Whitmore*, 58 Tex. 276; (carpenter injured by child superintendent) *Henry v. Brady*, 9 Daly, 143; (carpenter injured by act of foreman) *Bunnell v. St. Paul, M. & M. R. Co.* 29 Minn. 306; *Slater v. Chapman*, 67 Mich. 523; (conductor injured by act of engineer) *Harper v. Indianapolis & St. L. R. Co.* 47 Mo. 567, 4 Am. Rep. 853; (engineer injured by act of brakeman) *Mann v. Delaware & H. Canal Co.* 91 N. Y. 495; (engineer injured by act of engineer) *Newell v. Ryan*, 40 Hun, 256; (engineer killed by act of engineer) *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; (section boss injured through act of engineer) *Cincinnati, H. & I. R. Co. v. Madden*, 134 Ind. 463; (fire-

man injured by act of mechanic repairing engine) *Mobile & O. R. Co. v. Thomas*, 43 Ala. 674; (fireman injured by act of switchman who could not read time-table) *Taylor v. Western Pac. Co.* 45 Cal. 823; (laborer injured by act of engineer) *Patrick v. New Albany & S. R. Co.* 7 Ind. 436; *Cayser v. Taylor*, 10 Gray, 374, 69 Am. Dec. 317; *Colorado Midland R. Co. v. O'Brien*, 18 Colo. 219; (laborer injured by fellow workman in a gin factory) *Fones v. Phillips*, 30 Ark. 17, 43 Am. Rep. 234; (laborer injured by workman in removing fly-wheel) *McEligott v. Randolph*, 61 Conn. 187; (laborer injured by fellow laborer in mill) *Indiana Mfg. Co. v. Millican*, 37 Ind. 87; (laborer injured by act of carpenter) *Haworth v. Seavers Mfg. Co. (Iowa)* Feb. 13, 1892; (laborer injured by act of laborer) *Nordyke v. Van Sant*, 39 Ind. 183; *Fines v. Sillery*, 73 Hun, 549; (switchman injured by act of engineer) *Chesapeake, O. & S. W. R. Co. v. McMannon* (Ky.) 33 Am. & Eng. R. R. Cas. 308; (laborer injured by laborer with dynamite) *Stewart v. New York, O. & W. R. Co.* 28 N. Y. S. R. 215; (laborer injured by act of physician) *Richardson v. Carbon Hill Coal Co.* 20 L. R. A. 333, 6 Wash. 53; (snow shoveler injured by act of engineer) *Wall v. Delaware, L. & W. R. Co.* 54 Hun, 454; (switchman injured) *Indianapolis & St. L. R. Co. v. Johnson*, 108 Ind. 533; (track hand injured by act of road-master) *Chicago & G. E. R. Co. v. Harney*, 23 Ind. 23; (employee injured by act of engineer) *Blake v. Maine Cent. R. Co.* 70 Me. 60, 35 Am. Rep. 297.

Under Kansas Law of 1874, chapter 93, and Iowa Laws of 1883, a railroad company is liable to a servant for injury caused by negligence of fellow servant. *Kansas Pac. R. Co. v. Peavay*, 34 Kan. 472; *Kroy v. Chicago, B. L. & P. R. Co.* 32 Iowa, 357; *Hunt v. Chicago & N. W. R. Co.* 26 Iowa, 363.

And under 43 & 44 Vict., chapter 42, a master is liable to a servant for injury caused by negligence of fellow servant.

A railroad is negligent in selecting a freight conductor of one month's experience to act as conductor of wild train without examination as to his fitness. *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 460.

And a railroad company is negligent in allowing the track to stand for ten hours after heavy freshets without any one to guard washout, allowing train to pitch into it, although they claimed the section

**McSherry, J.**, delivered the opinion of the court:

This is an action brought to recover damages for personal injuries received by the appellee, an employe of the Norfolk & Western Railroad Company, as the result of alleged negligence on the part of his fellow servant. The verdict and judgment were in his favor, and the company has appealed. In the record there are three bills of exception, upon which the questions to be considered arise. Two of these exceptions were reserved by the appellant, and one by the appellee.

It appears that in May, 1891, an extra train of loaded freight cars was started from Shenandoah, Va., about 11:30 P. M., to run through to Hagerstown, Md. The crew consisted of a conductor, an engineman, a fireman, a flagman, and two brakemen. Hoover, the appellee, was the engineman. As the train proceeded northward, it descended some heavy grades, and the engineman noticed that its speed was not kept under proper control by the brakemen. At Luray the train laid over for an hour, and the engineman re-

quested the brakemen not to let him down the hills so rapidly, as the night was quite foggy. After leaving Luray, they ascended the grade to Vaughn's Summit, turning the point at a speed of about ten miles an hour. Immediately upon passing the summit the appellee shut off the steam, so that the train might descend by gravity alone, without aid from the engine. When about a train's length over the hill, he discovered that the train was increasing its speed, and he applied the tank brake; but, this producing no effect, he blew for brakes, turned on the driver brakes, and applied sand to the track. This not checking the train, he again blew for brakes, and reversed his engine. He repeated his signals for brakes at least once, and probably twice, afterwards, but they seem not to have been heeded by the brakemen, for the train moved rapidly onward down the grade. The packing blew out of the cylinder, and this caused the train to plunge forward, throwing the appellee back into the tender. At this juncture they were rapidly approaching, and were only some ten or twelve car lengths distant from, Possum

master was skillful. *Hardy v. Carolina Cent. R. Co.*, 76 N. C. 5.

A brakeman injured by a low bridge may show that the other brakemen causing the injury were green and incompetent and known to be such by the company. *Altee v. South Carolina R. Co.* 21 S. C. 550.

Incompetency on the part of the conductor and engineer operating colliding trains with other evidence showing collision was caused by such incompetency and that the railroad company was aware of such incompetency, establishes liability. (Engineer was killed) *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512.

In *Toledo, W. & W. R. Co. v. Durkin*, 76 Ill. 395; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20, 71 Ala. Dec. 229; *Thayer v. St. Louis, A. & T. H. R. Co.* 22 Ind. 26, 55 Am. Dec. 409; *Brazil & C. Coal Co. v. Cain*, 98 Ind. 232; *Marquette & O. R. Co. v. Taft*, 23 Mich. 229; *Quincy Min. Co. v. Kitts*, 42 Mich. 34; *Fifield v. Northern Railroad*, 42 N. H. 225; *Willis v. Oregon R. & Nav. Co.* 11 Or. 237; *Hard v. Vermont & C. R. Co.* 32 Vt. 473; *Fox v. Sandford*, 4 Sreed, 96, 67 Am. Dec. 537; *Weger v. Pennsylvania R. Co.* 55 Pa. 400; *Brown v. Winona & St. P. R. Co.* 27 Minn. 163, 38 Am. Rep. 238; *O'Donnell v. Allegheny Valley R. Co.* 50 Pa. 230, 98 Am. Dec. 838; *Delaware & H. Canal Co. v. Carroll*, 39 Pa. 374,—it was held that if a master has not used due diligence in the selection of competent servants he is liable for injuries caused by their acts to fellow servants by such incompetency; but this was not the question involved in these cases.

But a master is not liable to a servant for injuries caused by incompetency of a fellow servant, if the master has used reasonable care and diligence in selecting such servants causing the injury, and had no notice of his incompetency. (Baggageman claimed the bridge inspector was incompetent) *Warner v. Erie R. Co.* 39 N. Y. 463; (blacksmith was injured by act of striker) *Melville v. Melville*, 31 S. & G. R. Co. 43 Fed. Rep. 830; (brakeman injured by act of engineer) *Houston & T. C. R. Co. v. Willie*, 53 Tex. 313, 37 Am. Rep. 756; (brakeman was injured in making flying switch) *Pilkinton v. Gulf, C. & S. F. R. Co.* 70 Tex. 226; (brakeman injured by act of engineer and conductor) *Pittsburgh, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 197; *Summerhays v. Kansas Pac. R. Co.* 2 Colo. 484; (brakeman injured by act of switchman) *Pontou v. Wilming-* 25 L. R. A.

*ton & W. R. Co.* 51 N. C. 245; (engineer injured by act of chief engineer on a steamer) *Searle v. Lindsay*, 11 C. B. N. S. 429, 81 L. J. C. P. 108, 6 Jur. N. S. 744, 5 L. T. N. S. 447, 10 Week. Rep. 89; (brakeman injured by defective ladder through act of car inspector) *Maclin v. Boston & A. Railroad*, 135 Mass. 201, 45 Am. Rep. 455; (bricklayer injured by defective scaffold through act of foreman) *Wigmore v. Jay*, 5 Exch. 354, 19 L. J. Exch. 296, 14 Jur. 387; (engineer injured by act of telegraph operator throwing switch under sudden impulse) *Burke v. Syracuse, B. & N. Y. R. Co.* 60 Hun, 21; (fireman killed through act of telegraph operator and conductor) *Slater v. Jewett*, 85 N. Y. 73, 39 Am. Rep. 627; (fireman injured at a washout through act of chief engineer and superintendent) *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; (foundry helper injured by truck-wagon driver) *Hogan v. Central Pac. R. Co.* 49 Cal. 129; (laborer at blast furnace injured by act of laborer) *Holland v. Tennessee Coal, Iron & R. Co.* 13 L. R. A. 232, 91 Ala. 444; (laborer injured by act of engineer) *Louisville & N. H. Co. v. Collins*, 3 Duv. 114, 87 Am. Dec. 436; (laborer at mines injured through act of engineer) *Barton's Hill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767; (laborer at mines injured by act of mining boss) *Reese v. Biddle*, 112 Pa. 72; *McLean v. Blue Point Gravel Min. Co.* 51 Cal. 255; (laborer on tramway injured through act of track layer) *Gallagher v. Piper*, 16 C. B. N. S. 669, 53 L. J. C. P. 329; (laborer injured by failure to place signal) *Moran v. New York Cent. & H. R. Co.* 3 Thomp. & C. 770; (laborer on cars injured) *Hutchinson v. New York, N. & B. R. Co.* 5 Exch. 352, 19 L. J. Exch. 296, 14 Jur. 387; (laborer at rolling mill injured by act of engineer) *Caldwell v. Brown*, 53 Pa. 433; (laborer in building injured by act of superintendent in construction) *Brown v. Acorington Cotton Spinning & Mfg. Co.* 3 Harist. & C. 511, 34 L. J. Exch. 208, 13 L. T. N. S. 94; (laborer injured by act of foreman in locomotive shops) *Beaufileu v. Portland Co.* 43 Me. 291; (laborer on train injured by act of foreman and engineer) *O'Connell v. Baltimore & O. R. Co.* 20 Md. 212, 33 Am. Dec. 549; (laborer injured by foreman of hoisting tackle) *McDermott v. Boston*, 133 Mass. 349; (laborer on train injured by act of engineer) *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108; (mason injured through defective platform) *Colton v. Richards*, 123 Mass. 484; (painter injured by act of foreman with hoisting engine) *Feltham v. Mag-*

Hollow, which is crossed upon a trestle 75 or 80 feet high. The appellee saw that a collision with another freight train standing, or moving very slowly northward, on the trestle, was imminent and unavoidable, and, to save himself, jumped from his engine, and received the injuries for which he has brought the pending suit. There was evidence offered tending to prove that Huyett, one of the brakemen, had been drinking that night before the accident happened; and, within thirty minutes prior to the collision, his breath gave unmistakable evidence of it. In this state of the proof, a witness was asked whether he knew the general reputation of Huyett and Reese, the two brakemen, for sobriety for one or two years before the accident and following that, and, if so, to state what that reputation was. To this question and the evidence sought to be elicited thereby, the appellant objected, but the court permitted the question to be asked and answered, and this ruling forms the subject of the first exception.

It has been repeatedly held by this court,

and is the settled and established doctrine of Maryland, that in actions of this character, where a servant sues his master for injuries resulting from the negligence of a fellow servant, the plaintiff, to succeed, must prove not only that some negligence of the fellow servant caused the injury, but also that the master had himself been guilty of negligence, either in the selection of the negligent fellow servant in the first instance, or in retaining him in his service afterwards. Mere negligence on the part of a fellow servant, though resulting in injury, will not suffice to support the action, because the master does not insure one employé against the carelessness of another; but he owes to each of his servants the duty of using reasonable care and caution in the selection of competent fellow servants, and in the retention in his service of none but those who are. If he does not perform this duty, and an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employé, not for the mere negligent act or omission of the incom-

petent. *L. R. § Q. R. 38*; (painter injured by scaffold in building) *Tarrant v. Webb*, 18 C. B. 797, 35 L. J. C. P. 251; (snow shoveler injured by track-walker handling switch) *Fagundes v. Central Pac. R. Co.* 8 L. R. A. 824, 79 Cal. 97; (switch conductor injured by act of engineer) *Columbus, C. & I. Cent. R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 578; (switchman injured by act of engineer) *Batterly v. Morgan*, 85 La. Ann. 1166; (section hand injured by act of car inspector) *Indiana, L. & I. R. Co. v. Snyder* (Ind.) 68 Am. & Eng. R. R. Cas. 225; (yardman injured by act of engineer) *O'Hare v. Chicago & A. R. Co.* 95 Mo. 662.

And where a train manager was experienced and had notice that the conductor was sick or unfit and was compelled to make the run, and the engineer was injured, the master is not liable. *Michigan Cent. R. Co. v. Dolan*, 28 Mich. 510.

And that an inspector had worked three or four months putting in braces and then in the carpentry repair shop for one or two years, does not establish his incompetency. *Gibson v. Northern Cent. R. Co.* 22 Hun. 290.

The fact that a person is near sighted does not necessarily render him incompetent to be engineer of a locomotive, if he can see with glasses. (Car repairer killed) *Texas & P. R. Co. v. Harrington*, 62 Tex. 597.

And that a yard-master, was incompetent, partially paralyzed, sluggish, and forgetful, is not sufficient unless the company had notice of that fact or ought to have known it, where an engineer was killed. *East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea. 46.

And under Pennsylvania Act of 1885 (Pub. Laws, 217, §§ 15, 17), rendering mining company liable for employing mining boss who has no certificate of competency, the injury must be occasioned by willful failure to comply with the act, and it must be shown that the injury was occasioned by violation of the act. That is, there may be no liability although the boss had no certificate. *Christner v. Cumberland & E. L. Coal Co.* 146 Pa. 97.

In *Wright v. New York Cent. R. Co.* 25 N. Y. 562, it was held that where an engineer negligently and recklessly disregarded directions of master and ran ahead of time at great speed the company is not liable where the injury was not the result of ignorance or incompetency but of rashness and recklessness.

The question of competency must relate to the 25 L. R. A.

time of injury. (Fireman injured by switchman) *Harvey v. New York Cent. & H. R. R. Co.* 88 N. Y. 481.

And in *Johnston v. Pittsburgh & W. R. Co.* 114 Pa. 443, it was held that where a brakeman was injured through the negligence of the conductor and engineer, and it was claimed that the conductor was sick and unfit and the engineer had been on continuous duty so that he was unfit, there is no liability where it is not shown that the cause of the injury was occasioned through these reasons.

So there is no negligence shown in employing the engineer where the master mechanic employing him had reason to think he had served as fireman the usual period and some times as engineer, and no fault had been found. (Brakeman injured) *Texas & N. O. R. Co. v. Berry*, 67 Tex. 393.

And if a foreman acting as engineer handles cars and engines as carefully as any engineer of ordinary care could have done under the circumstances, a railroad company is not liable even if he was otherwise incompetent. (Engine oilier injured) *Gulf, C. & S. F. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573.

In *Parrish v. Pensacola & A. R. Co.*, 23 Fla. 251, it was held that where the plaintiff was on a gravel train and claimed that the fireman was inexperienced, incompetent, and unfit to act as fireman or engineer, but the declaration and proofs showed that the fireman was competent for fireman and the engineer was competent for engineer, there is no incompetency shown, although the engineer turned the engine over to the fireman. The turning of the engine over by the engineer was without knowledge or consent of any of the agents of defendant.

In *Houston & T. C. R. Co. v. Myers*, 55 Tex. 110, it was held that admitting that it was negligence for the engineer to trust the engine to the fireman and negligence for the fireman to operate it, still the engineer was competent and the fireman was competent for their purposes, and for this isolated act of negligence there can be no recovery, where a brakeman was injured in coupling.

And for a brakeman to recover for injuries caused by engineer, charging incompetency of fireman temporarily in charge, it must be established that the company did not exercise ordinary care in allowing him to run the engine, that he was so inexperienced as not to be fit for the position, that he mismanaged it and that the mismanagement caused the injury. *Core v. Ohio River R. Co.* 38 W. Va. 454.

petent or careless servant, but for his own negligence in not discharging his own duty towards the injured servant. As this negligence of the master must be proved, it may be proved like any other fact,—either by direct evidence, or by the proof of circumstances from which its existence may, as a conclusion of fact, be fairly and reasonably inferred. That drunkenness on the part of a railroad employé renders him an incompetent servant will scarcely be disputed; nor can it be questioned that a master who knowingly employs such a servant, or who, knowing his habits, retains him in his service, would be guilty of a reckless and wanton breach of duty, not only to the public, but to every employé in his service. There is no evidence in the record, nor has there been a suggestion, that either the conductor, fireman, or flagman of the train was negligent or incompetent. The negligence which directly caused the accident is attributed solely to the brakemen; and the appellant's negligence, which, as it is claimed, fixes its liability, lies in its employment of, or continuing to

retain in its service, these dissipated or intemperate brakemen. But, as we have stated, it was necessary for the plaintiff to show, not only their employment, but that the company had not used due and ordinary care in selecting them. There was no direct evidence adduced to show the absence of such care; but the question excepted to, and the evidence elicited in response to it, were designed to show by indirect or circumstantial evidence that the company had not used the degree of care and caution in the selection of these brakemen that its duty imperatively required it to use. So the question is, Can you fix upon the master a failure to use due care in selecting careful servants by showing such notorious or general reputation respecting the servant's unfitness or incompetency as that the master could not, without negligence on his part, have been ignorant of it when he employed the servant? About this there ought to be no difficulty. If the servant's general reputation before employment is so notorious as to unfitness as that it must have been known to the master but for his

But in *Norfolk & W. R. Co. v. Thomas* (Va.) July 20, 1893, it was held that a railroad did not perform its duty in furnishing a competent engineer where the engineer in charge turned over his engine to an inexperienced fireman who had only been in service three or four weeks and never on a railroad before and the conductor knew he was running the engine.

Although Mo. Gen. Stat. 1895, chap. 66, provides for liability of a corporation to any person for failure to ring a bell, no recovery can be had by an employé if the person causing the injury was competent, as this statute does not change the common law. *Robbuck v. Pacific Railroad*, 43 Mo. 187.

Similar doctrine is applied to Maine Rev. Stat., chap. 51. *Carle v. Bangor & P. Canal & R. Co.* 43 Me. 209.

And under Code of Napoleon, 1802, providing that every act that causes damages subjects him by whose failure it happened to repair it, does not apply to injuries by one servant to another unless it was shown that such servant was unskillful or habitually careless. *Hughes v. New Orleans & C. R. Co.* 6 La. Ann. 493, 54 Am. Dec. 555.

And in Florida, prior to 1887, a railroad was not responsible to a brakeman for injury caused by a fellow servant unless he was unskillful, and a railroad furnishing a surgeon of ordinary competency and skill is not liable. *South Florida R. Co. v. Price*, 32 Fla. 46.

Under California Code, section 1970, providing for liability for injuries to persons employed through negligence of other employé, it must be shown that the master was negligent in the selection of the servant. *McDonald v. Hazeltime*, 68 Cal. 35; *Stephens v. Doe*, 73 Cal. 23; *Congrave v. Southern Pac. R. Co.* 88 Cal. 300.

Under the seventh section of Illinois Act for Health and Safety of Miners, the master is liable for injuries to employés caused by the engineer if the engineer is incompetent or under eighteen years of age. *Niantic Coal & Min. Co. v. Leonard*, 126 Ill. 216.

And it was said in *Cowles v. Richmond & D. R. Co.*, 84 N. C. 309, 37 Am. Rep. 620; *Anderson v. New Jersey & B. Co.* 7 Robt. 611; *Treadwell v. New York*, 1 Daly, 123; *Harrison v. Central R. Co.* 81 N. J. L. 263; *William Bros. v. Carter*, 52 Mo. 373; *Gibson v. Pacific R. Co.* 46 Mo. 163, 2 Am. Rep. 497; *Howd v. Mississippi Cent. R. Co.* 50 Miss. 178; *Wonder v. Baltimore & O. R. Co.* 32 Md. 411, 3 Am. Rep. 143; *Atobin* 25 L. R. A.

*son, T. & S. F. R. Co. v. Moore*, 29 Kan. 633; *Benn v. Null*, 65 Iowa, 407; *Little Rock & Ft. S. R. Co. v. Duffey*, 35 Ark. 602; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197, 32 Am. Dec. 206; *Sherman v. Rochester & S. R. Co.* 17 N. Y. 153; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 641, 67 Am. Dec. 312; *Wiggett v. Fox*, 35 Eng. L. & Eq. 456; *Wilson v. Merry*, L. R. 1 H. L. Sc. App. 323, 19 L. T. N. S. 80; *Consolidated Coal & Min. Co. v. Floyd*, post, 343, 51 Ohio St. — that a master who uses due diligence in the selection of competent servants is not liable to other fellow servants injured by their acts arising from such incompetency; but this was not the question in the cases.

## 2. Retention in employ.

A master retaining in his employ incompetent servants after knowledge or notice of such incompetency is liable to fellow servants for injuries occasioned thereby. (Brakeman injured by switchman) *Coppins v. New York Cent. & H. R. R. Co.* 123 N. Y. 553; (brakeman injured by act of engineer) *Union Pac. R. Co. v. Young*, 19 Kan. 438; (brakeman injured by act of conductor) *Nelson v. Kansas City, St. J. & C. B. R. Co.* 35 Mo. 599; (carpenter injured by act of superintendent) *Montzer v. Armour*, 18 Fed. Rep. 373; (deck hand injured by act of steamboat engineer. Failure to test boiler) *Walker v. Bolling*, 23 Ala. 294; (engineer injured by failure of section boss and road-master) *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 253; (fireman injured by act of switchman) *Galveston, H. & S. A. R. Co. v. Faber*, 77 Tex. 153; (laborer injured by fireman acting as engineer) *Ohio & M. R. Co. v. Collarn*, 73 Ind. 231, 38 Am. Rep. 134; (laborer injured by foreman of pile-driver) *Hatt v. Nay*, 144 Mass. 130.

But a railroad has a reasonable time in which to discharge an engineer after knowledge of his inefficiency. *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210.

The negligence of a company in retaining an incompetent fireman after knowledge of incompetency whereby a switchman was injured, is a question for the jury. *Catlin v. Michigan Cent. R. Co.* 66 Mich. 355.

But a railroad company is not liable for injury to a watchman through an incompetent engineer causing injury in coupling cars, unless he was continued after knowledge of his incompetency. *Union Pac. R. Co. v. Milliken*, 3 Kan. 647.

(the master's) negligence in not informing himself,—if he could have been ignorant of it only because he failed to make investigation,—then it is obvious that he had not used the care and caution which the law demands of him in selecting his employés. Hence "the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation for unfitness on the master's part is not shown." Wood, Mast. & S. § 430.

In *Davis v. Detroit & M. R. Co.*, 20 Mich. 112, 4 Am. Rep. 384, Cooley, J., speaking for the court, adopts the case of *Gilman v. Eastern R. Co.* 13 Allen, 433, 90 Am. Dec. 210, which puts upon the employer the responsibility of negligently employing an unfit person, generally known and reputed to be such, notwithstanding the employer may in fact have been ignorant of such unfitness. Continuing, he said: "The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to

inquire was plainly imperative." So, in *Hills v. Chicago & G. T. R. Co.*, 55 Mich. 487, where a track hand was killed by an engine backing rapidly along a switch, and the engineman was drunk, the court said: "When, however, as in this case, it is shown that the accident occurred through the negligent act of the servant, who was in an intoxicated condition, and when it is shown, further, that he was in the habit of drinking intoxicating liquors to excess, and such habit had extended over a period of nine months while in defendant's employ, and no actual knowledge or notice ever reached any superior officer of the engineer, we think the jury may be justified in concluding from such evidence that the defendant was negligent in failing to learn such habit, and in retaining the engineer in its employment." See also, *Gilman v. Eastern R. Co.* 90 Am. Dec. 210, 13 Allen, 433; *Wright v. New York Cent. R. Co.* 25 N. Y. 566; *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293; *Chapman v. Erie R. Co.* 55 N. Y. 579. The evidence offered and admitted had no relation to specific or isolated

### 3. Incompetency through use of liquor.

The master is liable for injuries to a servant caused by incompetency of fellow servants where such master has not used due care in selecting or retaining in his employ the servant causing such injury; and habits of intoxication by servants in charge of dangerous machinery, rendering them careless or reckless, is equivalent to incompetency, and where a master has actual notice that the servant operating dangerous machinery and occasioning the injury was addicted to the use of intoxicating liquor, he is liable for employing or retaining him after such notice, if injury is occasioned thereby. As where an engineer was injured and the officers had knowledge of the yard-master's habits in the use of liquor. *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176.

And where a brakeman was injured by the conductor. *Galveston, H. & S. A. R. Co. v. Davis*, 4 Tex. Civ. App. 433.

So where a workman was injured and the company had notice of the habits of the foreman of mills. *Kean v. Detroit Copper & Brass Rolling Mills*, 68 Mich. 277.

And where a brakeman was injured and the company had notice of the habits of the conductor. *Neilon v. Kansas City, St. J. & C. B. R. Co.* 85 Mo. 609.

So where a laborer at a quarry was injured and the company had notice of the habits of the foreman. *Maxwell v. Hannibal & St. J. R. Co.* 85 Mo. 95.

So where a brakeman was injured and the round-house foreman had notice of the engineer's habits. *Williams v. Missouri Pac. R. Co.* 109 Mo. 475.

So where a workman on a scaffold was injured and the general agent of the railroad company for hiring foreman had notice of the foreman's habits. *Laning v. New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

And the same was held where an engineer was injured and the railroad superintendent had notice of the habit of the conductor causing the injury. *Huntingdon & B. T. R. & Coal Co. v. Decker*, 84 Pa. 419.

So where an engineer was killed and the company had notice of the habits of an assistant under Louisiana Code, article 2320, providing master is liable for damages by servants which he might prevent. *Poirier v. Carroll*, 35 La. Ann. 609.

But a mining law of Pennsylvania of 1835, re- 25 L. R. A.

quiring that an engineer employed be a sober and competent person, is satisfied if the employer believes him to be sober and competent. *Mulhern v. Lehigh Valley Coal Co.* 161 Pa. 370.

If the company is negligent in failing to ascertain the habits as to drinking of such employé which might have been known by reasonable inquiry and were the direct cause of the injury to co-employé, the company is liable. (Brakeman injured by brakeman) *Zumwalt v. Chicago & A. R. Co.* 36 Mo. App. 661; (laborer injured by railroad engineer) *Hills v. Chicago & G. T. R. Co.* 55 Mich. 487; (car coupler injured by switchman) *Gilman v. Eastern R. Co.* 13 Allen, 433, 90 Am. Dec. 210; (brakeman killed by act of engineer) *Illinois Cent. R. Co. v. Jewell*, 46 Ill. 99, 92 Am. Dec. 240; (brakeman killed through act of man in charge of train) *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293; (employé on engine injured by engineer on another) *Lyons v. New York Cent. & H. R. Co.* 39 Hun. 335; (mail agent injured by act of conductor) *Pennsylvania R. Co. v. Books*, 57 Pa. 343, 93 Am. Dec. 229; (oilier injured by act of engineer) *Stevens v. San Francisco & N. P. R. Co.* 160 Cal. 554.

These cases *supra* fully sustain the doctrine announced in *NORFOLK & WESTERN R. Co. v. HOOVER*.

But to render the master liable it must be shown that the injury was caused by such habits of intoxication where incompetency is alleged to have been from the use of liquor. (Laborer injured by engineer of stevedore company) *Cosgrove v. Pitman* (Cal.) June 26, 1894; (firemen killed by act of railroad engineer) *Engelhardt v. Delaware, L. & W. R. Co.* 78 Hun. 533; (laborer injured by act of derrick engineer) *Probst v. Delameter*, 100 N. Y. 266; (firemen injured by act of conductor) *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 37; *Campbell v. Wing*, 5 Tex. Civ. App. 431; (laborer injured by act of section foreman) *Harrington v. New York Cent. & H. R. Co.* 19 N. Y. S. R. 20; (engineer killed by act of conductor) *Bonner v. Whitcomb*, 80 Tex. 173.

The question of negligence is one for the jury where a foundry fireman had intemperate habits known to the superintendent, and by reason thereof a workman was injured. *Campbell v. Boediger* (Md.) March 13, 1894.

And the same was held where a railroad employed a boss carpenter who had habits of intemperance and a carpenter was injured through defective



acts of negligence. These, unless brought home to the knowledge of the master, would not have been admissible as reflecting on the question of the master's care. *Baltimore Elevator Co. v. Neal*, 65 Md. 488. We think, for the reasons we have given and upon the authorities we have cited, there was no error committed in allowing the question excepted to in the first bill of exceptions to be put and answered.

Under the ruling, quite a number of witnesses testified to Huyett's general reputation for intemperance, extending from a period long anterior to his employment by the appellant, up to and after the accident. One witness, Ryler, gave evidence as to Reese's general reputation. With respect to Huyett, the evidence, if credited by the jury, showed a general reputation, covering many years, uninterruptedly, and of such a notorious character that a jury might well have inferred it was known to the master when Huyett was employed, or else that the master failed to know it only because of neglecting to make proper inquiry. There was con-

sequently evidence legally sufficient to go to the jury upon the subject of the company's negligence; and therefore there was no error in rejecting the appellant's first and fifth prayers, which sought to take the case from the consideration of the jury, nor in rejecting its fourth prayer, which sought to exclude this evidence from the case.

There was error in rejecting the second prayer of the appellant. It asked the court to say to the jury that, if the injury to the plaintiff was caused by the intoxication or negligence of the brakemen, or either of them; that the brakemen were employed by Shull, the train dispatcher, and were sent out by him on the train in question; and, further, that Shull was guilty of negligence in sending out these brakemen, or either of them, on the train,—“yet the jury are further instructed that Shull and the plaintiff were coemployés of the defendant in the sending out of said brakemen, and the defendant is not responsible to the plaintiff for the neglect or want of care of the said Shull, unless they shall further find that there was

scaffold. *Brickner v. New York Cent. R. Co.* 2 Lans. 515.

And in *Gilman v. Eastern R. Corp.*, 10 Allen, 233, 67 Am. Dec. 636, it was held that, if a railroad company knowingly or in ignorance caused by its own negligence employed an habitual drunkard as switchman and thereby occasioned an accident, it is liable to a car repairer.

In *Sizer v. Syracuse, B. & N. Y. R. Co.* 7 Lans. 67, it was said that a railroad company owes to a car repairer the highest care to select a temperate engineer, and would be liable for knowingly employing others causing the injury, but that was not the question involved.

But in *Chapman v. Erie R. Co.*, 55 N.Y. 579, where an engineer was killed in a collision through the negligence of a telegraph operator and train dispatcher, competent when employed, but given to intoxication thereafter, it was held that good character and proper qualifications once possessed would be presumed to continue.

#### 4. Pleading incompetency.

A complaint is sufficient charging death of the taggagemaster through the act of the conductor alleging that he was not a careful, skillful, and attentive conductor for a passenger train, which was known to defendant, and that the death of plaintiff's intestate was caused by such conductor's negligence. *Kerlin v. Chicago, P. & St. L. R. Co.* 50 Fed. Rep. 185.

A petition by a laborer for a rope company alleging employment of a fellow servant was done in a careless and negligent manner and that in consequence thereof an incompetent servant was taken into the company's service who caused the injury by his incompetency, is a sufficient allegation of the negligence of employment. *Galveston Rope & Twine Co. v. Burkett*, 2 Tex. Civ. App. 308.

Complaint by a yard switchman charging incompetency of the fireman through failure to understand signals, and alleging his inexperience is sufficient as to the allegation of his incompetency. *Galveston, H. & S. A. R. Co. v. Eckels* (Tex.) May 16, 1894.

But failure by a brakeman injured by a defective bridge to allege employment of incompetent servants or failure to exercise ordinary care in their selection is insufficient. *McDermott v. Pacific R. R. Co.* 80 Mo. 115.

A petition by a brakeman charging negligence 25 L. R. A.

and unskillfulness of the conductor causing the injury, is insufficient unless it alleges that the company was negligent in employing or retaining. *Dow v. Kansas Pac. R. Co.* 8 Kan. 642.

And a complaint by an employé not alleging want of ordinary care and prudence in the employment of coemployé causing the injury, or retention after notice of inefficiency, and that the injury was caused by such incompetency, is insufficient. (Brakeman injured by engineer) *Indiana, B. & W. R. Co. v. Dalley*, 110 Ind. 75; (laborer injured by act of roadmaster) *Lawler v. Androsoggin R. Co.* 62 Me. 467, 16 Am. Rep. 492; (laborer injured by employé) *Elwell v. Haeker* (Me.) May 17, 1894; (mining laborer injured by engineer) *Collier v. Steinhart*, 51 Cal. 113; (laborer in factory injured by straw feeder) *Boyce v. Fitzpatrick*, 80 Ind. 537; (switchman injured by act of section boss) *Slattery v. Toledo & W. R. Co.* 23 Ind. 81; (teamster injured by blast) *Bogard v. Louisville, R. & St. L. R. Co.* 100 Ind. 491; (track repairer injured by act of engineer) *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1.

A petition alleging that the receiver and engineer in charge had put an unskillful engineer on a locomotive does not state a cause of action if it fails to allege that the receiver negligently and knowingly employed an unskillful and incompetent engineer, as he might have had good reason for believing he was competent. *Jordan v. Walls*, 3 Woods, C. C. 537.

And a complaint failing to allege that the act of the fireman caused the injury and that he was incompetent, was insufficient, where a brakeman was injured. *Kersey v. Kansas City, St. J. & C. B. R. Co.* 79 Mo., 362.

And an allegation by an employé that it was the railroad's duty to employ careful and skillful servants but that it failed to select those that were competent, is insufficient, as it should have charged want of care and diligence in the selection. *Moss v. Pacific Railroad*, 49 Mo. 167, 5 Am. Rep. 126.

And a complaint not alleging that the officer causing injury was incompetent, is insufficient. *Albro v. Agawam Canal Co.* 6 Cush. 73.

But a plea that the company had exercised ordinary care and diligence to secure a skillful engineer who was reputed to be careful and skillful and supposed to be such at the time of the collision is not good, as supposed means no more than believed. *Alabama & F. R. Co. v. Waller*, 48 Ala. 459.

negligence on the part of the defendant in the employment of Shull; and there is no legally sufficient evidence in the cause from which the jury can so find." Now, whether Shull was a deputy master, or vice-principal, or only a fellow servant of the plaintiff, is a question of law to be determined by the court, if the facts be undisputed or conceded. *Yates v. McCullough Iron Co.* 69 Md. 383. Shull was a mere dispatcher of trains, with power to employ and discharge flagmen and brakemen, and having general charge of the trainmen of the first division of the road, and the movement of trains thereon. He was employed by the division superintendent,

who had the general management of the division. The enginemen and firemen are also under the instructions of the division superintendent. This is all the evidence (and it is entirely undisputed) to show that Shull was a vice-principal, and not a fellow servant. In *Wonder's Case*, 32 Md. 418, 8 Am. Rep. 148, the general rule was laid down that all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow servants, each taking the risk of the other's negligence.

A complaint by an engine cleaner injured by the act of the engineer was sufficient as regards the allegation of incompetency of the engineer and negligence of the company in employing and retaining him; but was not sufficient for other reasons. *Spencer v. Ohio & M. R. Co.* 130 Ind. 181.

#### **c. Evidence.**

##### **a. Generally.**

If there is no evidence of personal negligence of the master in failing to ascertain fitness in hiring a servant, there can be no recovery for that cause. *Ormond v. Holland, El. Rl. & El. 102*; *Wiggins Ferry Co. v. Blakeman*, 64 Ill. 201.

And the mere fact of hiring a boy twelve years old to operate an elevator is not of itself want of ordinary care. *Smilie v. St. Bernard Dollar Store*, 47 Mo. App. 402.

Raising a car coupler to the place of conductor in a yard is not of itself evidence of negligence where his experience in inferior positions was such as to fit him for the higher. (Car coupler killed) *Haskin v. New York Cent. & H. R. R. Co.* 65 Barb. 120.

And a single act of incompetency together with the engineer testifying before the jury is not sufficient to justify the conclusion on his appearance and this act that his incompetency was known to the company where there was nothing in his appearance to indicate his incompetency. *Peaslee v. Fitchburg R. Co.* 152 Mass. 155. This case distinguishes *Keith v. New Haven & N. Co.*, *infra*, but also seems to overrule it.

In *Keith v. New Haven & N. Co.*, 140 Mass. 178, the jury were permitted to consider the appearance of the car inspector who was called as a witness, where a brakeman was injured, to aid them in determining whether he was of suitable qualification and sufficiently intelligent.

In *Corson v. Maine Cent. R. Co.*, 76 Me. 244, it was held that where a brakeman was injured by incompetency of an engineer he cannot show negligence in employment by looks and manners of engineer while testifying as a witness.

In *Summersell v. Fieh*, 117 Mass. 312, the court sustained an objection to argument as to negligence in selecting foreman when there was no evidence in the case on that question except the injury in raising the derrick. The negligence in employing was not pleaded.

##### **b. Specific acts.**

Knowledge of one act of incompetency or recklessness is not sufficient to impose liability. (Road master injured by act of engineer) *Holland v. Southern Pacific Co.* 100 Cal. 240; (brakeman injured by act of engineer and brakeman) *Ohio & M. R. Co. v. Dunn* (Ind.) March 7, 1894; (laborer on look injured by act of laborer) *Lee v. Detroit Bridge & Iron Works*, 62 Mo. 555; (laborer injured in shaft by act of engineer) *Baltimore v. War*, 77 Md. 508.

In *Frazier v. Pennsylvania R. Co.*, 38 Pa. 104, 80 Am. Dec. 467, it was held that where a brakeman

was injured by negligence of conductor the fact that the conductor had caused several collisions by carelessness for which he had been fined by the company, is inadmissible to establish his incompetency, as special acts do not establish reputation.

So specific acts of carelessness or unskillfulness do not establish negligence on the part of the master in employing or retaining such servant. (Laborer injured by act of captain of tug) *Baltimore Elevator Co. v. Neal*, 65 Md. 438; (employee injured by act of engineer) *Huffman v. Chicago, R. I. & P. R. Co.* 73 Mo. 50; (fireman killed through act of switchman) *Baulee v. New York & H. R. Co.* 50 N. Y. 364, 17 Am. Rep. 335. See also *Peaslee v. Fitchburg R. Co.*, *supra*.

So incompetency is not shown by the act causing the injury. (Employee at factory injured by act of operator) *Curran v. Merchants Mfg. Co.* 130 Mass. 374, 39 Am. Rep. 457; (laborer injured by act of foreman in stone quarry) *Salem Stone & Lime Co. v. Chastain* (Ind.) March 15, 1894; (laborer on railroad injured by act of co-laborer) *Lindvall v. Woods*, 44 Fed. Rep. 855; (brakeman injured by act of engineer) *Texas & N. O. R. Co. v. Berry*, 67 Tex. 238.

But in *Potts v. Port Carlisle Dock & R. Co.*, 2 L. T. N. S. 263, 8 Week. Rep. 524, where a brakeman was injured by faulty construction of turn-table, it was held that if the work could be shown to be grossly bad it might not be necessary to call evidence of negligence in faulty construction, but where it has stood the test for four years there is no case.

Evidence of specific acts is admissible to show notice to the company. (Brakeman injured by act of conductor) *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111.

And in *Couch v. Watson Coal Co.*, 46 Iowa, 17, the same was said, but was not admissible in that case because such acts were not shown to be prior to the accident. (Miner injured by act of engineer.) (Bridge carpenter injured by act of another carpenter) *Craig v. Chicago & A. R. Co.* 54 Mo. App. 523.

And evidence of subsequent acts of engineer not showing the incompetency complained of is not sufficient. *Ransier v. Minneapolis & St. L. R. Co.* 32 Minn. 331.

##### **c. Notice to company.**

Evidence of reports to conductor of carelessness on the part of the engineer and that the engine had frequently come into the shop in bad condition, was sufficient to make question for the jury where a brakeman was injured through act of engineer. *Houston & T. C. R. Co. v. Patton* (Tex.) June 30, 1888.

And after notice of incompetency of conductor the railroad continues him at their own risk, where an engineer was injured. *Ross v. Chicago, M. & St. P. R. Co.* 2 McCrary, 235.

And knowledge of infirmity of brakeman, habit

In that case, a brakeman, who was injured while using a defective brake, was held to be a fellow servant with the mechanics in the shops, the inspector of machinery and rolling stock, and the superintendent of the movement of trains. And so in *State v. Maister*, 57 Md. 287, it was held that a superintendent or manager is a fellow servant, within the rule which exonerates the master. In *Baltimore Elevator Co. v. Neal*, 65 Md. 488, the captain of a steam tug owned by the company was held to be a fellow servant of a laborer who was injured in the company's service. This court said in that case: "Nor is the liability of the master enlarged or made different by the fact that the servant

who has suffered the injury occupied a grade in the common service inferior to that of the servant whose misconduct caused the injury complained of." And in *Yates v. McCullough Iron Co.*, 69 Md. 870, the authorities were all reviewed, and it was held that the chief manager of the carbon works, who hired and discharged the hands, kept their time, etc., was only a fellow servant of a laborer who was injured while operating the machinery. *Baltimore v. War*, 77 Md. 598. In the face of these decisions, it is impossible to treat Shull as anything more than a fellow servant. The management of the division upon which he was train dispatcher was not committed to him. He was a subordinate, ap-

of going to sleep and failing to throw switch, is binding on the company. (Conductor injured) *Gulf, C. & S. F. R. Co. v. Pierce* (Tex.) June 14, 1894.

Notice to general superintendent of incompetency of engineer is notice to the company. (Road-master injured) *Missouri Pac. R. Co. v. Patton* (Tex. Civ. App.) 25 S. W. Rep. 339 (Tex. Sup.) 26 S. W. Rep. 978.

And a protest against the appointment of an engineer and discharge by the superintendent for causing a wreck, justifies finding that he was unfit. *Mexican Nat. R. Co. v. Mussette*, 24 L. R. A. 642, 86 Tex. 708.

And the knowledge by a road-master of the incompetency of a foreman is notice to the company. (Track repairer injured) *McDermott v. Hannibal & St. J. R. Co.* 78 Mo. 516, 89 Am. Rep. 526; *McDermott v. Hannibal & St. J. R. Co.* 87 Mo. 285.

But in *Reiser v. Pennsylvania Co.*, 153 Pa. 38, it was held that notice to the chief train dispatcher and telegraph operator that the station agent acting as telegraph operator was incompetent, whereby the fireman was killed, is not notice to the company, as the train dispatcher did not employ or discharge such servants.

The promise of a yard-master that a fireman should not run the engine is binding on the company. (Switchman injured) *Lyttle v. Chicago & W. M. R. Co.* 84 Mich. 289.

And the master promising a blacksmith to discharge his helper is sufficient notice. *Lyberg v. Northern Pac. R. Co.* 89 Minn. 15.

So a promise by the general superintendent to discharge for inefficiency the engineer is notice where a car coupler was injured. *Sutton v. New York, L. E. & W. R. Co.* 60 N. Y. S. R. 514.

Where a company ought to have known of the habits of a switchman by the exercise of reasonable diligence, the question of liability is one for the jury where a brakeman was killed. *Cameron v. New York Cent. & H. R. R. Co.* 77 Hun. 519.

And evidence showing that the company ought to have known of the incompetency of the foreman is sufficient, where a track repairer was injured. *Chicago, R. I. & P. R. Co. v. Doyle*, 15 Kan. 56.

A bricklayer in a sewer injured by a barrow full of brick may show general reputation of infirmity in sight and hearing and strength of man in charge of barrow. *Monahan v. Worcester*, 150 Mass. 439.

But the fact that some workmen had remarked that the engineer had a careless reputation where there is no notice to the company of habitual carelessness, does not show want of care in his employment. *Davis v. Detroit R. Co.* 20 Mich. 106.

A reputation of incompetency as yard-master is not sufficient when based only on the fact that he had had no experience as switchman. (A laborer was injured) *Lee v. Michigan Cent. R. Co.* 87 Mich. 574.

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See also subhead, *Habits of Intoxication*.

Where an injury was caused to an employé by the incompetency, recklessness, and unskillfulness of a captain of a tug, and the master by the exercise of reasonable care could have easily learned that the reputation of such captain for want of skill and recklessness was bad, it is wholly immaterial whether he knew it or not. *Western Stone Co. v. Whalen*, 161 Ill. 472.

#### d. Burden of proof

The burden of proof is on the party injured to establish the fact that the master did not use due care in the selection of the employé causing injury. (Conductor injured by act of engineer) *Roblin v. Kansas City, St. J. & C. B. R. Co.* 119 Mo. 476; (switchman injured by act of engineer) *Stafford v. Chicago, B. & Q. R. Co.* 114 Ill. 244; (employé injured by man in charge of machinery) *Southern Cotton-Oil Co. v. De Vond* (Tex.) Feb. 1, 1894.

The same was said in *Chicago & R. I. R. Co. v. Geary*, 110 Ill. 383, but was not the question involved. (Flagman injured by act of foreman.)

But if unfitness of engineer is shown to have existed at the time of employment the burden is then on the master to disprove negligence in employing him, where brakeman was injured. *Crandall v. McIlrath*, 24 Minn. 137.

And incompetency of brakeman cannot be inferred from the fact that he was colored. *Missouri Pac. R. Co. v. Christian*, 66 Tex. 393.

Under 5 U. S. Stat., p. 306, § 14, the burden of proof is on the master, in case of the boiler bursting, to show that he was not negligent. (An employé was injured and engineer had no license and was unskillful) *McMahon v. Davidson*, 13 Minn. 337.

While an employé may be competent and yet negligent and cause injury to a fellow servant for which the master is not liable since negligence is not always the same as incompetency, yet if the employé is in fact incompetent, lacks capacity or skill for the work assigned, his negligence causing an injury may sometimes be held to be the result of his incompetency or synonymous with it, so as to connect the injury with the master's negligence in employing such a fellow servant. And where incompetency was charged, the court in some cases has in fact spoken of the negligence of an incompetent servant causing an injury, as if it were in the particular case before them identical with incompetency.

In the preparation of this note cases in regard to contributory negligence of the employé; cases where the number of employés was inadequate; and cases where the master was attempted to be held for negligence of co-employé without regard to his incompetency,—are not included. L. T.

pointed by the superintendent; and though he had charge of the trainmen and of the movement of trains on his division, and could employ and discharge flagmen and brakemen, it is far from being shown that the master had relinquished all supervision of the work on that division, and intrusted its direction, as well as the procuring of materials and machinery and other instrumentalities necessary for the service, to his judgment and discretion. The engineman and fireman were not employed by him, but by the division superintendent; and, if the grade of his position was superior to that of the engineman, that fact did not make him a vice-principal as respects the latter. They were both engaged in the same common work, employed by the same agent of the common master, and were performing duties pertaining to the same general business; and, unless the whole current of the Maryland decisions is to be reversed, they were fellow servants of the railroad company, upon the evidence now before us. If this be so, then, even if Shull had been negligent in sending out these brakemen, and if that negligence caused the injury sued for, still the plaintiff could not recover, unless the company had not used due care in the selection of Shull, and of this there was not a particle of evidence offered.

The appellant's sixth prayer was properly rejected. There was no necessity to prove that the company had been incorporated. That fact was averred in the declaration, and was not denied by the pleas, and under section 108, article 75, of the Code, must be taken to be admitted.

This brings us to the prayers presented by the appellee. Under a local law of Washington county (sections 69, 70, article 22, Code Pub. Local Laws), we are required to consider the rejected prayers of the plaintiff, if he has excepted; and this he has done. By the defendant's exception, the plaintiff's granted prayers and the defendant's rejected prayers are brought before us. By the plaintiff's exception, his rejected prayers, as well as the defendant's granted ones, are presented for review. The court granted the plaintiff's first, seventh, and eighth prayers. We do not understand that the seventh and eighth are seriously questioned. Without discussing them, we need only say they are not open to substantial objection.

The appellee's first prayer, however, ought not to have been granted. It was objected in the argument that there was no evidence to support some of the hypotheses it contained, but as no special exception based upon that objection, and signed and sealed by the judge, appears in the record, we are not at liberty to consider it. *Albert v. State*, 66 Md. 334, 59 Am. Rep. 159. The prayer, after setting forth the facts, proceeds: "Then, if the said injury to the plaintiff was caused by the want of ordinary skill and experience or other unfitness on the part of the other hands, or any of them, in charge of said train, to manage and conduct the same, by reason of the intemperate state or condition of either of them," the plaintiff using due diligence, "the plaintiff is entitled to recover,

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provided the jury further find from the evidence that the defendant did not use reasonable care in the selection and employment of the brakemen or other hands or employes engaged with the plaintiff in conducting said cars;" that is to say, if the injury resulted from negligence caused by the intemperance of any of the train hands, the defendant would be liable, if it had failed to use due care in the selection of either of the employes on that train, even though that particular employe, thus carelessly selected, had been guilty of no negligence, and had in no way occasioned the accident. Consequently, if the jury thought the injury was caused by the drunkenness of the brakemen, and that the company had not used due care in the selection of the fireman, the company would be liable, notwithstanding the fact that the fireman had been guilty of no negligence, and had in no way produced or helped to produce the injury. Thus, the negligence of one servant, and the independent negligence of the master in employing some other servant, who had no connection with the accident, established, under this instruction, the plaintiff's right to recover. This is not the law. On the contrary, it is the negligence of a fellow servant, and the additional negligence of the master in employing that servant, whose negligence actually caused the injury, which must concur before a plaintiff can recover in a case of this character. The instruction therefore announced an obviously erroneous proposition, and was calculated to mislead the jury, because there was evidence before them from which they might have inferred that due care had not been used in the selection of the fireman, though there was no evidence from which they could have found that the fireman was responsible for the accident. The instruction should have clearly restricted the negligence of the defendant in selecting the plaintiff's fellow servants to the selection of such of them as by their incompetency, growing out of their intemperance, actually caused the injury.

The appellee's second, third, fourth, and fifth prayers were properly rejected. There was no legally sufficient evidence adduced to support them, or the several hypotheses assumed in them; and, if they had been free from other objections, this one was sufficient to justify the court in refusing to grant them.

There remains the appellant's third prayer, which the court granted, but we think erroneously granted. It told the jury, in substance, that unless the brakeman Huyett was drunk at the time of the accident, and his negligence, by reason of such drunkenness, produced or contributed to the accident, the evidence of general reputation as to his intemperance was not relevant, and could not be considered by the jury, "unless such reputation was brought home to the knowledge of the defendant before the accident;" and there is no such evidence of such knowledge. Had the prayer omitted the words italicized, it would have been correct, but those words superadded a condition which is manifestly inaccurate. Now, it is obvious that if Huyett was not drunk and was not negligent when the ac-

cident happened, and therefore did not cause or contribute to it, the evidence of his general reputation for intemperance was wholly irrelevant, even though that reputation had been brought home to the knowledge of the appellant before the accident, because, if he did not occasion the injury by his negligence, the fact that the master had knowledge of his bad reputation would in no way have made the master liable for an injury not caused by Huyett at all. In other words, the master's knowledge of Huyett's bad reputation had nothing whatever to do with the case if Huyett did not cause or contribute to the accident; and if Huyett did, by his in-

temperance, cause the accident, then it was immaterial whether the master had knowledge of his bad reputation or not, because, as already stated, the master was negligent in not knowing it. So, in either view of the question, the prayer was wrong, because of the addition of the words indicated.

For the error in granting the appellee's first instruction and the appellant's third, and for the error in rejecting the appellant's second prayer, the judgment must be reversed, and a new trial be ordered.

*Judgment reversed, with costs above and below, and new trial awarded.*

### MICHIGAN SUPREME COURT.

James C. DEYO

v.

George H. HAMMOND, *Plff. in Err.*

(.....Mich.....)

**Failure of the purchaser of a mare to have a test of her speed as compared with that of another one owned by him, made by the person and within the time agreed upon, because the mares were not in proper condition for the test, or to have the test made afterwards, will not relieve him from liability to pay an extra hundred dollars in case she is as fast as the other one on other proof of such speed.**

(September 25, 1894.)

**ERROR** to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover the contract price of a mare sold by plaintiff to defendant. *Affirmed.*

The facts are stated in the opinion.

*Mr. Fred H. Warren, for plaintiff in error:*

In the case of a condition precedent, that is, an act to be performed by the plaintiff before the defendant's liability is to accrue under his contract, the plaintiff must aver in his declaration and prove, either his performance of such condition precedent, or an offer to perform it, which the defendant rejected; or, his readiness to fulfill the condition, until the defendant discharged him, the plaintiff, from so doing, or prevented the execution of the matter to be performed by him.

*Chitty*, Cont. 7th Am. ed. 787; 1 *Chitty*, Pl. 11th ed. 321; *Brogden v. Marriott*, 2 Bing. N. C. 478; *Thurnell v. Balbirnie*, 2 Mees. & W. 786; *Benjamin, Sales*, 2d Am. ed. § 575; *Shear v. Wright*, 60 Mich. 159; *Thompson v. Russey*, 50 Ala. 329; *Hanley v. Walker*, 8 L. R. A. 207, 79 Mich. 607; *Guthat v. Gow*, 95 Mich. 527; *Johnson v. Lyon*, 75 Mich. 477; *Maryon v. Carter*, 4 Car. & P. 295; *Thomas v. Corey*, 74 Mich.

216; *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165.

Courts cannot make contracts for parties, and in interpreting them cannot be influenced by the hardships of a particular case.

*Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 30 L. R. A. 277, 92 Mich. 423; *Lorscher v. Supreme Lodge Knights of Honor*, 3 L. R. A. 206, 73 Mich. 816.

*Mr. John D. Conely, for defendant in error:*

Even in cases where a sale itself is conditional that the goods shall be satisfactory to the purchaser on a trial to be made by him, the purchaser cannot take advantage of his own omission to make the trial to defeat payment of the purchase price.

*Thompson-Houston Electric Co. v. Brush-Swan Electric Light & Power Co.* 81 Fed. Rep. 585; *Waters Heater Co. v. Mansfield*, 48 Vt. 878; *Potter v. Lee*, 94 Mich. 140.

*Long, J.*, delivered the opinion of the court:

On January 25, 1888, the plaintiff, who resides at Jackson, this state, sold his mare, the "Shelby Maid," to defendant. The contract was made in Jackson, and the bargain, as claimed by the plaintiff, is that, after Hammond had driven the mare, he offered to give plaintiff his check for \$900, and a further sum of \$100 if she could go as fast as his (defendant's) mare; that Mr. Moran was to drive them, and make the test, when he had been notified by defendant that he was ready, which test was to be made within 90 days. The plaintiff further testified that Mr. Moran was to decide if plaintiff's mare could go as fast to pole as defendant's, and, if she could, then defendant was to pay plaintiff the extra \$100. The defendant testified that after going to Jackson, and driving the mare, he commenced figuring with Mr. Deyo about buying her. Concerning the terms of the bargain, he gave the following testimony: "I offered Mr. Deyo \$900 for the mare if she could go as fast as my bay mare.

**NOTE**—The above decision that the stipulated test of speed by a certain person was not a condition precedent to the right of payment is somewhat analogous to those cases which hold a stipulation for an architect's or engineer's certificate is 25 L. R. A.

not absolutely binding, if the other party to the contract prevents obtaining it, or if it is withheld by fraud or collusion. For this class of cases, see *notes to Boettler v. Tendick* (Tex.) 5 L. R. A. 270; *Church v. Shanklin* (Cal.) 17 L. R. A. 207.

He says: 'She can go as fast. I will guarantee her to go as fast as your mare.' I said: 'Guaranties don't do. She has got to do it herself.' I says: 'I will give you \$800, and take her down there, and if she will go as fast as the bay mare I will give you \$900 for her,—an extra \$100. . . . He says, 'All right,' and we made the trade then and there. The mare, if she filled the bill, was to be \$900. There is no question about that; but otherwise she was to be \$800. . . . I was to pay an additional \$100 if the gray mare could trot as fast as the bay mare to pole. The test was to be made within ninety days, by Mr. Moran. Mr. Moran was mutually agreed upon to make the test. It would make no difference to me who drove if this mare could trot as fast as mine." The suit was brought to recover this \$100 and interest, and upon the trial the jury returned a verdict in favor of the plaintiff.

It appears that defendant took the mare to Detroit, but that Mr. Moran was never notified by either of the parties to make the test, and that the test was never made; the defendant claiming that it was impossible for him to make the test within 90 days for the reason that one mare was sick and the other lame. The plaintiff testified on the trial that the defendant was to notify Mr. Moran when he was ready to make the test, and within the 90 days; while the defendant testified that, though it was mutually agreed that Mr. Moran should make the test, nothing was said about his (the defendant's) notifying Mr. Moran. Defendant's contention here is that he is not liable to pay the additional \$100, as by the terms of the contract the plaintiff agreed that the mare purchased should, within 90 days, in a trial of speed to be made by Mr. Moran, trot as fast to pole as defendant's bay mare; that it was impossible to make the said trial within the time fixed by the parties by their contract by reason of circumstances over which he had no control, and for which he was not responsible; that a trial of speed by Mr. Moran, and a decision by him that plaintiff's mare was as fast to pole as defendant's, was a condition precedent to his liability to pay the \$100, and, having never been fulfilled, defendant is discharged from liability. We think the contract cannot be construed in this way. Defendant, after the purchase, took the mare into his possession, and thereafter kept it. The test was to be made in Detroit. While the parties agreed to abide by Mr. Moran's decision as to the speed of the

gray mare, yet the Moran test was not a vital part of the contract, but only the means provided by the parties for ascertaining the speed of the gray mare. The only condition upon which the \$100 depended was that she could trot as fast as defendant's, for he said: "It would make no difference to me who drove, if this mare could trot as fast as mine." The plaintiff introduced testimony to show that his mare was 8 or 10 seconds faster than defendant's, and this testimony was undisputed. Defendant was the only party who had it within his power to have the test made, and yet he seeks to set up in this case as a defense his failure to have it made, and thus avoid the payment of the \$100. The case is very similar in principle to *Potter v. Lee*, 94 Mich. 140. There it appeared that the plaintiff sold a number of cheeses by sample. There was testimony showing a warranty as to the quality of the cheeses. The defendant, however, said to plaintiff's agent: "You are a stranger to me, and I have only seen ten boxes of these cheese, and I don't know what is in the car. If, within the course of ten days, we find this cheese as you represent it, we will pay for them." Within the ten days some of defendant's customers rejected the cheeses, and refused to pay for them; but defendant continued to make sales for twenty-six days, and then notified the plaintiff that the cheeses were not as represented, and refused to pay for them. It was said by this court: "It is therefore evident, even if the warranty was made by Potter as to the quality of the cheeses in the car, and not examined by defendant, that defendant did not rely upon it, but preferred to make an examination for himself, and was to have ten days in which to do so. If he did not make such examination, it was his own fault." So in the present case. The plaintiff offered to guarantee the speed of his mare. The defendant rejected the offered guaranty, saying that he preferred to make a test of the speed. That he did not do so was no fault of the plaintiff's. There is no dispute about Mr. Moran's willingness to make the test. He testifies the opportunity was never given him. We think, under the undisputed testimony in the case, the court would have been justified in directing a verdict in favor of the plaintiff. In view of this, the other questions raised become immaterial.

*The judgment is affirmed.*

The other Justices concur.

## MARYLAND COURT OF APPEALS.

Joseph MULLEN, *Appt.*,

v.

Edward F. SANBORN *et al.*

(.....Md.....)

A plaintiff in an attachment suit who comes from another state to testify

therein is not privileged from service of summons while there is an action for maliciously bringing the attachment suit.

(June 20, 1894.)

APPEAL by complainant from an order of the Baltimore City Court quashing a writ

*NOTE.—Privilege of nonresident witness from suit.*

- I. Reason of the privilege.
- II. Nature of the privilege.
- III. The extent and limit of the privilege.
- IV. Parties as witnesses.
- V. Witnesses in general.
- VI. The effect of fraud and deceit.
- VII. Enforcement of the privilege.
- VIII. The question of waiver.
- IX. The question of deviation.
- X. English doctrine.

As to the effect upon a suit of a discharge from arrest of one arrested while attending court, see note to *Ellis v. De Garmo* (R. L.) 19 L. R. A. 580.

#### I. Reason of the privilege.

The common law has, from its earliest period, extended privilege and immunity to parties and witnesses in a law-suit while attending court, including the going and coming; the arrest of a party to a suit by civil process being regarded as a breach of the defendant's privilege. *Green v. Young*, 120 Ill. 180.

The foundation of the common-law rule is the policy of permitting an act which will deter suitors or witnesses from attending court. *Massey v. Colville*, 45 N. J. L. 119, 45 Am. Rep. 754.

It is the policy of the common law that witnesses should be produced for oral examination, and that parties should have full opportunity to be present and heard when their cases are tried; and in furtherance of such policy and the due administration of justice, suitors and witnesses from abroad are privileged from liability to suits commenced by summons as well as by *capias*. *First Nat. Bank of St. Paul v. Ames*, 80 Minn. 179; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 85, affirming *Person v. Pardee*, 6 Hun. 477.

It is the court's duty to foster this policy, out of which sprang the privilege. *Merrill v. George*, 23 How. Pr. 331.

Foreign or nonresident witnesses cannot be reached by the process of the courts, and their attendance is therefore voluntary. *Ibid.*; *Brett v. Brown*, 13 Abb. Pr. N. S. 295; *Sherman v. Gundlach*, 37 Minn. 118.

For this reason therefore their arrest on civil process is illegal. *May v. Shumway*, 16 Gray, 85, 77 Am. Dec. 401.

They should therefore, as far as possible, be encouraged to voluntarily come into the state where the action is pending and give their testimony in open court, but the policy of protection, as sound principles require, and as asserted by many courts, extends as well to parties as to witnesses. *Wilson v. Donaldson*, 3 L. R. A. 268, 117 Ind. 366.

It is very important and right that persons leaving the place of their domicile to attend to such duties in obedience to a direct or indirect requirement of law should be protected by the law, while so engaged, from being caught up to answer to actions brought in a different place from that of their domicile. *Homes v. Nelson*, 1 Phila. 217.

That a suitor should feel free and safe at all times to attend within any jurisdiction without incurring the liability of being picked up and held to answer

some other adverse judicial proceeding against him, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered. *Andrews v. Lembeck*, 46 Ohio St. 38.

A witness thus required to attend should feel that he is not subject, either to arrest or to the prosecution of a civil suit. *Atchison v. Morris*, 11 Biss. 191.

To deny him such exemption and leave him subject to a suit within such jurisdiction, would be a breach of faith upon the part of the court. *Waterman v. Merritt*, 7 B. I. 345.

By a contrary doctrine subjecting him to the necessity of remaining or returning to litigate foreign suits a serious obstacle would be interposed to his voluntary attendance. *Merrill v. George*, 23 How. Pr. 331; *Kauffman v. Kennedy*, 25 Fed. Rep. 785.

And as the judgment thus obtained would conclude him in all jurisdictions, its effect would be to deter him from coming at all. *Sherman v. Gundlach*, 37 Minn. 118.

Such a witness would refuse to come within the state to give testimony unless he was sure of protection. *Hollender v. Hall*, 58 Hun, 604, 18 N. Y. Supp. 759, 33 N. Y. S. R. 848.

Parties would be prevented from attending, delays would ensue and injustice be done. *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 85.

It would obstruct the administration of justice. *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713.

And work a miscarriage thereof, especially in a criminal case where the witness must meet the accused face to face, for no one would voluntarily go into a foreign state to give testimony in a suit if he were liable to be put to the expense of a law-suit in a strange forum. *Kauffman v. Kennedy*, 25 Fed. Rep. 785.

Courts of justice ought to be open and accessible to suitors, who ought to be permitted to approach and attend the courts in the prosecution of their claims, and the making of their defenses without fear of molestation or hindrance; their attention ought not to be distracted from the prosecution or defense of the pending suit, otherwise they might be deterred from prosecuting their just rights or making their just defenses to a suit by reason of their liability to suit in a foreign jurisdiction. *Baldwin v. Emerson*, 16 R. I. 304.

The reason of the rule extends to every obstacle that stands as a barrier, in the way of the preattendant of witnesses in a court of justice. *Merrill v. George*, 23 How. Pr. 331.

Its object is to encourage witnesses from abroad to come forward voluntarily and testify. *Sherman v. Gundlach*, *supra*.

Whether a man wishes to attend the court as a party or a witness, he should be able to do so under its protection. *Halsey v. Stewart*, 4 N. J. L. 306; *Mitchell v. Huron Circuit Judge*, 53 Mich. 542.

Such immunity works no injustice to any one, as, if the witness does not come into the state there would be no opportunity to serve process upon him. *Sherman v. Gundlach*, 37 Minn. 118.

Principles of public policy require that no un-

of summons and the return thereon in an action brought to recover damages for wrongfully and maliciously suing out an attachment on the ground that service had been obtained on defendant while he was in the state as a witness in another suit. *Reversed.*

The facts are stated in the opinion.  
*Messrs. R. W. Applegarth, and H. C. Kennard* for appellant.  
*Messrs. Hinckley & Morris*, for appellees:  
 A nonresident plaintiff coming to this state solely to testify in court and intending to re-

necessary obstacles shall be interposed to prevent the attendance and examination of witnesses in the presence of the court and jury. *Seaver v. Robinson*, 3 Duer, 622; *Tamkin v. Starkey*, 7 Hun, 479; *Mitchell v. Huron Circuit Judge*, *supra*; *Wilson v. Donaldson*, 3 L. R. A. 263, 117 Ind. 866; *Moletoz v. Sinnen*, 7 L. R. A. 817, 76 Wis. 308.

Courts of justice are bound to see that no improper use is made of such proceedings, which would look like a violation of good faith and perversion of measures to be resorted to in order to bring the party within their jurisdiction. *Moletoz v. Sinnen*, *supra*.

The protection of parties and witnesses demands it. *Mitchell v. Huron Circuit Judge*, *supra*; *Vincent v. Watson*, 1 Rich. L. 194; *Wilson v. Donaldson*, *supra*.

It affects the integrity of the administration of justice, in the protection of which the courts have ordained that no man in attendance upon the courts of deliberation shall be interfered with or the administration of justice interrupted by the service of process, the doctrine having its origin in those cases where the process was one of arrest. *McIntire v. McIntire*, 5 Mackey, 344; *Mitchell v. Huron Circuit Judge*, *supra*.

A party who could not attend to his suit without being liable to such service would be under personal restraint, from which those engaged in the administration of justice have a right to be free. *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Bridges v. Sheldon*, 7 Fed. Rep. 36.

The immunity does not depend upon statutory provisions, but is necessary for the due administration of justice. *Sherman v. Gundlach*, 37 Minn. 118; *Ex parte Cobbett*, 7 El. & Bl. 955, 26 L. J. Q. B. 203, 8 Jur. N. S. 665; *First Nat. Bank of St. Paul v. Ames*, 59 Minn. 179; *Re Healey*, *supra*.

The necessities of the judicial administration would be embarrassed if such rule were not enforced. *Juneau Bank v. McSpedan*, 5 Bliss. 64; *Byler v. Jones*, 22 Mo. App. 623; *Wilson v. Donaldson*, 3 L. R. A. 263, 117 Ind. 866; *Halsey v. Stewart*, 4 N. J. L. 266; *Mitchell v. Huron Circuit Judge*, *supra*; *Palmer v. Rowan*, 21 Neb. 452, 50 Am. Rep. 844; *Tribune Assn. v. Sleeman*, 12 N. Y. Civ. Proc. Rep. 21; *Matthews v. Tufts*, 87 N. Y. 568.

And without such exemption their attendance might not be readily obtained. *Parker v. Manoo*, 61 Hun, 519.

In *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713, it was stated as a well-settled rule of law.

The rule exists in order that causes may be fully heard and justice administered in an orderly manner. *Nichols v. Horton*, 4 McCrary, 567.

The protection is not chiefly the privilege of the person, but is granted in the necessity of the public in order that the courts may not be embarrassed or impeded in the conduct of their business. *Baldwin v. Emerson*, 16 R. I. 304.

A party should be permitted to approach the courts, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. *Halsey v. Stewart*, 4 N. J. L. 266.

As a breach of privilege. *Jacobson v. Hosmer*, 76 Mich. 264.

Such an arrest was held an invasion of the prerogative of the court, and entitled him to a discharge. *Jones v. Knaues*, 31 N. J. Eq. 211.

No lawful thing founded upon a wrongful act can be supported. *Luttrell v. Benin*, 11 Mod. 50.

In *Hayes v. Shields*, 2 Yeates, 222, it is said the 25 L. R. A.

party's attention to his own business in the suit depending is distracted by other objects and he is subjected to the inconvenience of attending an action at a considerable distance from his own place of abode, contrary to the wise indulgence of the law.

The arrest of one attending as a witness may be a contempt of the court as if made in the face of the court, against which the court must protect. *Vincent v. Watson*, 1 Rich. L. 194.

A person ordering an arrest of a witness is punishable for contempt of court for interfering with its business. *Smith v. Jones*, 76 Me. 123, 49 Am. Rep. 503.

The same reasons for exempting a nonresident witness from arrest exists in favor of exempting him from service of a summons in a civil action. *Sherman v. Gundlach*, 37 Minn. 118.

But the reason does not apply to a case in which the defendant is arrested on a criminal charge, and taken into a foreign state to answer such charge. *Byler v. Jones*, 22 Mo. App. 623.

In *Holmes v. Nelson*, 1 Phila. 217, it was contended that the defendant, a foreign corporation, was not entitled to the privilege, but the court held that the fact that the defendant was a citizen of another state was no ground of the exemption; that such contention was prevented by section 2, article 4, of the Constitution of the United States, declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, the court stating that such article was a special application of the grand Christian rule of intercourse, "Whatever ye would that men should do to you, do ye even so to them."

In *Day v. Harris*, 37 N. Y. S. R. 322, 50 Hun, 623, the court approved the principles established by *Matthews v. Tufts*, 87 N. Y. 568. The essential condition of the rule and ground of the exemption is, that the person claiming it shall come within the jurisdiction of the court issuing the process as such party or witness.

The reason for the distinction is, that in the case of a resident he could be immediately prosecuted, and if the right to do so did not exist, could be arrested again, and therefore it was not to his prejudice but rather to his benefit to require him to endorse his appearance as upon a non-bailable process, while in the case of a nonresident the court refused to acquire jurisdiction of his person by a legal arrest, the effect of such a discharge being necessarily to dismiss the action. *Merrill v. George*, 23 How. Pr. 381.

## II. Nature of the privilege.

The nature and extent of the privilege which the law accords to witnesses is not a natural right, it is contrary to common right; it is not an absolute right such as belongs to members of the royal family in England, or to ambassadors or some others, nor the case of total exemption from arrest such as the law extends to persons discharged from arrest by bankruptcy or insolvency proceedings, or where the law forbids arrest for the collection of demands. *Smith v. Jones*, 76 Me. 123, 49 Am. Rep. 503.

Yet the privilege to parties to judicial proceedings, as well as others required to attend upon them, of going to the place where they are held, and remaining so long as is necessary, and returning wholly free from the restraint of process in other civil proceedings, has always been well set-



turn home the same day, by the first convenient train, is privileged from summons as he leaves the court.

*Boligiano v. Gilbert Lock Co.* 78 Md. 182.

Sanborn was both a suitor and a necessary witness, and privileged in both capacities. He

was obliged to be here to testify, as he could not testify on commission and was so advised by counsel.

*Goodman v. Wineland.* 61 Md. 455.

If there is room to contend that the *Boligiano Case* does not go so far as the present case, see

tied and favorably enforced. *Bridges v. Sheldon*, 18 Blatchf. 507.

The proceedings, however, must be in court. *Parker v. Manco*, 61 Hun, 519.

The exemption rule is not by force of any statute. *Damkin v. Starkey*, 7 Hun, 479; *Sheehan v. Bradford, B. & K. R. Co.* 3 N. Y. Supp. 790.

The privilege arises out of the authority and dignity of the court where the cause is pending, and protection against the violation of the privilege is to be enforced by that court and will be respected by others. *Re Healey*, 53 Vt. 694, 33 Am. Rep. 713.

It is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses should be molested with process while attending court. *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 85; *Parker v. Manco*, *supra*; *Parker v. Hotchkiss*, 1 Wall. Jr. 268; *Sheehan v. Bradford, supra*; *Moletor v. Sinnen*, 7 L. R. A. 817, 76 Wis. 308.

The privilege exists to subserve public interest. *Moletor v. Sinnen*, *supra*.

It is founded upon valid considerations of public policy. *Sherman v. Gundlach*, 37 Minn. 118.

And is for the benefit of parties, enabling them to obtain the testimony of witnesses who might otherwise be reluctant to attend the court. *May v. Shumway*, 16 Gray, 80, 77 Am. Dec. 401.

It is a policy of the law established for the facilitation of the public business. *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598.

As such it has received almost universal recognition wherever the common law is known and administered. *Andrews v. Lembeck*, 46 Ohio St. 83.

Rendering the privilege of justice free and untrammelled, and protecting from improper interference all who are concerned in it. *Huddeson v. Prizer*, 9 Phila. 65.

The claim of privilege must, however, in general be taken strictly. *Chaffee v. Jones*, 19 Pick. 261.

It does not depend upon the writ of subpoena or of protection, but grows out of the privilege established by the law and constitutes a continuing order. *Re Healey*, 53 Vt. 694, 33 Am. Rep. 713; *Brett v. Brown*, 13 Abb. Pr. N. S. 206; *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844; *Sherman v. Gundlach*, *supra*.

There is no difference as regards this privilege between writs of summons and writs of capias, the exemption tending to both alike and is well settled. *Huddeson v. Prizer*, *supra*; *Richards v. Goodson*, 2 Va. Cas. 381.

The service of a subpoena makes no difference, and would be an idle ceremony. *Sherman v. Gundlach*, *supra*.

A witness from a foreign jurisdiction being under the protection of the law. *Wilson v. Donaldson*, 3 L. R. A. 266, 117 Ind. 356.

In the case of a nonresident suitor or witness, the weight of authority is to the effect that the immunity is absolute from the service of any process, unless the case is exceptional. *Re Healey*, 53 Vt. 694, 33 Am. Rep. 713.

Their immunity from the service of process for the commencement of civil actions against them is absolute *eundo, morando et redeundo*, both upon principle and authority. *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 85; *Richards v. Goodson*, 2 Va. Cas. 381; *Seaver v. Robinson*, 3 Duer, 622; *Sanford v. Chase*, 3 Cow 381.

And the party if arrested will be discharged absolutely. *Merrill v. George*, 23 How. Pr. 331; *Hop-* 25 L. R. A.

*kings v. Coburn*, 1 Wend. 292; *Friable v. Young*, 11 Hun, 474.

The privilege of parties and witnesses is alike the privilege of the court and the citizen; it protects the court from interruption and delay, takes away the inducement to disobey the process and enables the citizen to prosecute his rights without molestation, and procures the attendance of all who are necessary for his defence or support. *Halsey v. Stewart*, 4 N. J. L. 366.

It is the privilege of the court, yet it is the protection of the suitor or witness to whom the common law gives a right of privilege, in that case, in lieu of which summary relief on motion is now substituted and this cannot be denied on proper grounds shown, for there is no such thing in the law as writs of grace and favor issuing from the judges, they are all writs of right and not of courts. *United States v. Edme*, 9 Serg. & R. 147.

The privilege, however, has been held to be not that of the person attending, but of the court which he attends. *Re Healey*, 53 Vt. 694, 33 Am. Rep. 713; *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598; *Parker v. Hotchkiss*, 1 Wall. Jr. 268; *Hunter v. Cleveland* 1 Brev. 167; *Hayes v. Shields*, 2 Yeates, 222; *Ex parte Everts*, 2 Disney (Ohio) 83.

And as such has to be vindicated by a discharge when an arrest has taken place in violation of their privilege. *Com. v. Daniel*, 4 Clark (Pa.) 49.

The right is afforded, not so much for the witness as for the party. *Smith v. Jones*, *supra*.

Yet it has been held that the privilege does not concern the dignity of the court merely, but is primarily, and above all conferred for the just protection of the party himself, in order that the performance of a duty, or the submission to process which the party cannot resist, shall not be made use of to his injury or oppression. *People v. Detroit Super. Ct. Judge*, 40 Mich. 729.

It is the privilege of a party to an action or suit to attend the court and be examined as a witness or not, as he may be advised, without being subjected to civil prosecution while so remaining or being examined. *First Nat. Bank of St. Paul v. Ames*, 30 Minn. 179.

The privilege is personal, part of the man's individual freedom, essential to the defense of his legal rights, and designed to protect the feeble and the poor from oppression. *Key v. Jetto*, 1 Pittsb. 117; *Smith v. Jones*, *supra*; *Huddeson v. Prizer*, 9 Phila. 65.

The protection afforded by the law is a personal privilege of which the party entitled to rely upon it, may avail himself to prevent or defeat an arrest. *Brown v. Getchell*, 11 Mass. 11.

It has been considered not only the privilege of the party but of the people. *Anderson v. Rountree*, 1 Pinney, 115.

As the privilege of a court the incidental immunity to the party is scarcely the subject of abuse, being exercisable, or not, in each particular case, as the process of substantial justice may seem to require. *Parker v. Hotchkiss*, 1 Wall. Jr. 268.

The law does not declare that a witness shall not be arrested, but gives him the right to free himself from arrest if he desires to. *Smith v. Jones*, *supra*.

Protection to a witness ought to be at least as extensive as to a party. *United States v. Edme*, 9 Serg. & R. 147.

The fact that he was not summoned and ob-

the following cases, cited with approval by this court, which are exactly on "all fours" with the present case.

*Mitchell v. Huron Circuit Judge*, 58 Mich. 541; *First Nat. Bank of St. Paul v. Ames*, 89 Minn. 179; *Matthews v. Tufts*, 87 N. Y. 568; *Person v.*

*Grier*, 66 N. Y. 124, 28 Am. Rep. 35; *Wilson v. Donaldson*, 8 L. R. A. 286, 117 Ind. 856; *Small v. Montgomery*, 28 Fed. Rep. 707. See also *Dungan v. Miller*, 87 N. J. L. 182; *Kauffman v. Kennedy*, 25 Fed. Rep. 785; *Sherman v. Gundlach*, 87 Minn. 118; *Palmer v. Rowan*, 21

tained no writ of protection, does not alter the case. *May v. Shumway*, 16 Gray, 86, 77 Am. Dec. 401.

The right is not so much to avoid the arrest, but to terminate it. *Smith v. Jones*, *supra*.

It is a conditional or contingent right of the witness which may be taken advantage of by him or not as he pleases. *Ibid*.

Therefore judges are not bound judicially to notice a right of privilege, nor to grant it without claim. *Gyer v. Irwin*, 4 U. S. 4 Dall. 187, 1 L. ed. 762.

It is to some extent a discretionary matter with a court or judge, whether a witness shall be discharged upon arrest. *Smith v. Jones*, *supra*.

When it is not a mere cover to a skulking debtor, it ought to be considered liberally. *United States v. Edme*, *supra*.

Yet it is not an actual right. *Smith v. Jones*, *supra*.

The arrest of a person who has a special privilege or exemption is in no case void but voidable, merely, and an action of false imprisonment will not lie against the officer or party issuing out the process. *Fletcher v. Baxter*, 2 Ark. 224; *Smith v. Jones*, *supra*; *People v. Detroit Super. Ct. Judges*, 40 Mich. 729.

It remains valid until avoided. *Smith v. Jones*, *supra*.

A person ordering an arrest may be punished for contempt of court for interference with its business. *Ibid*.

An arrest is ceremonious with actual detention of the person of the party arrested, and does not mean merely a summons or citation. *Huntington v. Shultz*, Harp. L. 452, 18 Am. Dec. 660.

An arrest should not be valid, even for the purpose of giving jurisdiction to the court out of which the process issues, more especially where the witness is attending from a foreign state. *Seaver v. Robinson*, 3 Duer, 622; *Sanford v. Chase*, 3 Cow. 361.

### III. The extent and limit of the privilege.

Generally, at common law, parties and witnesses are liable to be sued though their bodies cannot be detached or detained, and hence it is stated that they are entitled to their liberty, but the privilege extends no further, the suit not abating for any such cause. *Bishop v. Vose*, 27 Conn. 1.

From the first it has been the law, both common and statute, that a foreign citizen if found in the state, whether there on business or pleasure, or hastening through the state with railroad speed, is liable to be sued like any other person and is not entitled to any personal or peculiar immunity. *Ibid*.

But a defendant is not amenable to process unless he is in, or comes voluntarily within the territorial jurisdiction of the court. *Wanser v. Bright*, 62 Ill. 42; *Williams v. Bacon*, 10 Wend. 636; *Carpenter v. Spooner*, 2 Sandf. 717; *Seaver v. Robinson*, 3 Duer, 622.

It is a general principle, however, that parties and witnesses, and all who have any relation to a cause which calls for their attendance in court as bail, are privileged during their attendance upon court, and in going to and returning from it, whether they are compelled to attend or not. *Fletcher v. Baxter*, 2 Ark. 224.

Parties and witnesses attending in good faith any legal tribunal, whether a court of record or not, having power to pass upon the rights of the per-

son attending, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, whether they are residents of the state or come from abroad; whether they attend on summons or voluntarily; and whether they have or have not obtained a writ of protection. *Thompson's Case*, 122 Mass. 423, 23 Am. Rep. 370.

In point of time, the privilege exists during the time fairly occupied in going to and returning from the place of trial or hearing, as well as during the time when the party is in actual attendance at the place of trial. *Nichols v. Horton*, 4 McCrary, 597, 14 Fed. Rep. 337; *Brooks v. Farwell*, 2 McCrary, 220; *Juneau Bank v. McSpedan*, 5 Blm. 64; *Bridges v. Sheldon*, 7 Fed. Rep. 17; *Plimpton v. Winslow*, 9 Fed. Rep. 365; *Lyell v. Goodwin*, 4 McLean, 28; *Person v. Grier*, 66 N. Y. 124, 28 Am. Rep. 35; *Holmes v. Nelson*, 1 Phila. 217; *Smythe v. Banks*, 4 U. S. 4 Dall. 230, 1 L. ed. 854; *Moletor v. Sinnen*, 7 L. R. A. 817, 7 Wis. 308; *Wilbur v. Boyer*, 1 W. N. C. 184; *Gregg v. Sumner*, 21 Ill. App. 110; *Re Dickenson*, 3 Harr. (Del.) 517; *Henegar v. Spangler*, 29 Ga. 217.

With a reasonable time for the witness to return home after the rising of the court. *Ex parte Hall*, 1 Tyler (Vt.) 274; *Schlesinger v. Foxwell*, 1 N. Y. City Ct. Rep. 461; *Brett v. Brown*, 13 Abb. Pr. N. S. 295.

It is not sufficient, however, that he is a nonresident of the jurisdiction; it must appear that he came from without the jurisdiction upon the occasion of the judicial proceeding which he was attending and for the purpose of attending it. *Day v. Harris*, 59 Hun. 623, 37 N. Y. S. R. 322, 14 N. Y. Supp. 3.

The immunity does not extend merely to particular individuals, but to all persons under certain circumstances, on the principle that where the law requires any duty of the citizen, it will protect him in the discharge of that duty, and that individuals cannot demand the use of public civil process, so as to arrest or interfere with others in the performance of public duties, or of duties required by public process. *Holmes v. Nelson*, *supra*.

The rule has been thus expressed: "All parties to a suit, and their witnesses, are, for the sake of public justice, protected from arrest in coming to, attending upon, and returning from the court, or as it is usually termed *cumdo, morando et redeundo*." *Greer v. Young*, 120 Ill. 139, reversing *Greer v. Youngs*, 17 Ill. App. 106. To the same effect, *Palmer v. Rowan*, 21 Neb. 422, 59 Am. Rep. 844.

The immunity is secured to all jurors, parties, witnesses, law agents, and even common agents of the parties. *Holmes v. Nelson*, 1 Phila. 217; *Hudson v. Prizer*, 9 Phila. 65.

To all who have any relation to a cause as parties, attorneys, bail, etc. *Christian v. Williams*, 111 Mo. 429.

And to a nonresident officer of a foreign corporation attending for the purpose of giving evidence. *Mulhearn v. Press Pub. Co.* 11 L. R. A. 121, 58 N. J. L. 158.

If the cause calls for their attendance in court. *Baldwin v. Emerson*, 16 R. I. 804; *First Nat. Bank of St. Paul v. Ames*, 89 Minn. 179.

The doctrine of exemption was upheld in *North v. Hassler*, 23 Fed. Rep. 561.

Even though attending voluntarily. *Baltinger v. Elliott*, 72 N. C. 596; *Bolgiano v. Gilbert Look Co.* 73 Md. 133.

Neb. 452, 59 Am. Rep. 844; *Miles v. McCulloch*, 1 Binn. 77; *Atchison v. Morris*, 11 Fed. Rep. 582; *Massey v. Colosille*, 45 N. J. L. 119, 46 Am. Rep. 754; *Hudson v. Prizer*, 9 Phila. 65; 1 Whart. Ev. § 889; Freeman's note, 77 Am. Dec. 401; Rorer, Interstate Law, 2d ed.

p. 82; Comyn's Dig. title *Privilege*; 1 Greenl. Ev. §§ 816-818; Taylor, Ev. § 1330 p. 1126; 22 Am. & Eng. Encyclop. Law, p. 163, title, *Service of Process*, 8, 3; 3 Bl. Com. 289; *Cole v. Hawkins*, 2 Strange, 1094; *May v. Shumway*, 16 Gray, 86, 77 Am.

The court being bound to protect them. *Norris v. Beach*, 2 Johns. 294. To the same effect, *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 85; *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844.

Even if summoned. *Palmer v. Rowan*, *supra*; *Sherman v. Gundlach*, 37 Minn. 118; *Brett v. Brown*, 23 Abb. Pr. N. S. 205.

Whether attending with or without a subpoena. *Pollard v. Union Pac. R. Co.* 7 Abb. Pr. N. S. 70; *Walpole v. Alexander*, 8 Dougl. 45; *Rogers v. Bullock*, 3 N. J. L. 109; *Dixon v. Ely*, 4 Bdw. Ch. 597, 6 L. ed. 973; *Dungan v. Miller*, 37 N. J. L. 123; *Re Healey*, 53 Vt. 664, 38 Am. Rep. 718; *Brett v. Brown*, 23 Abb. Pr. N. S. 205; *May v. Shumway*, 16 Gray, 86, 77 Am. Dec. 401.

The principles of exemption rest and apply as well to parties as to witnesses. *First Nat. Bank of St. Paul v. Ames*, 39 Minn. 179; *Mitchell v. Huron Circuit Judge*, 53 Mich. 542; *Pollard v. Union Pac. R. Co.* and *Dungan v. Miller*, *supra*; *Merrill v. George*, 23 How. Pr. 331; *MacKay v. Lewis*, 7 Hun, 53.

And to strangers as to citizens. *Holmes v. Nelson*, 1 Phila. 217.

Where they are necessarily attending any court. *First Nat. Bank of St. Paul v. Ames*, *supra*.

Having been brought into such foreign state by process of law, they cannot, while there, be called to answer in another action. *Brooks v. Farwell*, 2 McCrary, 220.

This is so whether the privilege be regarded as a personal one to the witness or a privilege of the court. *Bolgiano v. Gilbert Look Co.* 73 Md. 132.

The exemption from arrest in returning home is never allowed but for the sake of enabling the party to go and stay freely without any apprehension, even in regard to his return home. *Scott v. Curtis*, 27 Vt. 762.

The courts will not take jurisdiction of a party thus attending in good faith as a witness during the continuance of his freedom from arrest. *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 85.

The point has never been doubted. *Seaver v. Robinson*, 3 Duer, 622.

It is bad faith to commence a civil action and attempt to serve a summons and an order of arrest therein, before conviction on a criminal charge, and before the defendant has an opportunity to return. *Compton v. Wilder*, 40 Ohio St. 130.

And the tendency of the courts is to enlarge the privilege to all forms of process of a civil nature. *Bolgiano v. Gilbert Look Co.* *supra*.

The protection extends to all legal tribunals of a judicial character, whether strictly courts of record or not, recognized by the laws of the state and having power to pass upon the rights of persons attending them. *Wood v. Neale*, 5 Gray, 588; *Larned v. Griffin*, 13 Fed. Rep. 590; *Bolgiano v. Gilbert Look Co.* *supra*.

The term "court" has been thus construed: "The privilege is granted in all cases where the attendance of the party or witness is given in any matter pending before a lawful tribunal having jurisdiction of the cause." *Greer v. Young*, 120 Ill. 189, reversing *Greer v. Young*, 17 Ill. App. 106.

In civil suits of the United States courts there is the same privilege to suitors and witnesses as the law gives in actions by one citizen against another. *United States v. Edme*, 9 Serg. & R. 147; *Holmes v. Nelson*, 1 Phila. 217.

Such a witness in the circuit court is privileged from service of summons in an action in a state court. *Atchison v. Morris*, 11 Fed. Rep. 582.

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It extends to any tribunal sitting in the nature of a court in the administration of justice. *Fletcher v. Baxter*, 2 Alf. 224.

Not only to persons who are in the immediate presence of the judge of the courts of record, but to those also who are in attendance upon the subordinate tribunals and officers appointed by those courts, to assist them in the discharge of their duties to witnesses subpoenaed by commissioners. *Hudson v. Prizer*, 9 Phila. 65.

Wherever attendance is a duty in conducting any proceedings of a judicial nature, as commissions of bankrupt, a judge at his chambers, and a witness attending an arbitration under a rule of court, a witness before a master in chancery, to make an affidavit. *United States v. Edme*, *supra*; *Bridges v. Sheldon*, 18 Blatchf. 507.

To proceedings before any person substituted *pro hac vice* in the place of the court. *Holmes v. Nelson*, 1 Phila. 217.

Whether taking place in court or not. *People v. Detroit Super. Ct. Judge*, 40 Mich. 723.

The place of attendance is immaterial. *Dungan v. Miller*, 37 N. J. L. 123.

But the extension does not protect a witness or suitor of a tribunal unknown to our laws. *Holmes v. Nelson*, *supra*.

Nor where the evidence is taken out of court. *Parker v. Manco*, 61 Hun, 519.

It is not limited to mere exemption from arrest. *Martin v. Ramsey*, 7 Humph. 280.

Witnesses should be protected against molestation by means of the process of the court in any form; the practice of extending such protection must be upheld. *Lamkin v. Starkey*, 7 Hun, 479.

There must be an opportunity to return. *Compton v. Wilder*, 40 Ohio St. 130.

A reasonable time must elapse after the discharge for this purpose before a witness can be made. *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844; *Schlesinger v. Foxwell*, 1 N. Y. City Ct. Rep. 461; *Ex parte Hall*, 1 Tyler (Vt.) 274; *Brett v. Brown*, 23 Abb. Pr. N. S. 205.

It extends to a witness preparing for home served with summons the morning after the trial. *Wilbur v. Boyer*, 1 W. N. C. 154, where the witness had remained till after verdict.

His acts must be bona fide, and without unreasonable delay. *Sherman v. Gundlach*, 37 Minn. 118; *Bolgiano v. Gilbert Look Co.* 73 Md. 132.

It extends for so long a time as is fairly required in going and returning. *Gregg v. Sumner*, 21 Ill. App. 110.

Such time is measured according to the circumstances. *Wilbur v. Boyer*, *supra*.

Liberality is exercised in regard to the reasonableness of the time. *Salinger v. Adler*, 2 Robt. 704.

The courts will not nicely scan the time of the return of parties, witnesses, etc. *Hayes v. Shields*, 2 Yeates, 222.

It would be too severe a rule to say that a witness must take the first train after leaving court. *Wilbur v. Boyer*, *supra*.

The privilege extends to the protection of the party at his lodgings. *Ex parte Hurst*, 1 Wash. C. C. 186.

But if he stays for purposes of business or pleasure he is not protected. *Rex v. Platt*, 3 W. N. C. 187; *Smythe v. Banks*, 4 U. S. 4 Dall. 329, 1 L. ed. 854; *Finch v. Gallagher*, 13 N. Y. Supp. 497, 23 Abb. N. C. 404.

Dec. 401, *note*; *Hayes v. Shields*, 2 Yeates, 222; *Seaver v. Robinson*, 8 Duer, 622; *Re Henley*, 53 Vt. 694, 38 Am. Rep. 717, *note*.

*Mr. Bernard Carter* also for appellees.

*Fowler, J.*, delivered the opinion of the court:

Edward F. Sanborn and Arthur C. Mann,

It extends to exemption from suits or other civil process as not only the privilege of the party but of the people. *Anderson v. Roundtree*, 1 Pinney, 115.

Not only to arrest, but also freedom from action. *Merrill v. George*, 28 How. Pr. 331.

It extends to an attachment for nonpayment of costs only. *Snelling v. Watrous*, 2 Paige, 814, 2 L. ed. 923.

And to the taking upon a writ of *ne exeat*. *Dixon v. Ely*, 4 Edw. Ch. 537, 6 L. ed. 973.

To arrest under bail process. *Vincent v. Watson*, 1 Rich. L. 194.

His privilege protects him. *Jenkins v. Smith*, 57 How. Pr. 171.

In an action against him personally, or in a fiduciary capacity. *Grafton v. Weeks*, 7 Daly, 523.

It is enforced to protect not only the body of the suitor from arrest, but his horse and other things necessary for his journey which would otherwise be attachable by the custom of London from seizure for debt. *Bridges v. Sheldon*, 18 Blatchf. 507; *Year Book*, 20 Hen. VI. 10.

In all cases coming within its reason and true purpose, the court will not hesitate to enforce it. *Nichols v. Horton*, 4 McCrary, 507; *Pollard v. Union Pac. R. Co.* 7 Abb. Pr. N. S. 70.

And without a writ of protection. *Larned v. Griffin*, 12 Fed. Rep. 590; *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844; *Schlesinger v. Foxwell*, 1 N. Y. City Ct. Rep. 431.

The claim of protection not being affected by reason of the service of a summons to attend. *Atchison v. Morris*, 11 Blas. 221.

Upon principle as well as upon authority, the immunity from the service of process for the commencement of civil actions against them, is absolute *eundo, morando et redeundo*. *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 36; *Schlesinger v. Foxwell*, and *Larned v. Griffin*, *supra*.

The court will not sanction the service of a summons or mesne process upon a nonresident, coming into the state for the purpose of prosecuting or defending a cause of his own. *Juneau Bank v. Moßpedan*, 5 Blas. 64.

It does not extend to the taking of depositions before a notary who performs purely ministerial functions, and cannot decide questions or determine any matter affecting the rights of the parties, not having jurisdiction of the cause. *Greer v. Young*, 120 Ill. 189, reversing *Greer v. Youngs*, 17 Ill. App. 106; *Parker v. Manco*, 61 Hun, 519.

Yet it has been held to be no objection to the doctrine where the parties consent to the testimony being taken before a notary, instead of before an officer of the court, appointed for the purpose, the testimony given being as much in the action as if it had been given in court. *Hollender v. Hall*, 13 N. Y. Supp. 759, affirmed, 58 Hun, 604, 33 N. Y. S. R. 848; *Larned v. Griffin*, *supra*.

Nor where the testimony is taken *de bene esse* before a referee or notary. *Marks v. La Société Anonyme de L' Union des Papeteries*, 19 N. Y. Supp. 470, 48 N. Y. S. R. 660; *Hollender v. Hall*, 13 N. Y. Supp. 753, 33 N. Y. S. R. 848.

In *Andrews v. Lembeck*, 46 Ohio St. 88, the privilege was extended to a party attending court upon the hearing of an injunction.

To the case of a party to a suit in equity attending before a master or an examiner, the party having been served with summons. *Huddeson v.* 25 L. R. A.

trading as Sanborn & Mann, residing and doing business in Massachusetts, issued out of the Baltimore City Court an attachment on original process against Joseph Mullen, a citizen of this state and a resident of Baltimore City. This attachment was subsequently quashed, and the short note case was prosecuted, but without success. Sanborn,

*Prizer*, 9 Phila. 65; *Larned v. Griffin*, 12 Fed. Rep. 590; *Dungan v. Miller*, 37 N. J. L. 182; *Scott v. Curtis*, 27 Vt. 762; *First Nat. Bank of St. Paul v. Ames*, 39 Minn. 179.

Even though voluntary. *Dungan v. Miller*, *supra*.

And in vacation. *Vincent v. Watson*, 1 Rich. L. 194.

Also to one of several defendants so attending. *Dungan v. Miller*, *supra*.

And to such attendance in a suit for the infringement of letters patent. *Plimpton v. Winslow*, 3 Fed. Rep. 365.

And to the taking of testimony before a master or commissioner, preparatory to the final submission of the cause to a court. *Nichols v. Horton*, 4 McCrary, 507, 14 Fed. Rep. 827.

Also to the taking of testimony upon motion before a supreme court commissioner. *Mulhearn v. Press Pub. Co.* 11 L. R. A. 101, 53 N. J. L. 153.

To the taking of depositions upon commission as a contempt of court under section 723. *Rev. Stat. of the United States*. *Bridges v. Sheldon*, 18 Blatchf. 507, where a defendant so attending was served with summons.

To a witness returning home from attending before a magistrate under a rule of court. *United States v. Edme*, 9 Serg. & R. 147.

And to the attendance before arbitrators, commissioners. *Larned v. Griffin*, 12 Fed. Rep. 590; *Farmer v. Robbins*, 47 How. Pr. 415; *Sheehan v. Bradford*, B. & K. R. Co. 3 N. Y. Supp. 790.

Whether appointed by rule of court and master in chancery, or on the execution of a writ of inquiry. *Dungan v. Miller*, 37 N. J. L. 182.

There is no difference in principle or practice, whether the parties are necessarily and in good faith attending the trial of an action in court, or an examination before a referee or a master in chancery. *First Nat. Bank of St. Paul v. Ames*, 39 Minn. 179.

The privilege extends to freedom from arrest in attending upon an action referred for the court's decision upon a case stated. *Ex parte McNell*, 5 Mass. 245.

To the service of a summons upon a party while attending an appeal of his case from the court below. *Miles v. McCullough*, 1 Binn. 77.

It extends to attendance upon the court in the case of a suit adjourned from day to day owing to the illness of the other party. *Ellis v. De Garmo*, 19 L. R. A. 560, 17 R. I. 715.

If a defendant is really in the state to protect his own interest in the taking of testimony to be used against him in another state, the principles enunciated in the New York cases are looked upon as broad enough to protect him *eundo, morando et redeundo*. *Greer v. Young*, 120 Ill. 189.

The mere service of the summons upon a non-resident, when in another state, for the purpose of taking depositions to be used in an action to which he is a party in his own state, imposes no greater hardship upon him than to be served with process out of his own state when attending to any other kind of business. *Greer v. Young*, 120 Ill. 189, reversing *Greer v. Youngs*, 17 Ill. App. 106.

Yet the privilege has been held to extend to the taking of depositions upon commission. *Bridges v. Sheldon*, 18 Blatchf. 507, under rule of court.

one of the plaintiffs in the attachment suit, was advised by his counsel here that it would be necessary for him to testify as a witness at the trial of the short note case, and it is admitted he came here for that purpose.

The case, however, was continued and Sanborn having left the court-room in Baltimore was about to depart from this state for his

home in Massachusetts, when he was summoned as a defendant in the cause brought by the appellant, Mullen, to recover damages for wrongfully, maliciously, and without apparent cause issuing the attachment above mentioned. Sanborn moved to quash the writ of summons and the return of the sheriff thereon, on the ground that being a witness from

*Klusman v. Reineix*, 2 Miles (Pa.) 300; *Wetherill v. Seitzinger*, 1 Miles (Pa.) 237.

If a citizen or resident of the state, he is entitled to discharge on entering his appearance, and if from a foreign state, absolutely. *Pollard v. Union Pac. R. Co.* 7 Abb. Pr. N. S. 70.

The privilege of a witness from arrest requires an absolute discharge from arrest, and makes such arrest a contempt of court under 2 Rev. Stat. 402, § 51. 1844.

The power to discharge suitors and witnesses is inherent in every court, but will not be exercised except under special circumstances. *Kinsman v. Reineix*, and *Wetherill v. Seitzinger*, *supra*.

It has been held there is no immunity from the service of process, because the party is only temporarily within the jurisdiction of the court. *McIntire v. McIntire*, 5 Mackey, 344.

In *Blight v. Fisher*, 1 Pet. C. C. 41, the privilege of a suitor or witness was held to extend only to an exemption from arrest, and did not extend to exemption from the service of a summons, either upon a party to a cause or a witness.

The exemption has been held only to apply to arrest and not to cover cases of service of process which does not interfere with or prevent the party's attendance upon the court. *Baldwin v. Emerson*, 16 R. L. 304; *Capwell v. Sipe*, 17 R. L. 475.

A suitor may be privileged from arrest on civil process, but is not privileged from service of non-bailable process. *Hunter v. Cleveland*, 1 Brev. 137; *Hopkins v. Coburn*, 1 Wend. 232; *Sadler v. Ray*, 5 Rich. L. 533; *Legrand v. Bedinger*, 4 T. B. Mon. 539.

The privilege only extends to the exemption of his person from arrest. *Sadler v. Ray*, *supra*.

It does not apply to a prisoner discharged from duress or imprisonment. *Lynch's Case*, 1 City Hall Rec. 133; *Shotwell's Case*, 4 City Hall Rec. 75.

And does not extend throughout the term at which the cause is marked for trial. *Smythe v. Banks*, 4 U. S. 4 Dall. 320, 1 L. ed. 354.

Nor is it an absolute freedom from arrest, such as belongs to the members of the royal family of England, or to ambassadors and some others. *Smith v. Jones*, 76 Me. 133, 49 Am. Rep. 593.

It is not a total exemption from arrest, such as is extended to persons discharged from arrest in bankruptcy or insolvency proceedings, or where the law forbids arrest for the collection of demands. *Ibid*.

It does not apply to a witness taken to a foreign state to answer a criminal charge, served with a summons while there. *Scott v. Curtis*, 27 Vt. 762; *Com. v. Daniel*, 4 Clark (Pa.) 49; *Key v. Jetto*, 1 Pittsb. 117; *Byler v. Jones*, 22 Mo. App. 623; *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470; *Williams v. Bacon*, 10 Wend. 636; *Addicks v. Bush*, 1 Phila. 19.

In *Lucas v. Albee*, 1 Denio, 663, the court held the rule of privilege did not extend to a defendant, arrested on a capias in a civil action for an offense of which he had just been tried and convicted in the court of special sessions.

It has been held not to apply to the case of a suitor served with a writ of summons while attending court, such process not interfering with his attending nor obstructing the due administration of justice. *Hills v. De Garmo*, 19 L. R. A. 560, 17 R. J. 715.

Nor to protect a witness from arrest for perjury 35 L. R. A.

committed in the cause wherein he had given evidence. *Ex parte Levi*, 23 Fed. Rep. 651.

The privilege extends at common law only so far as to discharge from arrest when arrested on civil process, and does not abate the suit. *Christian v. Williams*, 111 Mo. 423.

The privilege from arrest of parties and witnesses attending before the senate or house of representatives, or their committee, is the same as of those attending any strictly judicial tribunal. *Thompson's Case*, 122 Mass. 423, 23 Am. Rep. 370.

The fact that a party is engaged in preparing to set aside a referee's report gives him no claim to exemption from arrest. *Clark v. Grant*, 2 Wend. 257.

Such act only grants immunity from arrest when the party is in attendance under due service of a subpoena. *Massey v. Colville*, 45 N. J. L. 119, 45 Am. Rep. 754.

The law permits civil suits to be commenced and prosecuted against persons who may be brought unwillingly into the state, where the creditor has nothing to do directly or indirectly with bringing such debtor within the jurisdiction of the court. *Nichols v. Goodheart*, 5 Ill. App. 374; *Williams v. Bacon*, 10 Wend. 636.

In *Nichols v. Goodheart*, *supra*, the defendant, brought within the state on a criminal process, was sued civilly, and it was held the evidence not showing that the plaintiff brought him within the jurisdiction, either directly or indirectly, that such suit was maintainable.

On every joint and several bond, where the actions are supported against two or more defendants, every individual is liable in his separate and distinct capacity, and the privilege or exemption from arrest which the law allows to one defendant will not prevent the ordinary course of justice against any of the other obligors, the privilege not being extended by implication, because a fellow debtor is entitled to legislative exemption from arrest. *Gibbes v. Mitchell*, 2 Bay (S. C.) 403.

In *Greer v. Young*, 120 Ill. 139, reversing *Greer v. Young*, 17 Ill. App. 103, the court held the privilege was not to be extended to a case of service by merely reading the document.

Such an action does not come within the reasons of the rule. *Greer v. Young*, *supra*.

#### IV. Parties as witnesses.

Nonresident parties have been held entitled to privilege from service of summons. *Wilson Sewing Mach. Co. v. Wilson*, 22 Fed. Rep. 303; *Brooks v. Farwell*, 4 Fed. Rep. 163; *Parker v. Hotchkiss*, 1 Wall. Jr. 206; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Small v. Montgomery*, 23 Fed. Rep. 707; *United States v. Bridgman*, 9 Biss. 221; *First Nat. Bank of St. Paul v. Ames*, 39 Minn. 179; *Gregg v. Sumner*, 21 Ill. App. 110; *Wilson v. Donaldson*, 8 L. R. A. 266, 117 Ind. 356; *Greer v. Young*, 120 Ill. 139, reversing *Greer v. Young*, 17 Ill. App. 103; *Jacobson v. Hoemer*, 76 Mich. 234; *Letherby v. Shaver*, 73 Mich. 500; *Mitchell v. Huron Circuit Judge*, 53 Mich. 542; *Torry v. Bast*, 3 W. N. C. 63; *Moletor v. Sinnen*, 7 L. R. A. 317, 76 Wis. 303; *Addicks v. Bush*, 1 Phila. 19; *Wetherill v. Seitzinger*, 1 Miles (Pa.) 237; *Waterman v. Merritt*, 7 R. L. 345; *Palmer v. Brown*, 21 Neb. 452, 59 Am. Rep. 644; *Halsey v. Stewart*, 4 N. J. L. 366; *Tribune Assn. v. Sleeman*, 12 N. Y. Civ. Proc. Rep. 21; *Matthews v. Tufts*, 37 N. Y. 533; *Murphy v.*

another state he was exempt from civil process while attending as a witness in the short note case, and for a reasonable time thereafter. This motion was answered by Mullen, who insisted that it should be dismissed but the court below being of opinion that it was

bound by the decision of this court in *Belgiano's Case*, 78 Md. 183, passed an order quashing the writ of summons as prayed by Sanborn. From this order Mullen has appealed.

The only question, therefore, presented

Sweezy, 2 N. Y. Supp. 241; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 36; *Dungan v. Miller*, 37 N. J. L. 182; *Holmes v. Nelson*, 1 Phila. 217; *Hayes v. Shields*, 2 Yeates, 222; *Kaufman v. Kennedy*, 26 Fed. Rep. 765; *Miles v. McCullough*, 1 Binn. 77; *Bridges v. Sheldon*, 18 Blatchf. 507.

They have also been held exempt from arrest in civil actions. *Compton v. Wilder*, 40 Ohio St. 130; *Page v. Randall*, 6 Cal. 38; *Thompson's Case*, 123 Mass. 423, 23 Am. Rep. 370; *Com. v. Huggesford*, 9 Pick. 267; *Wood v. Neale*, 5 Gray, 535; *Case v. Bora-bacher*, 15 Mich. 537; *Torry v. Bast*, 8 W. N. C. 63; *Addicks v. Bush*, 1 Phila. 19; *Wetherell v. Seltzinger*, 1 Miles (Pa.) 237; *Harris v. Grantham*, 1 N. J. L. 143; *Clark v. Grant*, 2 Wend. 257; *Snelling v. Watrous*, 2 Paige, 814, 2 L. ed. 923; *Murphy v. Sweezy*, 2 N. Y. Supp. 241; *Salhinger v. Adler*, 2 Robt. 704; *Ellis v. De Garmo*, 19 L. R. A. 560, 17 R. L. 715; *Dungan v. Miller*, 37 N. J. L. 182; *Tribune Assn. v. Sleeman*, 12 N. Y. Civ. Proc. Rep. 21; *Holmes v. Nelson*, 1 Phila. 217; *Hayes v. Shields*, 2 Yeates, 222; *Moleter v. Sinnen*, 7 L. R. A. 817, 76 Wis. 308; *Com. v. Daniel*, 4 Clark (Pa.) 49; *Pollard v. Union Pac. R. Co.* 7 Abb. Pr. N. S. 70; *Ex parte McNeil*, 6 Mass. 245; *Blight v. Fisher*, 1 Pet. C. C. 41; *Schlesinger v. Foxwell*, 1 N. Y. City Ct. Rep. 441; *Richards v. Goodson*, 2 Va. Cas. 381; *Taft v. Hopkin*, Anthon, Nisi Prius 187.

But some courts have held that a nonresident plaintiff is not exempt from obeying any ordinary process of the court. *Page v. Randall*, *supra*; *Blahop v. Vose*, 27 Conn. 1.

A nonresident plaintiff is not exempt from service of a summons in another suit. *Baldwin v. Emerson*, 16 R. I. 304.

The reason being that such service amounts simply to a notice and does not obstruct the administration of justice, nor interfere with the attendance or attention of a party to the suit then on trial. *Ellis v. De Garmo*, 19 L. R. A. 560, 17 R. L. 715.

Where the plaintiff alleged that he was not a resident of San Francisco, in attendance as a suitor upon the board of the United States land commissioner, but did not allege that at the precise time of the summons he was in attendance upon any court as a witness, juror, or party, the court held that even if this had been so he would only have been exempted from arrest in a civil action, and not from obeying any ordinary process of the court. *Page v. Randall*, 6 Cal. 32.

Yet where a nonresident party plaintiff in a suit procured a writ of protection and attending under it on the trial, and until the case was committed to the jury, and when on his way home was served with a writ of summons, the action was dismissed for want of legal service. *Waterman v. Merritt*, 7 R. I. 245.

Where the defendant pleaded in abatement that he was privileged while attending court as a party defendant to another suit from service of a civil process, the court held that in general, exemption from service of process without arrest, merely because a party was attending court awaiting trial, was unauthorized by any settled rule of law and was not required by public policy. *Case v. Bora-bacher*, 15 Mich. 537.

A mere nominal plaintiff without personal interest in the suit in attendance as such, is entitled to exemption from service of summons. *Capwell v. Sipe*, 17 R. I. 475.

In *Moleter v. Sinnen*, 7 L. R. A. 817, 76 Wis. 308, 25 L. R. A.

however, it was held that the weight of judicial opinion was in favor of the proposition that where a party in good faith is brought within the jurisdiction of a state, or detained therein, being a non-resident either as a party to a suit or as a witness in another suit, he is not subject to service.

The authorities hold that privilege from the service of summons has existed from time immemorial, and has been upheld by both the federal and state courts, and the rule of law announced by them with such unanimity ought not to be considered to have been abrogated by any implication from the language used in section 5459 of the Ohio Statute. *Andrews v. Lembeck*, 46 Ohio St. 23.

In *Addicks v. Bush*, 1 Phila. 19, the defendant was charged with criminal conspiracy, tried, and acquitted, and immediately afterwards served with writ. The court held there was no distinction of the privilege between that of arrest, and service of civil process.

In *State v. Stewart*, 60 Wis. 537, 50 Am. Rep. 368, however, where the relator was arrested in Indiana upon a requisition, and after being tried, acquitted, and discharged, was again arrested before he had time to return, it was held, there being arrangement between the states, that the second arrest was legal.

And in a case where the question was whether a person, charged with crime before a committing magistrate to discharge on his recognizance for a further hearing, was subject while returning from the office of the magistrate to arrest on civil process for debt, the court held that such a man did not come within any of the classes of persons exempted by law, while going to, attending on, or returning from judicial proceedings in which they were interested, he being neither a suitor, witness, juror, nor officer of the court. *Key v. Jett*, 1 Pittsb. 117.

So where the defendant, charged with having obtained goods by false pretenses, arrested as a fugitive from justice in the state of Massachusetts, by virtue of a precept by the governor of that state, was again arrested on a *copias ad respondendum* in actions founded upon contract, it was held he was not within the rule of privilege. *Williams v. Bacon*, 10 Wend. 639.

Again where the plaintiff sought to set aside a verdict and judgment, upon the ground that the suit was brought and service perfected upon him while in attendance upon the court, by virtue of a state requisition for him as a fugitive from justice forced to return to answer the charge against him, to which he did not appear or plead, but it did not appear that he was in the state under any extradition in legal contemplation, his presence not being compelled, the court held he was there as a mere volunteer, and that if not in the state as a prisoner or under compulsion as a fugitive from justice, he was liable as others and must answer in like manner; and further that he did not avail himself of the privilege at the proper time, even if he were entitled to it. *King v. Phillips*, 70 Ga. 408.

In *Brooks v. Farwell*, 4 Fed. Rep. 166, the court stated that the authorities were clear to the point, that a party going into another state as a witness or as a party under process of a court, to attend upon the trial of a cause, was exempt from process in such state while necessarily attending in respect to such trial, following *Parks v. Hotchkiss*, and *JunEAU Bank v. McSpedan*, 5 Biss. 64.

here, is whether, under the circumstances of this case, the appellee, Sanborn, is exempt from the service of summons issued to bring him into court to respond in damages for the wrongful and malicious issuing of the attachment. We do not think this case is

within the rule laid down by this court in *Boligiano's Case, supra*. That was the case of a witness, who was not a party to the suit, who came here from New Jersey, where he resided, for the purpose of testifying in a cause on trial in this state, and we there ex-

The rule was extended to the case of a nonresident defendant, indicted in the district court, who came to the state without arrest, under arrangement with the government for the purpose of being present at his trial, and pleading to the indictment and giving bail, served with summons in a civil action, his attendance being really compulsory, as if he had not come he could have been brought upon warrant, and for that reason he was necessarily within the jurisdiction. *United States v. Bridgman, 9 Bls. 221.*

Where a citizen of the state of Pennsylvania was extradited upon a criminal prosecution instituted in the state of Ohio, and upon his being brought into the latter state, was served with summons and arrested in a civil action, it was held he was entitled to privilege. *Compton v. Wilder, 40 Ohio St. 180.*

Where the defendant, immediately after the trial was served with a capias containing an *ac etiam* clause, and bail not being demanded indorsing his appearance, it was held that the defendant was privileged from arrest, but not from having process served upon him in that action, which was non-bailable. *Hopkins v. Coburn, 1 Wend. 302.*

The doctrine of privilege of nonresident witnesses and parties was upheld in *Small v. Montgomery, 23 Fed. Rep. 707*, where a nonresident defendant, a necessary witness on his own behalf, was served with a subpoena in another cause then pending in the circuit court, and while attending as a witness in the latter in obedience to the subpoena, was served with process to which he pleaded in abatement upon which plea the court gave judgment.

So in *Parker v. Hotchkiss, 1 Wall. Jr. 299*, the defendant, a nonresident served with summons on the day of the trial at his lodgings, was held privileged, the court overruling *Blight v. Fisher, 1 Pet. C. C. 41.*

The rule applies to a defendant, attending as a party and witness before an examiner in chancery in the circuit court in a suit, served with summons pursuant to section 287 of chapter 66 of the Minnesota General Statutes of 1873, requiring him to show cause why he should not be bound by the judgment in an action brought against the firm in which he was a partner. *First Nat. Bank of St. Paul v. Ames, 30 Minn. 179.*

To the case of one within the jurisdiction for the purpose of testifying on his own behalf under the advice of counsel, served with summons while the jury were considering the case and while he was still in the court-room. *Gregg v. Sumner, 21 Ill. App. 110.*

In *Wilson v. Donaldson, 8 L. R. A. 266, 117 Ind. 356*, a nonresident defendant in the state for the purpose of testifying, was held not legally served with a summons at the suit of the same plaintiff, the provisions of section 812 of the Indiana Revised Statutes of 1881, providing for service on a nonresident not applying to such a case.

Where the litigants, citizens of Tennessee, met in Georgia and each sued out bail process against the other, and the defendant was arrested in vacation, the court thought it but just that he might have the plaintiff arrested during the term, where he was in attendance as a suitor, but the court upon appeal held that, inasmuch as the law as it then stood made no such distinction, the exception must be grafted upon common-law principle by the legislature and not by the courts. *Henegar v. Spangler, 20 Ga. 217.*

Where a nonresident presented a claim against

the commonwealth of Massachusetts to the legislature, and voluntarily appeared before a joint committee to prove the same, when he was arrested on an execution issued upon a judgment of that state against him, he was held privileged and discharged on writ of habeas corpus. *Thompson's Case, 123 Mass. 423, 33 Am. Rep. 370.*

So where the petitioner, having a suit pending, obtained a writ of protection and was arrested while employed about his cause, which presented a question of law upon facts agreed, and it was not shown that it would not be put upon the law docket of the term, or that there would be no jury trials, it was held he could not be prejudiced by the circumstance that the term was a law term and was therefore entitled to be discharged upon habeas corpus. *Com. v. Huggesford, 9 Pick. 237.*

And where the petitioner, a foreigner, whose claim was specially assigned for examination, attended a hearing by commissioners appointed by a judge of probate to examine claims against an insolvent decedent's estate, which was begun and continued, was arrested on mesne process before the adjourned meeting, he was held privileged and discharged upon habeas corpus. *Wood v. Neale, 5 Gray, 638.*

Again where the relator was served with a summons while on his way home, without any deviation as to his journey, and with no delay that was not fully justified, the service was held a breach of privilege and an abuse of process and a mandamus was granted with costs against the plaintiff. *Jacobson v. Hoerner, 76 Mich. 234.*

And again where a nonresident plaintiff was served with a summons while attending court on a trial of his suit, as a party and a witness therein, and for no other purpose, it was held such service was void and might be set aside upon a motion to the court. *Letherby v. Shaver, 73 Mich. 500.*

So also where the relator, a nonresident, attending to business, was sued civilly and also arrested criminally, being let out on bail went in search of his attorney, but did not find him on that day, subsequently visited him in consultation when he was served with summons for the tort involved in the criminal complaint, the service was set aside upon mandamus as a breach of privilege. *Jacobson v. Hoerner, supra.*

Where the relator, a party to two suits in a foreign jurisdiction, examined as a witness in one of the causes, the other being continued, was served with summons in another suit while attending court for the sole purpose of giving evidence, and applied to the court to set aside the service which being refused he moved for a mandamus, the court held that the writ should issue as public policy, the due administration of justice and the protection to parties and witnesses alike demanded it. *Mitchell v. Huron Circuit Judge, 53 Mich. 542.*

A nonresident, attending upon a notice of his counsel the argument of a rule on which he was defendant, was served with summons while on his way back to his hotel, and was held privileged from arrest or service of summons. *Torrey v. East, 8 W. N. C. 62.*

So where a nonresident defendant attended with a view of being present with his counsel at the taking of the depositions of a witness, under rule entered for that purpose, the court held that he was entitled to the privilege of a suitor, notwithstanding the cause was at that time under arbitration. *Wetherill v. Seitzinger, 1 Miles (Pa.) 237.*

In *Com. v. Hambright, 4 Serg. & R. 146*, the de-

pressed the view that the tendency of the courts in this country "is to enlarge the privilege and afford full protection to suitors and witnesses from all forms of process of a civil nature during their attendance before any judicial tribunal, and for a reasonable time

in going and returning," but continuing, we said, "We think the decided weight of authority has extended the privilege so far, at least, as to exempt a resident of another state who comes into this state as a witness to give evidence in a cause here from service of pro-

cesses of the court and dismissed the writ. *Ex parte Everts*, 2 Disney (Ohio) 83.

And where the defendant served with an ordinary summons pleaded in abatement that he was a resident of another state, present for the purpose of defending an action pending against him, and testifying on his own behalf, which action being called on for trial he announced his readiness to proceed, but plaintiff dismissed the action and withdrew the papers from the file, but immediately afterwards refiled his complaint and caused defendant to be served with a new summons while on his way home, the court held the service illegal. *Wilson v. Donaldson*, 3 L. R. A. 236, 117 Ind. 854.

Again where a nonresident attended divorce proceedings, the hearing of which was adjourned owing to the wife's sickness, and remained in the state awaiting the assignment of the hearing, the court held that until such assignment under the facts, he was, and was required to be in attendance upon the court in the strict sense of the term, the case not being continued or definitely postponed, and being in order, he was liable to be called at any time when the petitioner could come into court, and that therefore his arrest on writ of *assumpsit* was a violation of his privilege as a party attending court. *Ellis v. De Garmo*, 19 L. R. A. 560, 17 R. I. 715.

In *Re Kimball*, 2 Ben. 38, a bankrupt was arrested while on his way to the register's office for the purpose of examination, it was held that he was not exempt from arrest under section 26 of the Bankrupt Act, but that the order was substantially a subpoena and he was to be considered as a witness, and that as such and as a party, he was entitled to protection and his discharge was ordered as a breach of privilege subject to the power to rearrest.

In *Ex parte Kerney*, 1 Atk. 55, the question was raised as to whether a man was liable to be rearrested while under the summons of commissioners of bankrupts, and the court considering it a question of great importance and finding no precedence of like cases, ordered the petition to stand over and a search to be made for such cases, and in the meantime advised the sheriffs to discharge the petitioner.

But in *Parker v. Manco*, 61 Hun, 519, the evidence was agreed to be taken before a notary public out of court, and the defendant who came into the state for that purpose was served with summons in a civil action by the same plaintiff. It was held that he was not entitled to the privilege, as the doctrine did not apply to cases where the testimony was taken out of court.

So in *Finch v. Gallagher*, 13 N. Y. Supp. 457, 25 Abb. N. C. 404, the defendant, a nonresident, was served while attending court as a party and attorney in his own behalf, the proofs showing that he remained longer than was necessary after his determination to drop the examination by way of depositions, and the court held the privilege was lost by remaining within the state an unreasonable and unnecessary length of time, his presence having no real relation with the examination of witnesses, and was purely for his own pleasure and purely for ulterior objects.

So where the plaintiff, present under the advice of his attorney for the purpose of assisting him in the taking of depositions in support of his case, while in his attorney's office considering the depositions taken, was served with process by the sheriff reading the same, it was held he was not

defendant, taken on a *capias ad satisfaciendum* which was set aside, was afterwards arrested upon a *capias ad respondendum* and imprisoned, the court refused the rule to show cause why he should not be discharged,—held upon appeal that the court would not interfere with the decision of the court below upon the question of privilege.

The same doctrine was upheld by the court in *Palmer v. Bowan*, 21 Neb. 452, 59 Am. Rep. 844, where the defendants attended court in a suit in which the state was prosecuting and in which they were entitled to defend.

Where the defendant was arrested while attending the inferior court of another county, he was discharged from arrest upon motion. *Harris v. Grantham*, 1 N. J. L. 142.

A nonresident attending as a necessary party, who after the decision left the court-room, and while descending the steps of the court-house was met by the sheriff who read a summons to him when the defendant went directly to his counsel's office to consult him and was there served with a copy, was held entitled to a discharge. *Halsey v. Stewart*, 4 N. J. L. 333.

And a nonresident attending a reference as a party to the suit, was held entitled to the privilege from arrest. *Clark v. Grant*, 2 Wend. 267.

Where upon attachment against a defendant for non-answer to a complaint, he applied to the proper officer for his discharge under the insolvent act, and an examination was obtained and after its close and as he was leaving the office was arrested by an improper contrivance, he was discharged. *Snelling v. Watrous*, 2 Paige, 314, 2 L. ed. 923.

A nonresident present to answer a criminal charge, served with civil process while necessarily in the state waiting an examination, was held entitled to immunity from service or arrest. *Murphy v. Sweezy*, 2 N. Y. Supp. 241.

In the above case the defendant had given bail to appear at any time when called upon, and the case had been adjourned owing to the inability of the complainant to attend. *Ibid*.

A defendant present for the purpose of attending a meeting of creditors of a bankrupt, solely as a creditor and witness to prove his debt and claim against the estate, to participate in the choice of assignee and for no other purpose, served with process fifteen minutes after the adjournment of the meeting, was held privileged. *Matthews v. Tufts*, 87 N. Y. 568.

Where, before the court in which his action was pending commenced its session, having come for the purpose of attending either the trial of his cause or its removal upon the justification of sureties the defendant was arrested when leaving for home thinking nothing would be done, it was held he was entitled to go to ascertain if anything would be done as was expected, and to return unmolested, and that merely stopping to announce to opposing counsel that nothing would be done, was not a deviation, and was therefore entitled to be discharged on stipulating not to bring an action. *Salhinger v. Adler*, 2 Robt. 704.

So where the parties were attending court upon the hearing of an *habeas corpus*, which was dismissed and the parties had an interview, which the plaintiff pretended was for the purpose of an amicable settlement, but really for the purpose of detaining the defendant until such time as he could issue another writ, which was served during the interview, the court held the same an abuse of the



cess for the commencement of a civil suit against him in this state, and that the privilege protects him in staying and returning, provided he acts bona fide, and without unreasonable delay."

The language above quoted was, of course,

privileged and the service was good. *Greer v. Young*, 120 Ill. 189, reversing *Greer v. Young*, 17 Ill. App. 108.

The words "taken" "captas" and "arrest" do not comprehend the service of a process by which no imprisonment, no restraint of liberty, no bail is required, but only a notice or copy of the process. *Legrand v. Bedinger*, 4 T. B. Mon. 539.

The privilege from arrest, as established under the Vermont Statute, chapter 84, section 17, extends only to parties or witnesses in civil suits, and not to criminal proceedings, the words of the statute showing that it was intended to confine its provisions to the former class of cases its words are "any party or witness in any case pending before any court in this state, or before auditors, referees, etc." *Scott v. Curtis*, 27 Vt. 762.

A statute only extends to the witness's exemption when he is attending under the compulsion of a subpoena. *Hardenbrook's Case*, 8 Abb. Pr. 416.

Prior to the revised statutes, the exemption of voluntary witnesses from arrest was confined to voluntary foreign witnesses.

A summons in a civil action is "process" within the meaning of the cases, although it is held not to be a process within the meaning of section 14 of article 6 of the Minnesota Constitution. *Sherman v. Gundlach*, 37 Minn. 118.

The suggestion that the North Carolina statutes, which in express terms exempt witnesses from arrest, had the effect by implication of abrogating the rule of the common law in regard to suitors, was held to have no force. *Hammerskold v. Rose*, 52 N. C. 629.

In *Hammerskold v. Rose*, *supra*, the court held that it saw no ground to support the position that the principles of the common law, by which the suitor while going to, remaining at, or returning from court was exempted from arrest, was in force in that state.

Section 5457 of the Revised Statutes of Ohio designates particularly the persons either absolutely or at certain times, privileged from arrest, and includes all suitors while going to, attending, or returning from court.

Section 5458 fixes the time and place which shall be free from the disturbance liable to follow from an arrest.

Section 5459 provides, nothing in this subdivision contained shall be construed to extend to cases of treason, felony, or breach of the peace, or to privilege any person herein specified from being served at any time with a summons or notice to appear, and all witnesses not contrary to the provisions herein contained, made in any place, or on any river or watercourse within or bounding upon the state, shall be deemed lawful.

In the construction of this statute, it is held that an indictable offense was included under the term "breach of peace." *Ex parte Levi*, 28 Fed. Rep. 651.

#### V. Witnesses in general.

A resident of another state or country who has in good faith come into a state as a witness to give evidence in a cause, is exempt from service with process for the commencement of a civil action against him. *Sherman v. Gundlach*, 37 Minn. 118; *Bishop v. Vose*, 27 Conn. 1; *Moletor v. Sinnen*, 7 L. R. A. 817, 76 Wis. 306; *Schlesinger v. Foxwell*, 1 N. Y. City Ct. Rep. 461; *Jenkins v. Smith*, 57 How. Pr. 171; *Matthews v. Turfts*, 57 N. Y. 568; *Pope v. Negus*, 8 N. Y. Supp. 796; *Person v. Grier*, 66 N. Y. 124, 28 36 L. R. A.

used in reference to the facts of the case then before us—that of a witness who was not a party to the cause. As we did not, in the case just cited, undertake to lay down any general rule as to the exemption of suitors from civil process, because that was a case

*Am. R.p. 35; Brown v. Sleeman*, 13 N. Y. Civ. Proc. Rep. 20; *Hopkins v. Coburn*, 1 Wend. 262; *Hollender v. Hall*, 58 Hun. 604, 13 N. Y. Supp. 759, 38 N. Y. S. R. 848; *Snelling v. Watrous*, 2 Paige, 314, 2 L. ed. 923; *Lamkin v. Starkey*, 7 Hun. 479; *Thorp v. Adams*, 58 Hun. 603, 11 N. Y. Supp. 41; *Sheehan v. Bradford*, B. & K. R. Co. 3 N. Y. Supp. 790; *Wilbur v. Boyer*, 1 W. N. C. 154; *Atchison v. Morris*, 11 Biss. 191; *Bridges v. Sheldon*, 18 Blatchf. 507; *Brooks v. Farwell*, 4 Fed. Rep. 166; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Small v. Montgomery*, 23 Fed. Rep. 707; *First Nat. Bank of St. Paul v. Ames*, 30 Minn. 178; *Gregg v. Sumner*, 21 Ill. App. 110; *Wilson v. Donaldson*, 3 L. R. A. 206, 117 Ind. 366; *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844; *Dungan v. Miller*, 37 N. J. L. 182; *Brett v. Brown*, 13 Abb. Pr. N. S. 295; *Capwell v. Sipe*, 17 R. I. 475; *Kauffman v. Kennedy*, 25 Fed. Rep. 785; *Baldwin v. Emerson*, 16 R. I. 304; *Saever v. Robinson*, 3 Duer. 622; *Bolgiano v. Gilbert Look Co.* 73 Md. 122; *Pollard v. Union Pac. R. Co.* 7 Abb. Pr. N. S. 70.

He is also privileged from arrest. *Christian v. Williams*, 111 Mo. 429; *Sanford v. Chase*, 3 Cow. 881; *Mackay v. Lewis*, 7 Hun. 83; *Schlesinger v. Foxwell*, 1 N. Y. City Ct. Rep. 461; *Jones v. Knauss*, 31 N. J. Eq. 211; *Norris v. Beach*, 2 Johns. 294; *Hollender v. Hall*, 58 Hun. 604, 13 N. Y. Supp. 759, 38 N. Y. S. R. 848; *Farmer v. Robbins*, 47 How. Pr. 415; *Dixon v. Ely*, 4 Edw. Ch. 557, 6 L. ed. 973; *Snelling v. Watrous*, 2 Paige, 314, 2 L. ed. 923; *Lamkin v. Starkey*, 7 Hun. 479; *Vincent v. Watson*, 1 Rich. L. 194; *Martin v. Ramsey*, 7 Humph. 260; *Moore v. Chapman*, 3 Hen. & M. 260; *Washburn v. Phelps*, 24 Vt. 506; *Hurst's Case*, 4 U. S. 4 Dall. 387, 1 L. ed. 878; *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598; *Pollard v. Union Pac. R. Co.* 7 Abb. Pr. N. S. 70; *Blight v. Fieber*, 1 Pet. C. C. 41; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754.

But where witnesses had given testimony before the grand jury and were discharged and were arrested on a warrant charging them with perjury, it was held they were not protected from arrest on such criminal charge, it being an indictable offense. *Ex parte Levi*, 28 Fed. Rep. 651.

In *Flechter v. Franko*, 15 N. Y. Supp. 674, the court upheld the doctrine as applied to nonresident witnesses, although in that case the party was a resident of the state.

The fact that the witness was not influenced makes no difference. *Atchison v. Morris*, 11 Biss. 191.

The rule is especially applicable in all its force to suitors and witnesses from foreign states attending upon the courts of this state. *Person v. Grier*, 66 N. Y. 124, 28 Am. Rep. 35.

An arrest should not be valid, even for the purpose of giving jurisdiction to the court out of which the process issues, especially where the witness is attending from a foreign state. *Sanford v. Chase*, 3 Cow. 881.

It is no answer to the claim of privilege of a non-resident witness, that he was not served with compulsory process after his arrival within the jurisdiction. *Brett v. Brown*, 13 Abb. Pr. N. S. 295.

In *Pollard v. Union Pac. R. Co.* 7 Abb. Pr. N. S. 70, the court held that the mere service of a summons without arrest, in a cause other than the one in which the party was attending court, would not be set aside on the ground of privilege.

Since the revised statutes, the privilege from arrest has been confined to witnesses attending court

involving only the rights of a witness, we do not think the case now before us would justify us in announcing a rule of exemption applicable alike to all suitors in all civil actions. As to what the better rule may be, both as to plaintiff and defendants, there is

some conflict of authority; but we are of opinion that this right of exemption should not be extended to one who, like the appellee, comes here and avails himself of the right given him by our statute to issue an attachment for fraud, or, as it is generally

after being subpoenaed. *Pollard v. Union Pac. R. Co.* *supra*.

In *Finch v. Galligher*, *supra*, the court stated that it was not prepared to follow in all particulars the doctrine of *Greer v. Young*, 120 Ill. 184.

Where a witness was arrested while returning home from a criminal trial in which he had given evidence, it was held in an action of trespass brought by him against the sheriff, that the action could not succeed, except it were granted by a legislative power. *Carle v. Delesdernier*, 13 Me. 363, 20 Am. Dec. 506.

In *Smith v. Jones*, 75 Me. 133, 49 Am. Rep. 593, the plaintiff sued defendant for causing his arrest upon civil process while returning as a witness from court; the court refused to entertain the action, as the nature and extent of the privilege from arrest accorded by law to a witness was not a natural right and was contrary to common right, the plaintiff's arrest being pursuant to a general right in the same manner as any other debtor could have been, the claim being suable the court having jurisdiction.

In *Jones v. Knauss*, 31 N. J. Eq. 211, the defendant was arrested on a *ca. ex.* while in attendance as a voluntary foreign witness. It was held that his arrest was illegal, the court distinguishing the case from that of *Rogers v. Bullock*, 3 N. J. L. 109, upon the ground that in the latter case the witness was a citizen of the state and as such amenable to the process of its courts, and that if it were otherwise the fact was too important to have escaped mention by the reporter, a member of the court deciding the case.

The courts will not take jurisdiction of a party whose rights are thus invaded, as to do so would be to withdraw the shield and protection uniformly given by the law to witnesses. *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35.

Where the defendant, a nonresident, was present to testify in two separate courts on the same day, and the cases were adjourned of which fact he had not personal knowledge and his attendance was not required during the day, upon his being served with process on the same day, it was held he was entitled to the privilege, the court stating that his remaining within the jurisdiction during the time the court was in session and up to the time of its usual adjournment, was not such an unreasonable delay as to prevent his claiming the privilege of exemption. *Pope v. Negus*, 3 N. Y. Supp. 796.

The defendant, a nonresident subpoenaed to attend before arbitrators, was arrested by virtue of a *captus ad respondendum*, and was ordered discharged absolutely without being required to find bail. *Sanford v. Chase*, 3 Cow. 381.

So where a nonresident was attending court at the request of the executor and devisee of a will, for the purpose of proving it, to which will he was a witness, was arrested after he had given his testimony, and was proceeding home, he was discharged. *Norris v. Beach*, 2 Johns. 294.

And where the defendant, a resident of Nicaragua, having foreign residence there, but retaining his status as a citizen of the state of New York, was in that state for the purpose of testifying in an action in the federal court, his evidence being taken before a notary public, it was held the doctrine of privilege from service of summons extended to the case where the testimony was taken by consent in

that form. *Hollender v. Hall*, 68 Hun, 604, 13 N. Y. Supp. 759, 33 N. Y. S. R. 848.

But where a witness attended the trial upon subpoena, and afterwards at the request of counsel, the court held that the last attendance was not privileged, being voluntary. *Hardenbrook's Case*, 8 Abb. Pr. 418.

Section 800 of the New York Code of Civil Procedure, Bliss' ed. vol. 1, p. 733, provides a person duly and in good faith subpoenaed and ordered to attend for the purpose of being examined in a case where his attendance may lawfully be enforced by attachment or by commitment, is privileged from arrest in a civil action or special proceeding while going to, remaining at, or returning from the place where he is required to attend.

By section 54 of 3 New York Revised Statutes, 419, it is provided that every arrest of a witness made contrary to the foregoing provisions shall be absolutely void and shall be deemed a contempt of the court issuing the subpoena. *Farmer v. Robbins*, 47 How. Pr. 415.

A defendant exempt by reason of his attendance before a referee upon a subpoena, arrested when about to return home without unnecessary delay or deviation from the proper route, was held privileged. *Farmer v. Robbins*, 47 How. Pr. 415.

If his attendance is in good faith, service of summons is irregular. *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35.

And even though not subpoenaed after his arrival, he cannot be taken on a writ of *ne exeat* while waiting to give evidence. *Dixon v. Ely*, 4 Edw. Ch. 557, 6 L. ed. 973.

An attachment for the nonpayment of costs only, although criminal in form, in substance is civil, and a party will be entitled to the like protection from arrest thereon, as in other civil process during his attendance as a party or witness, and a reasonable time to go and return. *Snelling v. Watrous*, 2 Paige, 314, 3 L. ed. 933.

In *Lamkin v. Starkley*, 7 Hun, 479, it was held that the court had power independently of statute to protect its suitors, officers, and witnesses, protection being afforded for the sake of public justice.

*Matthews v. Tufts*, 37 N. Y. 563, was followed and approved of in *Thorp v. Adams*, 68 Hun, 603, 11 N. Y. Supp. 41, where the defendant came to testify before a legislative committee, such committee not sitting for some few days after his arrival, the summons being served upon him while coming from the committee rooms.

If attending in good faith either with or without a writ of protection, they are privileged from arrest on civil process and this immunity extends to all kinds of civil process and affords an absolute protection to set aside the service as illegal. *Schlesinger v. Foxwell*, 1 N. Y. City Ct. Rep. 461.

Where service was made upon one of the directors of a foreign railroad and a resident of a foreign state, attending before a referee at the request of one of the parties, such service was set aside on motion. *Sheehan v. Bradford, R. & K. R. Co.* 3 N. Y. Supp. 790.

Under section 3071 of the General Statutes of South Carolina, all witnesses are exempted from service of all process going to, and remaining, and returning from court to which they have been subpoenaed or bound, except upon criminal charges of treason, felony, or breach of the peace.

called, an attachment on original process. This proceeding has always been considered an extrinsic remedy, and the legislature seeing the great temptation there would exist to abuse it, and the loss and injury to the defendant which must necessarily follow such

abuse, provided by statute that no such attachment should issue until the plaintiff therein should give bond with good security to answer for all such costs and damages as should be awarded against him for wrongfully suing out such an attachment.

In *Martin v. Ramsey*, 7 Humph. 260, it was held that the process of subpoena to answer in chancery executed in that case upon witness was within the act.

The Tennessee Act of 1794, chapter 1, section 34, provides for the exemption from service of any writ, warrant, order, judgment, or decree, except witness summons during the attendance of any person, summoned as a witness to any court whatsoever, and during the time that such person is going to and returning from the place of such attendance, allowing one day for every twenty-five miles such witness has to travel to and from his place of residence.

In *Moore v. Chapman*, 8 Hen. & M. 260, a witness attending court under subpoena was arrested under an execution and brought action for assault and battery, and false imprisonment. The court held such action would not lie, even though the debt in the prior action had been paid.

In *Hurst's Case*, 4 U. S. 4 Dall. 387, 1 L. ed. 378, it was held that a citizen of another state in attendance on court as a suitor, subpoenaed as a witness in another case, was privileged from an arrest in execution issued from a state court while at his lodgings.

Upon a motion to set aside the service of a summons upon the ground that the defendant was a state's witness in attendance upon a congressional committee under subpoena, the court held that the privilege of a witness before congress, or before any of its committees, stood on the same footing as the privilege of the members of that body, and did not extend to freedom from the service of a simple summons but only from arrest. *Wilder v. Welsh*, 1 McArthur. 566.

Where a motion was made to be discharged from arrest, on the ground that he was attending the trial of a cause in a county court as a witness without a subpoena, the court held that under the New Jersey statutes, a witness to be entitled to protection from arrest must be necessarily attending court, or going to or from it under a subpoena "previously and duly executed." *Rogers v. Bullock*, 8 N. J. L. 109.

In *Dungan v. Miller*, 37 N. J. L. 182, the court referred to the opinion in *Rogers v. Bullock*, *supra*, and held that it did not apply to the case of a non-resident.

In *Massey v. Colville*, 45 N. J. L. 119, 45 Am. Rep. 754, the privilege conferred upon witnesses by "an act concerning evidence" was said to be that every witness should be privileged from arrest in all civil actions, and no other during his necessary attendance, where his attendance should have been required by subpoena previously and duly served, and in coming to and returning from the same, allowing one day for every thirty miles from his place of business.

The South Carolina Act of 1791, 7 Stat. at L. 265, section 15, which provides all persons necessarily going to, attending on, or returning from the same, (referring to the superior courts) and shall be freed from arrest in any civil action, was held not to protect a party served with a *captus ad respondendum*. *Huntington v. Shultz*, Harp. L. 453, 18 Am. Dec. 360.

The scope and object of the South Carolina act was held to require no more than that the person of the party attending the court should be free from detention, and that therefore he might be cited or summoned without any detention of his person. *Ibid.*

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## VI. The effect of fraud and deceit.

A valid and lawful act cannot be accomplished by any unlawful means, and whenever such unlawful means are resorted to the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by such unlawful means to his rights. *Byler v. Jones*, 22 Mo. App. 623; *Ialey v. Nichols*, 12 Pick. 270, 22 Am. Dec. 436.

The law will not lend its sanction or support to an act otherwise lawful which is accomplished by unlawful means. *Chubbuck v. Cleveland*, 37 Minn. 496; *Townsend v. Smith*, 47 Wis. 623, 33 Am. Rep. 736; *Ialey v. Nichols*, 12 Pick. 270, 22 Am. Dec. 436; *Sherman v. Gundlach*, 37 Minn. 118; *Williams v. Reed*, 30 N. J. L. 385.

It is undoubtedly the law that where a debtor has been fraudulently induced to come within the jurisdiction of the court, so that he may be served or arrested under civil process, he is entitled to privilege. *Nichols v. Goodheart*, 5 Ill. App. 574. *Snelling v. Watrous*, 2 Paige, 314, 2 L. ed. 323, to the same effect.

An inhabitant of another state has a right to have his controversies settled by the courts in his own government, and must not be drawn into another state under ostensible protection of the court, and then be exposed to an entanglement and litigation. *Ex parte Hall*, 1 Tyler (Vt.) 274.

Courts of record will not tolerate service of process on any person, who for that purpose has been deceitfully brought within their jurisdiction, and they will protect from arrest *eundo et redeundo* not only parties, but also witnesses, who in obedience to its process, or in furtherance of its proceedings, appear within its jurisdiction. *Slade v. Joseph*, 5 Daly, 187.

In *Van Horn v. Great Western Mfg. Co.*, 37 Kan. 523, the defendants moved to set aside a summons and the service thereof, upon the grounds *inter alia* that the service was procured by fraud or trick, by means of which they were brought within the jurisdiction of the court, and the court held that such a process was an abuse and could not be tolerated in any court of justice, and entertained the motion. To the same effect, *Dunlap v. Cody*, 31 Iowa, 280, 7 Am. Rep. 129; *Goupil v. Simonson*, 3 Abb. Pr. 474; *Baker v. Wales*, 14 Abb. Pr. N. S. 331; *Wood v. Wood*, 73 Ky. 624; *Steele v. Bates*, 3 Ark. 338, 16 Am. Dec. 720; *Wanser v. Bright*, 53 Ill. 85; *Townsend v. Smith*, 47 Wis. 623, 33 Am. Rep. 736; *Allen v. Miller*, 11 Ohio St. 374; *Hevener v. Heist*, 9 Phila. 274; *Williams v. Reed*, 30 N. J. L. 385; *Metoak v. Clark*, 41 Barb. 45; *Brenner v. Eply*, 33 Kan. 123; *Snelling v. Watrous*, 2 Paige, 314, 2 L. ed. 323.

Where the party is induced by fraud, or compelled by criminal process, to enter within the boundaries of a county other than that of his residence, he is privileged. *Christian v. Williams*, 111 Mo. 429; *Lagrange's Case*, 14 Abb. Pr. N. S. 333, *in note*.

No court will take jurisdiction of a party where it is obtained by fraud. *Wanser v. Bright*, 53 Ill. 42.

The same conclusion was arrived at in the case of *Capitol City Bank v. Knox*, 47 Mo. 314; *Martin v. Woodhall*, 24 Jones & S. 439; *Chubbuck v. Cleveland*, 37 Minn. 496.

The privilege is confined to parties in civil proceedings, unless it appears that his apprehension of the criminal charge was a contrivance by the

When the appellee issued the attachment, the wrongful issuing of which and the damages thereby caused being the causes of action in this case, he gave bond as required by law, and the appellant not only has the right to look to that bond for compensation

for the injury done him by the appellee, but in most cases it is the only source from which he may hope to secure it. We have held, however, that the bond cannot be put in suit, unless a suit against the plaintiff in the attachment for wrongfully suing it out

plaintiff to get him into custody on the civil suit. *Com. v. Daniel, 4 Clark (Pa.) 49; Addicks v. Bush, 1 Phila. 19.*

In order to sustain the objection that the defendant was brought by criminal proceedings, and against his will, within the civil jurisdiction of the court, two things must be established: first, that the criminal proceedings were instigated by a creditor or person attempting to subject him to the civil jurisdiction, and second, that such creditor or person was guilty of a wrongful act in the instigation of the criminal proceedings. *Martin v. Woodhall, 24 Jones & S. 439.*

Where the plaintiff in procuring the arrest of the defendant acted maliciously and without probable cause, his acts were wrongful and unlawful, and the service of a summons upon such defendant obtained by means of such act were not upheld. *Byler v. Jones, 22 Mo. App. 623.*

If a man voluntarily leaves his residence and goes to another county, or if seized when properly chargeable with crime and taken to another county, he may be said to be found there within the sense of the word as used in the Illinois statutes, but it is a base and utter perversion of the object of the law to permit an arrest under false and fraudulent pretense, and the abduction of a man for the sole purpose of obtaining service in a civil proceeding. *McNab v. Bennett, 66 Ill. 157.*

In *Vastine v. Bast, 41 Mo. 493*, the plaintiff, a resident of Illinois, sought to set aside a judgment rendered against him in the Missouri courts, upon the ground that jurisdiction was obtained by a false and fraudulent design in the service of the process in order to bring him within the jurisdiction of the court; the court held that the objection should have been taken by appearing in the original suit by way of motion to set it aside upon the ground of fraud.

Where a nonresident was decoyed into the state for the purposes of suit upon which his body was attached, the court ordered him discharged upon habeas corpus. *Hill v. Goodrich, 38 Conn. 583.*

Where a relator was arrested in the county of which he was a resident, on a criminal warrant from another county, and his examination was postponed upon his giving bail when he was arrested on a civil capias from the circuit court of the latter county, and also gave bail and moved to set the proceedings aside, it was held that such arrest was illegal, pending his release on bail on the criminal charge. *Baldwin v. Branch Circuit Judge, 48 Mich. 625.*

Where the evidence showed that the plaintiff arrested the defendant, and thereby caused him to be brought within the jurisdiction of the plaintiff's court, where he was then served with summons, the court held that if he was induced there by false representations for the purpose of being served with summons, such process was an abuse of legal process, and the court upon proof would set aside the service. *Byler v. Jones, 22 Mo. App. 623.*

Where the defendant was arrested on criminal process for the purpose of coercing him into a compromise of the plaintiff's demand for money, alleged to have been obtained by false pretenses, and was detained in custody until an order for his arrest in a civil action could be obtained, the court held it an abuse of the process of the law. *Benninghoff v. Oswell, 37 How. Pr. 235.*

With reference to the language "served at any time with a summons or notice to appear" as used 25 L. R. A.

in section 5459 of the statute, and "may be summoned" as used in section 5381 of the same statute, is to be held to contemplate such a service of summons as, according to the course of proceedings at the common law, where capias corresponded in its use to a summons, was free from the objection that it is either inactive fraud of the law or tended to impede or embarrass the administration of public justice, by deterring suitors from freely attending all proceedings which concern them or require their presence, the language contemplating such service as by well-recognized principles constitute good service. *Andrews v. Lembeck, 46 Ohio St. 83.*

With reference to the provisions of the above statute, it was held that the general assembly neither intended nor attempted to comprehend within the purview of these enactment cases, where service of a summons was procured and made in fraud of the law, or cases where the tendency was to impede or embarrass the free and complete administration of justice in courts of law. *Ibid.*

In *United States v. Rauscher, 119 U. S. 407, 80 L. ed. 423*, the defendant was charged with murder on the high seas and delivered up by the foreign authorities to the United States for trial upon that charge, upon which he was not prosecuted, but a minor offense, not included in the treaty by extradition was preferred against him, and the court held that he could not lawfully be tried for any offense other than that of murder, and that the treaty, the act of congress and the proceeding by which he was extradited, clothed him with the right to exemption from trial for any other offense until he had an opportunity to return to the country from which he was taken, a national honor requiring good faith to be kept with the country concerning him.

#### VII. Enforcement of the privilege.

He may procure his writ of protection in advance of starting for or from the court, if circumstances make it reasonable to ask the court's mediation for such protection. *Smith v. Jones, 76 Me. 133, 40 Am. Rep. 593.*

Such writ always receives a liberal construction in favor of the witness covered by it. *Ex parte Hall, 1 Tyler (Vt.) 274.*

Every privileged person, however, must at a proper time, and in a proper manner, claim the benefit of his privilege. *Gyer v. Irwin, 4 U. S. 4 Dall. 187, 1 L. ed. 732.*

The usual course is to appear in the cause for which the arrest was made and procure a rule against the plaintiff and his attorney, to show cause why the defendant should not be discharged out of custody by reason of his alleged privilege upon his filing common bail, the rule being supported by affidavit setting up the fact of arrest and the attending circumstances. *Greer v. Young, 120 Ill. 189, reversing Greer v. Young, 17 Ill. App. 103.*

It was formerly necessary to plead specially the privilege from arrest, but modern practice gives relief on motion. *Vincent v. Watson, 1 Rich. L. 194.*

The process can only be avoided by applying to the court for a discharge. *Smith v. Jones, 76 Me. 133, 40 Am. Rep. 593; Lyell v. Goodwin, 4 McLean, 20; Ellis v. De Garmo, 19 L. R. A. 540, 17 R. I. 715.*

It does not dismiss the suit which may stand as though commenced by summons. *Ellis v. De Garmo, supra.*

In such a case the service will be stricken out. *Juneau Bank v. McSpedan, 5 Bias. 64.*

has first been prosecuted to judgment. *McLuckie v. Williams*, 68 Md. 265. The appellee having failed to prosecute his attachment with success, and the appellant having sued him in the court where the bond was filed to ascertain the damages so that he could

avail himself of a suit on the bond to make himself whole we think the appellee should be held to have waived his right, if he had any, to exemption from summons, and should at least be put in the same and no worse situation than resident suitors would be under

The applicant must show that he is a nonresident. *Matthews v. Puffer*, 10 Fed. Rep. 606.

The privilege may also be taken advantage of by plea in abatement. *King v. Oolt*, 4 Day, 129; *Gregg v. Sumner*, 21 Ill. App. 110.

Such plea must be filed in apt time, that is, at the earliest practicable moment. *Holloway v. Freeman*, 22 Ill. 197; *Union Nat. Bank of Chicago v. First Nat. Bank of Centreville*, 90 Ill. 53.

It was held the proper remedy in *McNab v. Bennett*, 66 Ill. 157, where defendant was arrested upon a false complaint and taken by force to another jurisdiction for the purpose of being sued civilly.

In order to preserve his right to move to discharge the arrest, the attorney should appear specially, notice of retainer generally being an appearance in the cause. *Stewart v. Howard*, 15 Barb. 25.

He should plead his privilege in abatement of the action, or in bar of an execution against his body. *Wood v. Kinsman*, 5 Vt. 588.

Prior to the passing of the Vermont statute, a mere privilege from arrest could not be pleaded in abatement. *Washburn v. Phelps*, 24 Vt. 506.

So he may sue out a habeas corpus. *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598; *Wood v. Neale*, 5 Gray, 538; *Com. v. Huggesford*, 9 Pick. 257; *Thompson's Case*, 122 Mass. 423, 23 Am. Rep. 870; *Ex parte McNeil*, 6 Mass. 245.

There is no question about the issuing of the writ where the suit was commenced by arrest, and the reasons for exemption are applicable, though with less force in other cases. *Mitchell v. Huron Circuit Judge*, 53 Mich. 542.

So the proceedings will be set aside upon mandamus. *Jacobson v. Hosmer*, 76 Mich. 234; *Mitchell v. Huron Circuit Judge*, 53 Mich. 542.

In *Grover v. Green*, 1 Cal. 115, the court held that a person arrested while attending a reference under an order of the court would not be discharged upon motion if there was no notice of applying, but the court would only grant a rule to show cause.

Either the court, whose proceedings, having been interrupted by the arrest of a witness or the court in whose process the arrest is made, may interfere for the discharge. *Vincent v. Watson*, 1 Rich. L. 194.

The general practice is to apply to the court on whom the contempt has been committed, for redress. *United States v. Edme*, 9 Serg. & R. 149; *Kinsman v. Reine*, 2 Miles (Pa.) 200.

The court in which the party is a suitor or witness is the proper one to apply for the discharge. *Com. v. Daniel*, 4 Clark (Pa.) 49.

Such court has the power conferred upon it in order that its business may not be interrupted or its dignity impaired. *Ibid.*

The court from which the process issued may discharge, but would act upon a different principle, namely, for an abuse of its process and not for contempt. *Ibid.*

#### VIII. The question of waiver.

The presumption is that every person within the territorial jurisdiction of a justice of the peace is subject to his jurisdiction for the service of process, and the party claiming an exemption must overcome the presumption by affirmative proof. *Day v. Harris*, 59 Hun, 623 37 N. Y. S. R. 322, 14 N. Y. Supp. 2.

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A waiver and voluntary submission are to be presumed, where there are no allegations to the contrary. *Brown v. Getchell*, 11 Mass. 11.

The exemption from arrest is a mere personal privilege which can be waived. *Hardenbrook's Case*, 8 Abb. Pr. 416.

While the privilege continues the person is sacred, but no longer. *Petrie v. Fitzgerald*, 1 Daly, 401.

The privilege may be waived and therefore the arrest is not void but voidable, and remains valid until avoided. *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598.

By not taking steps the privilege is waived.

*Ibid.*

No application to set aside process or proceedings for irregularity will be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step with a knowledge of the irregularity complained of, and the rule applies as well to the case of a prisoner as to other persons. *Green v. Bonaffon*, 2 Miles (Pa.) 219.

In general the party will waive his privilege unless he applies for a discharge upon motion, or on habeas corpus. *Smith v. Jones*, *supra*; *Fletcher v. Baxter*, 2 Aik. 224.

The privilege must be taken advantage of at the proper time or it will be waived. *King v. Phillips*, 70 Ga. 400.

Upon the first opportunity, otherwise his neglect will be deemed a waiver. *Wood v. Kinsman*, 5 Vt. 588.

The privilege fails unless claimed at once. *Petrie v. Fitzgerald*, 1 Daly, 401; *Fletcher v. Baxter*, 2 Aik. 224; *Pollard v. Union Pac. R. Co.* 7 Abb. Pr. N. S. 70.

Unless it be promptly taken. *Matthews v. Puffer*, 10 Fed. Rep. 606.

It must be insisted upon. *Tipton v. Harris*, Peck (Tenn.) 414.

A party privileged from arrest must take advantage thereof before pleaded in bar, as such plea admits that he is in court by proper process. *Randall v. Crandall*, 6 Hill, 342.

The giving of bail is no waiver of privilege. *Mackay v. Lewis*, 7 Hun, 83; *Larned v. Griffin*, 12 Fed. Rep. 560; *United States v. Fime*, 9 Serg. & R. 147; *Washburn v. Phelps*, 24 Vt. 506.

An appearance by an answer which simply protests against the exercise of jurisdiction and claims no other right is not such an appearance as waives the objection. *Chubbuck v. Cleveland*, 37 Minn. 466.

Where the defendant came into the jurisdiction with a bona fide intention of taking depositions, and upon sufficient justification changed his purpose, such alteration of purpose was held not to be a waiver of his privilege. *Wetherill v. Seitzinger*, 1 Miles (Pa.) 237.

So where the defendant came within the jurisdiction for the purpose of testifying before a legislative committee which did not sit for some few days. *Thorp v. Adams*, 58 Hun, 603, 11 N. Y. Supp. 41.

In *Brett v. Brown*, 13 Abb. Pr. N. S. 295, the question was whether the defendant had appeared generally and thereby waived his exemption, his affidavit relating to his attendance as a witness, the service of the summons upon him while so attending, and the order to show cause predicated of that paper, and related also to such attendance and service and asking the summons to be set aside, the court held the indorsement of the papers "attor-

like circumstances. Having voluntarily appeared in our courts to take advantage of this peculiarly harsh remedy; and having given bond, without which he could not have attached, he ought not to be allowed to assume a position which might enable him to escape

all liability for his wrong doing, and at the same time destroy the efficacy of his bond. For, if the bond which in many cases will alone protect the defendant from loss and his business from destruction, cannot be put in suit until the nonresident plaintiff on attach-

neys for defendant " must be shown in connection with the proceeding initiated, of which it was a part, and that the extension of the time to answer was a precautionary step founded upon the possible denial of the motion, and that the appearance could not be enlarged into a waiver of the privilege, especially as the claim relating thereto was asserted to at the same time that the quasi appearance was made.

If he waives the privilege and submits himself in the custody of the officer, he cannot afterwards object to the imprisonment as unlawful or as made by a void authority. *Brown v. Getchell*, 11 Mass. 11.

Where the defendant is given bail and justified, he waives his privilege. *Petrie v. Fitzgerald*, 1 Daly, 401.

So his silence is a waiver. *Farmer v. Robbins*, 47 How. Pr. 415.

And the demand of a copy of the demand and notice of retainer have been held waivers. *Stewart v. Howard*, 15 Barb. 28.

Where, at the time of the arrest, the defendant was actually under examination as a witness in a case before a commissioner under subpoena, it was held that by putting in bail he waived his privilege. *Ibid*.

An appearance is a waiver when general. *Williams v. McGrade*, 13 Minn. 174; *Brett v. Brown*, 18 Abb. Pr. N. S. 295.

So is the doing of some act in the cause in reference to his appearance or defense. *Petrie v. Fitzgerald*, 1 Daly, 401.

The giving of a bond for the prison bounds is a waiver of such privilege. *Tipton v. Harris*, Peck (Tenn.) 414.

And where the irregularities are known the obtaining of a rule to show cause there is a waiver. *Green v. Bonaffon*, 2 Miles (Pa.) 219.

It will be waived if judgment is suffered to pass without claiming the privilege, and by giving bail. *Fletcher v. Baxter*, 2 Aik. 224.

Where the principal not only gave bail but suffered judgment to pass against him in the original suit, without claiming or setting up his privilege, it was held he committed a waiver and there was no defense to an action against the bail. *Ibid*.

In *Atchison v. Morris*, 11 Fed. Rep. 582, the privilege was extended to a nonresident witness in the circuit court, from service of the summons in a civil action in the state court. The fact that the defendant so served, moved the court by petition and bond under the act of congress to remove the cause to the federal court, was held not to be a waiver of privilege, nor of the objection to service in the circuit court.

Where an answer to the motion asserted that the defendant did not claim his privilege as a witness, and that the sheriff did not know or suspect thereof, and that the defendant gave bail without objection, the sheriff discharging him out of custody, and subsequent notice of retainer by defendant's attorneys and demand of copy of complaint, it was held the privilege was waived, as had the defendant claimed his privilege the officer had power to discharge him out of custody; and for the further reason that notice given by his attorneys of retainer in the cause, and demanding copy of complaint, was a further waiver. *Stewart v. Howard*, 15 Barb. 28.

Where the defendant failed to claim his personal privilege to the sheriff, and to demand the same. -25 L. R. A.

from the county judge who issued the order but acquiesced in the arrest by his silence, and entered into the usual undertaking, and then waited twenty-one days before serving the motion papers for his discharge, it was held the defendant waived his personal privilege and acquiesced in the arrest. *Farmer v. Robbins*, 47 How. Pr. 415.

Where the defendant, a resident of Kansas, attended as a witness but the case not being tried, claimed his privilege for the reason that the new circuit commenced in the following February and that it would be more convenient and less expensive for him to stay over until then than to return home; upon arrest in another action and giving bail, the court held he could not claim the privilege as it did not appear that he was not at perfect liberty to return since the fifteenth of December. *Shultz v. Andrews*, 54 How. Pr. 380.

Where the defendant obtained a rule to show cause of action, and why he should not be discharged on common bail, in which the court reduced the bail, and afterwards he obtained a rule to show cause why the writ and service should not be quashed, upon the ground that the defendant was a sutor in the case pending, the court held that the writ and service could not be quashed, the defendant having obtained a rule to show cause of action, and several days having elapsed since its hearing. *Green v. Bonaffon*, 2 Miles (Pa.) 219.

In *Van Liew v. Johnson*, decided in March, 1871, but not reported, and cited in *Person v. Grier*, 68 N. Y. 124, 128, 23 Am. Rep. 35, the court held in substance that a summons could not be served upon a defendant, a nonresident of the state, while attending a court in the state as a party. The order, however, was denied upon the ground that the party had lost his privilege by remaining within the state an unreasonable and unnecessary time after the close of the trial upon which he had attended, but not without the dissent of two of the judges.

In *Marks v. La Société Anonyme de l'Union des Papeteries*, 19 N. Y. Supp. 470, 46 N. Y. S. R. 600, the question was whether a director and president of the defendant's society was actually in this country as a witness at the time of the service of the summons upon him, and for no other purpose, the facts showing that he was cabled here as a witness, and that he left Brussels but on arrival found the action had been tried and a verdict rendered against his company, but although not needed as a witness, his evidence was taken *de bene esse* after verdict, in view of a possible new trial. The witness transacting business in the meantime the court held the service of summons valid, as there was unnecessary delay in the taking of his depositions and that attending to business while here occasioned a loss of privilege.

Where the defendant claimed that he was engaged in the military service of the United States, and the suspension of plaintiff's remedy by the Act of March 2, 1865, section 1, of which exempted him from service of all civil process during their military service, the court held that the legislature had not declared the service of process void, but had attempted to confer a personal privilege upon those falling within the class designated, and that such privilege might be waived; that the defendant availing himself of the exemption should move to set aside the service and not appear generally by answering, which was submitting himself to the jurisdiction of the court and a waiver of privilege. *Williams v. M'Grade*, 13 Minn. 174.

ment has been sued and a judgment recovered against him in the perhaps far distant state where he resides, the value of the bond as a security to the alleged debtor, and as a means of preventing the fraudulent and reckless abuse of the process of the court, will

be greatly diminished, if not in many cases made absolutely worthless.

It would seem, therefore, that whatever rule of exemption we may adopt in regard to suitors generally in civil actions when the occasion arises, that neither public policy

In *Rex v. Platt*, 3 W. N. C. 187, a rule was applied for to set aside a summons on the ground that defendant was served while attending the trial as a witness in another jurisdiction, the trial of the case being postponed when the defendant returned to Philadelphia, where he had no special business and for the probable purpose of seeing the Centennial, and while there was served with the writ in question, and left Philadelphia for the place of trial after service of the writ in order to be in time for the trial, and the court discharged the rule.

### IX. The question of deviation.

The law is not so strict in point of time as to require a party to set out immediately after the trial; a little deviation or loitering will not forfeit the privilege, provided the act be done in good faith, and the delay and deviation not for the purpose of transacting private business. *Chaffee v. Jones*, 19 Pick. 261.

There is no deviation where the delay is fully justified. *Jacobson v. Hoemer*, 76 Mich. 234.

A party may be indulged in remaining to learn the verdict of a jury, who cannot separate after a cause is committed until they pronounce a verdict. *Clark v. Grant*, 2 Wend. 257.

A party returning from court is not bound to go the direct road, necessary deviations being allowed. *Chaffee v. Jones*, 19 Pick. 261.

Yet there must not be any unnecessary delay or deviation. *Farmer v. Robbins*, 47 How. Pr. 415.

When his business is done he must return, so as not to be guilty of a material deviation. *Ex parte Hurst*, 1 Wash. C. C. 186.

The defendant must be free from laches in his efforts to get rid of the arrest to which he has a valid objection. *Farmer v. Robbins*, *supra*.

The burden of establishing a deviation rests upon the arresting party. *Salinger v. Adler*, 2 Robt. 704.

His privilege, however, ought not to avail him if the deviation is equivalent to an abandonment of the original journey, for the purposes of pleasure or family visiting. *Miner v. Markham*, 23 Fed. Rep. 387; *Rex v. Platt*, 3 W. N. C. 187.

A witness has a reasonable time to return to his residence, but if instead of doing so he proceeds about his business, he loses his privilege. *Shultz v. Andrews*, 64 How. Pr. 380.

Where the deviation is for a distinct purpose disconnected with the return home of the party, he will not be protected. *Chaffee v. Jones*, 19 Pick. 261.

Stopping to attend to other matters has been held a deviation. *Salinger v. Adler*, *supra*; *Clark v. Grant*, 2 Wend. 257; *Chaffee v. Jones*, *supra*; *Smythe v. Banks*, 4 U. S. 4 Dall. 329, 1 L. ed. 654.

Where it appeared that the defendant was not returning home from court at the time of his arrest, but that in returning home he unnecessarily deviated from the direct route in order to attend a funeral, the court held he forfeited his privilege. *Chaffee v. Jones*, *supra*.

Where the deviation was occasioned by circumstances which rendered it justifiable if not absolutely necessary, it was held no waiver of the privilege. *Miner v. Markham*, 23 Fed. Rep. 387.

### X. English doctrine.

A party is protected *cumdo, morando et redeundo*. *King v. Hall*, 2 W. Bl. 1110.  
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The privilege exists in all cases, whether civil or criminal, in respect to witnesses, jurymen, and prosecutors. *Gilpin v. Cohen*, L. R. 4 Exch. 181.

In *Magray v. Burt*, 5 Q. B. 381, *Davis & M.* 652, it was held that a party arrested by the sheriff while attending as a witness had no ground of action for damages, but his only remedy was by application to the court and by whose authority he had been compelled to appear as a witness, the privilege being not that of a person but of the court, and therefore discretionary.

The protection of a witness is founded upon the suggestion that a person properly in attendance ought not to be prejudiced in his own interests by his attendance. *Webb v. Taylor*, 1 Dowl. & L. 684, 13 L. J. Q. B. 24, 8 Jur. 30.

In *Cole v. Hawkins*, 2 Strange, 1004, the defendant was served with copy bill while attending the sitting of a cause wherein he was defendant. The court held the privilege was designed to prevent any interruption of the business of the court, and such service was a contempt for which the lawyer would be arrested, but that he consented to waive the proceedings and pay the costs.

However inferior the tribunal may be, if it be a lawful one the privilege on principle exists. *Ex parte Cobbett*, 7 El. & Bl. 955, 25 L. J. Q. B. 238, 8 Jur. N. S. 685.

But this does not extend to a person going voluntarily with a view of commencing a proceeding as a common informer. *Ibid*.

The privilege of a witness does not depend upon the subpoena, no subpoena being necessary where the witness lives abroad. *Walpole v. Alexander*, 3 Dougl. 45.

The insolvent court is a court of justice. *Chanvin v. Alexander*, 31 L. J. Q. B. 79, 2 Best & S. 47, 31 L. J. Q. B. 79, 8 Jur. N. S. 262, 10 Week. Rep. 248.

On general principles there is no difference between an insolvent and any other court in this respect. *Ibid*.

A bankrupt is privileged while attending before the commissioners. *Arding v. Flower*, 8 Term Rep. 584, 8 Esp. 117.

In *Ex parte King*, 7 Ves. Jr. 312, it was intimated that a creditor attending to prove his debt, though not under summons, was entitled to privilege.

In *Spencer v. Newton*, 6 Ad. & El. 623, 1 Nev. & P. 318, 1 Jur. 52, the court questioned whether the privilege would be extended to the case of the detention of a witness through sickness.

The question in such cases always is whether the person arrested was at the time of his arrest bona fide engaged in the business he was called on to execute. *Heron v. Stokes*, *Re Owen*, 6 Ir. Eq. Rep. 125.

In *Davis v. Sherron*, 1 Cranoh. C. C. 237, a witness was attached while in the gallery of the courtroom, and the court held the service was not good.

A party on his return from a court of justice ought substantially to receive its protection, and to have the benefit of its dignity and quiet till he reached his home. *Pitt v. Coomes*, 5 Barn. & Ad. 1078, 3 Nev. & M. 312.

A party is not bound to go the nearest way home, and if he does not abuse the privilege for the purposes of going about a business of his own, he is entitled to be discharged. *Willingham v. Matthews*, 6 Taunt. 350, 3 Marsh. 57.

If a party shows that he is on his way home, it is for the party who arrests him to show a deviation.

nor the due administration of justice demands that we should hold the appellee exempt from the service of the summons issued against him to compel him to answer in damages for the alleged wrongful issuing of the attachment in question. Sound public policy, on the contrary, as well as the administration of equal justice, would seem to demand that no inducements should be held out to non-resident suitors to avail themselves of the harshest remedy known to our statutes; but if they should come, and should abuse the remedy to the injury of an alleged debtor, let them answer here, as the residents of this state must do in like cases.

In conclusion we need only say that we think it unnecessary to discuss further than we have already done *Bolgiano's Case*, for whether or not the principles there announced

and the cases there cited to support them establish, as contended by counsel for appellee in the additional brief filed a few days ago, that generally, plaintiffs, defendants, and witnesses are all equally exempt from civil process while attending court in another state, the case now before us, for the reasons we have given, is unlike that case and the cases therein cited.

We must not be considered as agreeing that *Bolgiano's Case* goes to the extent contended for by the appellee here. The exemption from service of civil process enjoyed by witnesses in this state under the rule laid down in the case cited should not be further extended, except upon the most careful consideration.

*Order reversed and cause remanded.*

*Selby v. Hills*, 8 Bing. 166; *Lightfoot v. Cameron*, 2 W. Bl. 1113; *Willingham v. Matthews*, *supra*.

The doctrine of deviation must not be carried to such an extent that whenever the officer sees the party going one yard out of his way home he may immediately arrest him. The party should not be dodged too closely. *Pitt v. Coomes*, 5 Barn. & Ad. 1078, 3 Nev. & M. 212.

The delay on the road must not be too great or the deviation unreasonable. *Randall v. Gurney*, 3 Barn. & Ad. 233, 1 Chitty, 679.

In *Ex parte Clarke*, 2 Deacon & Ch. 99, a witness from a distant part of the country attending court upon a summons was arrested for debt while waiting for his conveyance home. The court held he was entitled to be discharged, even though he had gone some little distance to another part of the city before taking the conveyance.

The privilege of a party attending his own cause extends to a bankrupt on his return from attending his petition for leave to surrender after expiration of the time, where he has deviated no further than to call on the solicitor to arrange the proper steps for giving effect to the order. *Ex parte Jackson*, 15 Ves. Jr. 117.

And where two witnesses staid in the town in which the trial took place for the purpose of returning home by coach on the succeeding day, it was held they were privileged from arrest. *Hatch v. Blissett*, 2 Strange, 933.

Where a person returning home from a motion in a case to which he was a party, called in at an office where he kept his papers but did not reside, for the purpose of refreshing himself and sorting the papers, remaining there one or two hours, when he left and went into a tailor shop in the same locality, intending, however, to proceed home immediately, when he was arrested by an officer who had watched him from the court, it was held he was entitled to the privilege of the party *redeundo* from the court and must be discharged. *Pitt v. Coomes*, 5 Barn. & Ad. 1078, 3 Nev. & M. 212.

In *Atty-Gen. v. Skinners, Co.*, *Ex parte Watkins*, 8 Sim. 877, 1 C. P. Coop. 1, the privilege was objected to upon the ground that the applicant did not take the shortest road to his residence, and that he stopped to speak to an acquaintance in the street and deviated from his course by going into a pub-  
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lic house. The court held that although the road taken by him was not the shortest possible, yet it being one not unusually taken, that he might therefore reasonably and fairly take it, and that his stopping to speak to an acquaintance, or his deviating a yard or two from his course for the purpose of taking refreshment, was not a sufficient ground for deviation and did not deprive him from his benefit of privilege.

In *Poole v. Gould*, 1 Hurst. & N. 99, 25 L. J. Exch. 250, it was held it was no ground for setting aside the service of a summons, that it was served on the defendant while attending in a *niel prius* court, in obedience to a subpoena to give evidence in a cause in which he was plaintiff, the court stating that the service of summons would not be set aside on slight grounds, and that every opportunity ought to be afforded to persons to serve debtors with writs.

A witness is not protected in going three days before the time appointed for his examination to the solicitor's office to look at the interrogatories in view of preparing himself. *Gibbs v. Phillipson*, 1 Russ. & M. 19, 8 L. J. Ch. 43.

In *Randall v. Gurney*, 3 Barn. & Ad. 233, 1 Chitty, 679, the defendant, who was summoned to give evidence in an arbitration in a distant court, left for that jurisdiction three days before and went to where his wife resided, and sought up papers necessary to be produced by the arbitrator, occupying a greater portion of two days in selecting and arranging the same, and on the afternoon of the second day was arrested. The court held he could not claim the privilege, having employed more than a reasonable time for the above purpose, he not having sworn that he was occupied the whole time in the object of the suit.

Where a party to a cause had attended before the master upon a summons, and having left the office was arrested on his way home, it was held, it appearing that the direction he took was beyond the jurisdiction of his residence, that there was a deviation which deprived him of his privilege. *Heron v. Stokes, Re Owen*, 6 Ir. Rq. Rep. 123.

The application should be made to the court out of which the attachment issues. *Pitt v. Evans*, 2 Dowl. P. C. 223.  
K. W.



## MICHIGAN SUPREME COURT.

Stephen BALDWIN

v.

George S. HOSMER, Circuit Judge.

(.....Mich.....)

1. The title to the twenty per cent of the assessments levied by the Order of Iron Hall which is retained by the local branches, as well as to the eighty per cent which is transmitted to the supreme sitting, is under the laws of the order in the supreme sitting.
2. Local branches of a secret benefit order cannot, when called upon to pay over assessments which they have collected under the laws of the order and which by such laws belong to the supreme sitting, question the validity of the incorporation of the supreme sitting.
3. An ancillary receiver may be appointed by the Michigan chancery court to aid the receiver appointed for a benefit society by the courts of the state of its residence, in collecting assessments located in Michigan and which belong to the order.
4. Local branches of a foreign benefit society which has become insolvent cannot refuse to turn over assessments in their hands to an ancillary receiver appointed to aid the foreign receiver in collecting in the assets, to be by him transmitted to the foreign receiver for distribution in the discretion of the court, if such disposition appears to be proper and consistent with affording due protection to the citizens of the state.
5. Funds which have been garnished will not be directed to be turned over to the receiver until the rights of the plaintiffs in the garnishment proceedings have been disposed of.
6. Contempt proceedings are not appropriate for the trial of issues involving the title to a fund raised by assessments upon the members of the benefit society, which is in the possession of the local branch from whose numbers it came, nor to determine the validity of a lien alleged to have been acquired by garnishment proceedings against it.

(June 16, 1894.)

**A**PPPLICATION for a writ of mandamus to compel respondent as judge of the Circuit Court to punish for contempt certain persons who were officers of local branches of the order of iron hall, for refusing to turn over funds in their hands to a receiver who had been appointed by the court. *Denied.*

The facts are stated in the opinion.

Mr. Carlos E. Warner for respondent.

Mr. Charles A. Kent for respondent.

Long, J., delivered the opinion of the court:

This is an application for a writ of mandamus to compel the respondent, who is one of the judges of the circuit court for the county of Wayne, to punish as for contempt certain persons who are officers of a local

**NOTE.**—In connection with the above case as to the exercise of comity toward the foreign receiver of the Iron Hall, see *Fawcett v. Supreme Sitting of Order of I. H. (Conn.)* 24 L. R. A. 815, and *Buswell v. Supreme Sitting of Order of I. H. (Mass.)* 23 L. R. A. 846.

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branch of the Order of the Iron Hall. The petition alleges substantially that the Order of the Iron Hall is a corporation organized at the city of Indianapolis, Ind., in the month of July, 1881, under and pursuant to the provisions of article 8, chap. 24, of the Revised Statutes of the state of Indiana; that, after its formation, it entered upon the business for which it was organized, and solicited memberships throughout the different states of the Union. The business of the order was carried on by and through the instrumentalities of so-called "local" or "sisterhood" branches, which were responsible to the main organization, and which, as declared by their constitutions, were required to consist of no less than 16 members, who should possess certain powers and privileges under the jurisdiction of the supreme sitting. There were about 1,190 local branches established in the United States, and 9 in Canada, making a total membership exceeding 60,000 persons, including those in the benefit division and life division, all of whom were subject to the authority and control of the main organization and its officers, under the articles of association, constitution, laws, and regulations of the supreme sitting, and each of which said local branches has in its hands, accumulated as a reserve fund, a large amount of money, the amount in Detroit alone ranging from \$300 to \$14,000. The supreme sitting continued to exist and carry on its business until about the 29th of July, 1892, when it became insolvent; and upon a bill filed in the superior court for Marion county, Ind., one James F. Failey was on the 28d day of August, 1892, appointed receiver of all the property and effects of every kind of the Iron Hall, both within and without the state of Indiana, with full power to receive, demand, and collect in his own name, as receiver, from the defendant and all of its officers, agents, branches, bankers, and any and all other persons, whether within or without said state, and to take, hold, and keep in his possession, under the direction of said court, all of said property, rights, credits, and effects, books, papers, and things, of any and every description, belonging to the defendant at the time of bringing such action on July 29, 1892, or since acquired, and to do and perform all and singular the duties imposed upon him and required by law. Mr. Failey duly qualified as such receiver, and entered upon the performance of his trust.

On the 2d of December, 1893, a final decree was entered in that court and cause, in which it was adjudged that the order of the iron hall, at the commencement of said action, was, and ever since had been, insolvent and unable further to carry on the business for which it was organized, and that its assets and property should be reduced to money, paid and applied upon its debts and outstanding obligations; and Mr. Failey was continued and confirmed as permanent receiver of said order. September 27, 1892, a bill of complaint was filed in the circuit court for the county of Wayne, in chancery by one

Lewis P. Durkee, in behalf of himself and all others interested who should choose to come in and be made parties, praying that a receiver be appointed in aid of and ancillary to the administration and receivership of all the property and effects of the defendant corporation appointed by the court in Indiana; and on the 1st of October, 1892, an order was entered in said Wayne circuit court, in chancery, appointing Stephen Baldwin, of Detroit, this state, as such ancillary receiver of all the property and effects of the order within the state of Michigan. Mr. Baldwin thereupon duly qualified, and entered upon the discharge of his trust, and such proceedings were thereafter had that on February 9, 1894, a final decree was entered in said Wayne circuit court, in chancery, in which it was declared that the defendant corporation, or supreme sitting of the Order of the Iron Hall was on the 29th of July, 1892, and ever since has been, insolvent; that it was unable further to carry on the business for which it was organized within the state of Michigan and elsewhere; and that its assets and property should be reduced to money, and applied upon its debts and outstanding obligations and liabilities,—and in which decree Mr. Baldwin was further continued and confirmed as ancillary permanent receiver of all such assets within the state of Michigan, with direction and authority, among other things, to take, hold, and convert into money, under the order and direction of the court, all the property, real, personal, and mixed, of every kind, belonging to said supreme sitting of the Iron Hall, with full power to demand, receive, and collect in his name as receiver or otherwise, as he might deem proper, from the defendant and all its agents, officers, branches, bankers, and any and all other persons within the state of Michigan, all such property and effects, and to take, hold, and keep in his possession, under the direction of the court, all such demands and effects, books, papers, and property, and other things, of every description, belonging to the defendant corporation on July 29, 1892, or since acquired, and to do and perform all and singular of the duties imposed upon him or required by law. It is further alleged in the petition that the organization was effected and existed only under the laws of the state of Indiana, and that the branches of the order existed, not by independent authority in any state in which they are situated, but solely by the authority of the charter granted to them in pursuance of the constitution and laws of the order under which they were permitted and organized. It is further shown that local sisterhood branch No. 5, so called, was one branch of the supreme sitting of the order in the state of Michigan, and was organized as such under the rules, regulations, constitution, and laws of the supreme sitting; that, at the time of the filing of the bill in this cause, Peter J. Schiffer, Jr., was the chief justice of said branch, Fred J. Kirtz accountant, John J. Starling cashier, and George Leitch, Fred. Linsell, and Charles Hampshire trustees; that afterwards Fred J. Kirtz removed from the city of Detroit, and one Carlton H. Royce was appointed or

elected his successor, and that Charles Hampshire died, and Charles Beck was afterwards appointed or elected his successor, as trustee; that, at the time of filing the bill in this case, the said chief justice, accountant, cashier, and trustees had charge of the funds, property, and assets of the supreme sitting, which were collected and received through the instrumentality of said local sisterhood branch No. 5; and that they then held in moneys, property, and securities of said order the sum of about \$20,000, which was subject to the order and direction of the supreme sitting, subject to the decree before mentioned; and that, at the time of filing this petition, the said officers and trustees held the moneys in the possession of the branch, which sum was subject to the order and direction of the supreme sitting, subject to said decree. It is further alleged that the petitioner caused a copy of the order appointing him receiver in this state, and a copy of the final decree in the cause, to be served upon the officers and trustees of said branch No. 5, and also caused personal written demands to be made upon each and every of said officers and persons for all moneys, property, goods, chattels, and effects in their hands belonging to the supreme sitting; but that said officers and trustees refused to comply with such demands and pay over the said moneys, property, and effects to the petitioner.

It appears that on March 12, 1894, the petitioner caused a petition to be filed in the Wayne circuit court, in chancery, praying that the officers of local branch No. 5 of said order might be ordered and required to show cause in said court why they should not be punished for contempt in neglecting and refusing to turn over to the petitioner such moneys, property, and effects in their hands and under their control, and that an attachment or other process might be issued requiring the persons named to comply with such order; and that, on said 12th day of March, that court entered an order requiring such persons to show cause on the 19th of March why they should not be punished for contempt, and why an attachment should not issue as prayed in the order. On the 19th day of March, in response to the order, the officers and trustees of said local branch appeared and answered the petition. In their answer they say: (1) That they were not parties to or bound by the proceedings by which Mr. Baldwin was appointed receiver ancillary to the receiver appointed by the court of Indiana; and, upon information, they assert that the appointment of Mr. Baldwin was made at the instance of the Indiana receiver, though, as he is not a party, he cannot be bound thereby, and for the purpose of taking all the funds belonging to branch No. 5, as well as those belonging to other branches, out of the state, and distributing them mainly among persons who have not contributed to them, and against the equitable rights of the members of branch No. 5, and that his appointment is unauthorized and void. (2) That the Order of the Iron Hall, and especially of the supreme sitting thereof, was devised and conducted

with the grossest fraud; and that this appears in the bill filed in the cause; and that, in consequence, any contract between said supreme sitting and the local branches is void, at the option of said branches. They aver further, on the advice of counsel, that, while said order claimed to be a corporation organized under the laws of Indiana, in fact there has not been and is not any law in Indiana under which said corporation could organize, and the claim to be a corporation is a fraudulent scheme, devised to deceive and defraud the members of the local branches.

(3) That all the funds in their hands have been contributed by the members of said local branch No. 5; that these moneys were contributed by each member under the belief that he would receive the benefits promised in the contract; and that, with the failure of the order, justice requires that these moneys should be returned to those who contributed them. (4) That, under the rules of the order, every local branch, in proportion to the number of its members, should have a fund nearly equal to that held by any other local branch; and that, if the funds in the possession of each branch be distributed among its members, justice will be better done than in any other way. (5) That if the money in question is to be sent to Indiana, and there distributed, the members of local branch No. 5 will be put to great expense in proving their claims in the Indiana court; that, as they are informed and believe, dividends have already been made by said Indiana receiver in which the members of said branch No. 5 will not be able to participate; and that the result will be that such members will receive a much smaller dividend than if the money be divided among those who have contributed it. (6) They admit that the fund in their hands or under their control is respectively as follows: Peter J. Schiffer has nothing. Fred J. Kirtz has about \$1,000. Carlton H. Royce has nothing. John J. Starling, George Leitch, Frederick Linsell, and Charles L. Beck have in money and securities about the sum of \$15,000. (7) The respondents Leitch and Linsell, further answering, say that on or about August 28, 1892, they, with John J. Younghusband and Charles Hampshire, were served with a writ of garnishment issued out of the circuit court for Wayne county in a cause then pending, in which Lewis Cohen is plaintiff, and the supreme sitting of the Iron Hall defendant; that they, as garnishee defendants, are enjoined from paying over the money or delivering any property or effects to said principal defendant until the further order of the court; that said cause is still pending and undetermined in said court; that said Charles Hampshire, named in said writ, is now dead, but that, at the time of service of said writ, he was one of the trustees of branch No. 5; and that Beck, one of the respondents herein, was duly appointed as his successor.

The issues raised by these pleadings were referred by the court to a commissioner to take proofs, whereupon the parties entered into a stipulation as to the facts which they deemed material to the issues. The stipulation admits the organization of the defend-

ant company, and also sets out the various provisions of the statutes of Indiana authorizing the formation of corporations which were in force at the time this corporation was organized. The court thereupon entered an order denying the relief asked, and refusing to adjudge the parties guilty of contempt. It is now averred by the petition here that, under the pleadings and proofs so stipulated, it is shown that the officers and members of local branch No. 5 received their charter and right from and under the supreme sitting, and that the property, money, and effects held by said branch belong to the supreme sitting; and it is prayed that a writ of mandamus issue to be directed to the Honorable George S. Hosmer, circuit judge, commanding him to show cause why he should not set aside and vacate the order denying the relief prayed, and why he should not proceed, in said court and cause, to compel the payment of said moneys now in the hands of such local branch to such ancillary receiver by the ordinary proceeding as for contempt, and why he should not enter an order in said court and cause adjudging the officers of said local branch in contempt of the authority of the court in neglecting and refusing to pay over said moneys. An order to show cause was issued, and the circuit judge has made a return thereto substantially as follows: (1) That the order and decree appointing Stephen Baldwin as receiver of the assets of the Order of the Iron Hall, the order that the local branches turn over the assets to said receiver, were granted in a suit in which none of said local branches or their trustees or other officers were made parties; that said order and decree were made without opposition or discussion, and by the consent of all the parties then represented. (2) That when the answer of Peter J. Schiffer and others, officers of branch No. 5, was filed in the contempt proceeding instituted by said receiver, it became evident that several serious questions of law were involved, some of which are as follows: (a) Whether or not there was any law of Indiana authorizing the formation of the corporation of the supreme sitting of the Order of the Iron Hall. (b) Whether or not the bill does not show that the organization of such association was so fraudulent as to release all the branches from their obligations or contracts entered into with said supreme sitting. (c) Whether or not, on the dissolution of said supreme sitting, from whatever cause, equity does not require that the moneys in the hands of the local branches be distributed among the persons who have contributed to the same, the purposes of such contributions having wholly failed. (d) Whether or not a court of equity in this state will not protect the persons equitably entitled to the funds held by the local branches of this state by a decision here, instead of compelling them to prove their claims before the court of Indiana, and taking such dividends as may be there ordered. (e) Whether or not the different local branches have such connection as renders the appointment of one receiver for all proper. (f) Whether or not it is proper for a court of equity to appoint in this state a

receiver ancillary to the Indiana receiver.

(g) Whether or not, under the averments of the bill to the effect that all the assets of said supreme sitting have been assigned to said Failey, by the voluntary assignment of said supreme sitting, any receiver should be appointed of such assets, or whether such appointment is not, for this cause alone, void.

(3) That this respondent is of the opinion that it is not proper that said cause should be decided on application to punish for contempt; that, in his opinion, when only persons who are not parties to a suit in which a receiver is appointed make a bona fide claim to property claimed by the receiver, the dispute should be decided in a regular suit brought by the receiver against the parties making the claim, and he submits that this rule is laid down by the authorities, citing *Ex parte Hollis*, 59 Cal. 405; *Re Paschal*, 77 U. S. 10 Wall. 438, 19 L. ed. 992; *Beach, Receivers*, § 247; *State v. Ball*, 5 Wash. 387.

(4) For these reasons, the respondent refused to punish the officers and agents of local branch No. 5 for not turning over this fund to the receiver; but, at the same time, the court offered the attorney for the receiver, and who has appeared in said proceeding for him, an order permitting the receiver to sue the officers and agents of the local branch, and this offer was refused.

There is returned into this court, as a part of the case, a copy of the decree made by the Indiana court appointing Mr. Failey receiver, and defining his powers and duties, together with the several orders made by that court, the constitution and by-laws of the order of the supreme sitting, a copy of the bill filed by Mr. Durkee, and the decree made by the Wayne circuit court appointing Mr. Baldwin ancillary receiver, and defining his powers and duties. It appears from the decree of the Indiana court that the corporation was organized under the Indiana statute. Whether such organization was authorized by those statutes does not seem to have been raised by the Indiana court, or, if so, the proceedings before us do not disclose the fact. That court proceeded to authorize the winding up of the concern and the collection of the assets, and, for that purpose, directed the receiver to collect from the local branches and others, whether within or without the state of Indiana, the property and assets of the corporation. Upon the appointment of the ancillary receiver within this state, he was authorized to receive and collect in the assets within this state; but it is nowhere provided in the decree that the moneys shall be transmitted by the ancillary receiver to the receiver at Indianapolis, but that he shall report to the court his doings in the matter, to the end that the court may make such further order in the premises as justice and equity may require. By the articles of association and the laws of the company, these local branches are made subordinate to the supreme sitting. All their powers and duties are set forth therein, and they exist only by authority of the law of the supreme sitting. The moneys now held by the officers of local branch No. 5 were collected by and under the authority thus conferred. The con-

stitution and laws of the order provide for the raising of these funds. Section 1, law 1, is as follows: "There shall be attached to this order a benefit fund in which members may participate (except social members) as they may severally elect, either in the sum of one thousand dollars, eight hundred dollars, six hundred dollars, four hundred dollars, or two hundred dollars, on which they shall pay the rates and be entitled to the benefits prescribed in the following table," etc. One of the objects of the organization, as stated in article 2, § 3, of the constitution, is as follows: "To establish a benefit fund from which those who have held membership in the order for thirty days or more may, should they so desire, on proper application, and complying with all the rules and regulations governing said benefit fund, become participants therein, and may receive the benefit of a sum not exceeding twenty-five dollars per week, nor more than one half the amount of the benefit certificate held by each member, when, by reason of disease or accident, they become totally disabled from following any avocation; or in case of death, if a member for more than two years, one half of the amount of the benefit certificate will be paid, less benefit received; or an amount of not more than one thousand dollars when they have held a continuous membership in the order for seven years: provided, however, that the sum total drawn from this order by any of its members shall never exceed in sick, disability, death, and final benefits the sum named in the benefit certificate." This benefit fund was derived from assessments upon the holders of benefit certificates, which assessments were made by the supreme sitting of the order from time to time, and out of which benefits were paid in case of the sickness, disability, or death of a member. The assessments were made through the local branches, and 80 per cent thereof was sent to the supreme cashier of the supreme sitting. Law 11, § 1, is as follows: "Twenty per cent of the amount received by each branch on each assessment shall be set aside and retained as a reserve fund, which fund is the property of the supreme sitting, and shall be subject to its control at all times as herein-after provided. At the expiration of the first term of six years and six months from the date of the organization of the order, one seventh of the reserve fund then on hand shall be called for by the supreme accountant, and used by the supreme cashier in the payment of the benefits; and annually thereafter one seventh of the reserve fund on hand shall be called for and used in like manner, unless otherwise ordered by the supreme sitting." An examination of the various provisions of the constitution and laws of the order convinces us that the legal title to this reserve fund is in the supreme sitting of the order, and not in the different local branches; that the 20 per cent of the assessment retained by each local branch differs from the 80 per cent transmitted to the supreme sitting, mainly in this: that the possession and supervision subject to the constitution remain with the local branches. The whole fund is for the protection of, and payment of benefits to,

holders of benefit certificates; and the reserve fund seems to us essentially a part of the benefit fund, although it may be in the nature of a safety fund to insure the payment of maturing certificates. This question has lately been before the courts of last resort in Massachusetts. The case is not yet officially reported, and is entitled *Buncell v. Supreme Sitting of Order of I. H.* 161 Mass. 234, 23 L. R. A. 846. There it was held that the funds held by the local branches of the order belong to the supreme sitting, and we think there can be no escape from such conclusion. In a late case in equity, brought in New Jersey, the vice-chancellor holds the same rule, and determined that the fund belonged to the home company. The case is *Ware v. Supreme Sitting of Order of I. H.* (N. J. Eq.) 28 Atl. 1041, and is not officially reported. Several of the states, through their courts of last resort, have passed upon this question, and, so far as we have found, have not held to the contrary.

It is said, however, that there was no legal incorporation in Indiana. We are not called to pass upon that question. The courts of Indiana have permitted the proceedings to be brought there to wind up the affairs of the order as a valid and subsisting corporation, and have recognized its legal status. The several courts of other states have also taken jurisdiction by the appointment of ancillary receivers to aid in collecting the funds to be transmitted to the home receiver. But we think the parties here are not in a position to raise that question. These local branches and their officers are a part of the order, and cannot, in this proceeding, question its due incorporation. *Merchants & Mfrs. Bank v. Stone*, 88 Mich. 779; *Empire Mfg. Co. v. Stuart*, 46 Mich. 482; *Niblack, Mut. Ben. Soc.* § 2. The object of the association was to create what is called a "benefit fund." The constitution and laws of the order were the contract between the parties. Courts can only enforce the contract as made, which is that the fund shall belong to the supreme sitting, and be distributed so that each member shall derive a benefit from the entire corpus of the assets of the supreme sitting, without regard to his local habitation. It was for the purpose of collecting in these assets in this state that the ancillary receiver was appointed. There can be no doubt of the right of a court of chancery within this state to make the appointment. Mr. Baldwin was so appointed, and is attempting to gather in these assets. These are trust funds for creditors and for distributees under the laws of the order. It is a principle now generally acted upon by the courts that a receiver or other trustee appointed in another state will be permitted, on the principle of comity, to bring an action in the domestic forum for the purpose of collecting the assets of the insolvent for distribution, in accordance with the law of the jurisdiction within which the receiver has been appointed, when so to do will not contravene the rights of citizens of the state in which the action is brought. *Metzner v. Bauer*, 98 Ind. 425; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Toronto General Trust Co. v. Chicago, B. & Q. R.* 25 L. R. A.

*Co.* 123 N. Y. 87; *Comstock v. Frederickson* 51 Minn. 350; *Graydon v. Church*, 7 Mich. 86.

But the rule of comity is never allowed to operate when it will contravene the rights of a citizen of the state where the action is being taken. So far as this local branch and its officers and members are concerned, however, they are part and parcel of the corporation. The receiver appointed in Indiana and the ancillary receiver appointed here, not only represent the creditors of the corporation, but stand in its stead; and under the decree of the Indiana court and the Wayne circuit court, in chancery, in this state, they are directed to gather in the assets; and, unless some reason is shown why that order should not be carried out, this local branch and its officers and members cannot refuse to turn over the assets to the ancillary receiver, and, when he has possession of such assets the court may order them transmitted to the Indiana receiver. But such order should be made only when it is made certain to the court that the members from this state would share proportionately with the other members throughout the organization. The fund is found in many different states, and comity requires that we should do all we can to insure, as far as possible, a speedy distribution of the whole property among those entitled to it. But the court below must have some discretion in making this order so that the rights of the citizens of this state may be protected.

By the answer of the local branch and its officers, it appears that the fund has been garnished in their hands, and that such proceedings are still pending and undetermined. Certainly, the court would not make an order for the payment of this fund into the hands of the receiver until the questions arising under the garnishment proceedings are determined. The plaintiffs in those cases have a right to their day in court before they can be deprived of the fund, or before the local branch and its officers are bound to pay it over to the receiver. The plaintiffs in the garnishment proceedings are not parties here, and their rights cannot be here litigated. If they have obtained a valid lien on the fund, that lien is not dissolved by the filing of a bill, and the appointment of a receiver, but may be enforced. *Hubbard v. Hamilton Bank*, 7 Met. 340; *Taylor v. Columbian Ins. Co.* 14 Allen, 358; *Folger v. Columbian Ins. Co.* 99 Mass. 267. Proceedings for contempt are not appropriate for the trial of issues involving the title to this fund, or to determine the validity of the lien which the garnishee claims. *Ex parte Hollis*, 59 Cal. 405; *Re Paschal*, 77 U. S. 10 Wall. 488, 19 L. ed. 992; *State v. Ball*, 5 Wash. 387. In *Beach on Receivers* (section 247) it is said: "It is also equally well settled that, in a proceeding to punish for contempt of court, the question of the title to the property cannot arise or be adjudicated. The court will not in such a proceeding do more than pass upon the bare question of contempt. It will not directly or indirectly assume to consider or to decide to whom the property belongs, or to decide that the receiver has or has not the right of possession in and to it."

The court below offered to permit the receiver to bring suit for these assets, which offer was declined. We think the court, under the facts stated in the answer of the local branch and its officers, properly refused to adjudge the parties guilty of contempt. We may remark, however, that, if the assets are finally paid into the hands of the receiver, it will be the duty of the court to direct that, upon their payment over to the Indiana receiver, the Michigan claimants shall receive a proportionate dividend with creditors elsewhere.

*The writ will be denied.*

The other Justices concur.

Flora A. POOLE

v.

CONSOLIDATED STREET R. CO., *Plf.*  
*in Err.*

(..... Mich. ....)

1. It is not negligence as matter of law to attempt to alight from a car at a pleasure resort station established by a street railway company, on the side opposite to that prepared for the reception of passengers if those in charge of the car have invited an alighting on such opposite side.
2. That a car has not reached the usual stopping place when a stop is made and a passenger attempts to alight, will not render him guilty of negligence if there was no warning not to alight and from the surroundings a passenger might well have understood that the stop was made for that purpose.
3. Whether or not the unevenness of the ground at a point used by passengers in alighting from a car is such as to constitute negligence on the part of the carrier is a question for the jury.
4. A defendant is entitled to have its theory of the case presented to the jury in specific instructions if such theory is supported by evidence and the instructions are properly requested.

(May 22, 1894.)

**E**RROR to the Superior Court of Grand Rapids to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

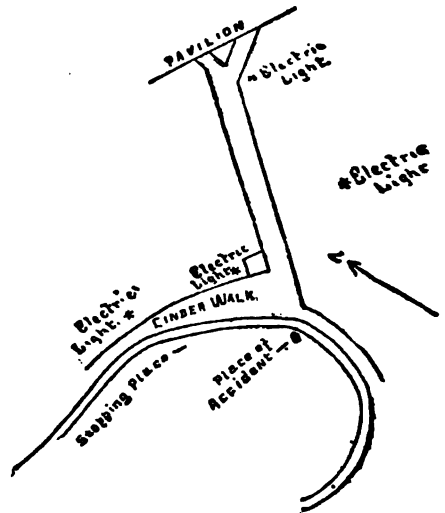
*Messrs. Kingsley & Kleinhans* for appellant.

*Messrs. Wesselius, Corbitt & Ewing* for appellee.

**Montgomery, J.**, delivered the opinion of the court:

The defendant operates an electric street railroad in Grand Rapids, with a line extending to Reed's Lake, which is a summer resort a short distance east of the city. The

company maintains pleasure grounds at this place, including a pavilion and conveniences for visitors. During the summer, the travel over this route is very large. For the convenient transaction of its business, the company's double track is extended and formed into a loop at the Reed's Lake terminus, so that cars may run continuously, without reversing or switching, around this loop, and back to the city. Within this loop is vacant ground, and, on the side to the north, nearest the pavilion, cinders have been spread, connecting with the walk and the pavilion, and forming an admittedly safe landing place. The accompanying sketch sufficiently shows the surroundings to indicate the situation.



On the evening of the 12th of April, 1892, the plaintiff, who had taken passage on one of defendant's cars, in attempting, after the car came to a stop, to alight inside, next the loop, received serious injuries. She brought this suit against the company, alleging that the defendant did not keep its grounds at Reed's Lake, at and adjacent to where said car stopped for passengers to leave the same, in such condition that passengers might alight with safety from said cars by night, but permitted said grounds to be and remain in such a rough, broken, and uneven condition, and permitted a steep bank of earth, of the height of, to wit, six inches, to be and remain at and alongside of said railway at said terminus where said cars stopped for passengers to leave the same, so that passengers alighting from said cars were liable to be thrown down and injured; and alleging that the plaintiff, by reason of the unsafe condition of the grounds, was, without fault on her part, thrown down and caused to fall to the ground with great force and violence, and received the injury complained of. The plaintiff covered a verdict for \$5,000, and defendant brings error.

**NOTE.**—The situation of the stopping place where the accident occurred in the above case, while unusual, is sufficiently like that in many other places to make the decision valuable. For the whole array

of cases on injuries received in getting on or off railroad trains (but not including street railway cases), see *note* to *Carr v. Bel River & E. R. Co.* (Cal.) 21 L. R. A. 354.

The defendant contends that upon the whole record it appears that the landing place provided on the northerly side of the track was suitable and proper, and known to the plaintiff to be so, and that she had no right to alight on the side of the car next the loop, and that, if she chose to do so, it was at her own risk; and it is further contended that the plaintiff's testimony, taken as a whole, failed to make it clear how the injury occurred, and also that the grounds inside the loop were a reasonably safe landing place. A number of other questions are raised, relating to rulings on the trial as to admissibility of testimony, refusal of requests to charge, preferred by counsel for the defendant, and the charge of the court on its own motion, which will be considered in order. The plaintiff's theory is that in attempting to leave the car she stood with both feet on the running board; that a gentleman who was aboard the car assisted her from the running board to the ground; that she clasped his hands in making her descent to the ground, and that, upon stepping down from the running board, she stepped upon the steep bank of earth, which the testimony shows to be somewhere from four to five inches high; that her foot slipped and gave way, and that she fell, and received the injuries in question. The defendant's theory as to the manner of her injury is that the true cause of her injury was not the uneven condition of the ground, but that it was occasioned by some person stepping upon the plaintiff's dress as she was alighting, thereby throwing her to the ground; and the defendant offered the testimony of numerous witnesses tending to sustain this theory.

It is strenuously insisted that, the company having provided a safe landing place on the northerly side of the loop, its full duty to the passengers was performed, and that it cannot be held liable for an injury occurring by reason of a passenger attempting to alight inside the loop. Upon this question the trial judge charged the jury as follows: "A street-railway company has the right to select and adhere to the making of their own arrangements for platforms and landing places at such resorts as Reed's lake, provided, only, that they make the landing place on one side safe and commodious, and so conspicuous that all passengers can see it by day or by night, unless it has been so used, and is so used, and the circumstances are such, in connection with the landing, as amounts to an invitation to alight on the other side;" and, further: "It is certain, under the testimony in this case, that the construction of that walk and landing, running from 30 feet wide down to 10 feet each way, and an extent of from 150 to 200 feet along this north side next to the resort, that it offers a plain and palpable invitation for the passengers upon its trains to get off upon that side; and I have no doubt that under the arrangements as testified to, and uncontradicted, in order for the company to be held as inviting an alighting upon the inside of the loop, that there must be, and should be, some positive act on the part of the company, as if a conductor should invite a passenger to get off

upon that side, or as if any arrangements had been made for the landing of passengers upon that side; and I believe the law to be, under the peculiar testimony in this case, that there should be something that you should fix in your minds, other than the fact that passengers upon a loaded train, riding upon the running board, upon the outside, saw fit to jump off within the loop, and run around across the track to the place of amusement." This charge was sufficiently favorable to the defendant, and fairly stated the law of the case, if there was any testimony tending to show that passengers had been, by the course of conduct of the defendant, invited to alight upon the inside of the loop. See *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa, 124, 96 Am. Dec. 114; 2 Redf. Railways, 533. We also think that there was testimony which justified this instruction. According to the plaintiff's testimony, she had previously been helped off the car by conductors inside the loop, and there is abundant testimony in the record that the common practice was to alight on either side indiscriminately. The car was so constructed that passengers could alight from either side, and there was no warning or notice to passengers to step off only on the northerly side. The cars were crowded with passengers, and the evidence shows that, as some would alight, others would press forward and take their seats. Under these circumstances, we are not prepared to say that, as a matter of law, it was negligent to attempt to alight on the inside the loop. But it is said that the car had not reached its usual stopping place, nor the place where plaintiff had been previously assisted to alight. But the car had come to a full stop on the occasion in question. There was no warning not to alight, and a glance at the surroundings is sufficient to indicate that a passenger might well have understood that the stop had been made for that purpose. The evidence shows that not the plaintiff alone, but substantially all, if not all, the passengers, interpreted the stop as an invitation to alight. The cinder walk was opposite the stopping place on the north, and the car was directly opposite the walk which leads to the pavilion. We also think the question of whether the uneven condition of the ground was such as to amount to negligence on the part of the company was, under the circumstances of this case, fairly a question for the jury. The plaintiff's theory was that the bank of earth from which her foot slipped was directly at the point where one, in alighting from the car, would be likely to step upon its edge, and slip backward. We are not prepared to say, as a matter of law, that this was a suitable landing place.

The defendant asked the court to charge the jury as follows: "If the jury find that the space between the outer edge of the running board of the car and the edge of the sod or little embankment was not more than seven or eight inches in width, it was not negligence on the part of defendant to have such a space at that time and place, and the plaintiff cannot recover." This request was refused, and the defendant's counsel assigns error upon its refusal, citing and relying

upon the case of *Ryan v. Manhattan R. Co.*, 131 N. Y. 126, as sustaining their contention that the request should have been given. That case is not at all analogous to the present. That was the case of an elevated railway company, which had left a space of from seven to eight inches between its platform and the running board of the car. This running board was presumably substantially upon the same level as the platform, and the court held that some space was necessary between the running board and the platform to enable the company to run its cars, and that, because of a necessary curve in the track, the distance of seven or eight inches was not unreasonable, and that, as it must be known that there is a vacant space between the car and the platform, such a space as could be spanned by a single step of a passenger was not unreasonable, and the leaving of such a space was not negligence. But in the present case the passenger was compelled to step downward in order to alight, the running board of the car being about eighteen inches above the surface of the earth, and we cannot say, as matter of law, that a passenger, in stepping down from the running board of the car, would in all cases step outward more than seven or eight inches. There was certainly no necessity for maintaining an obstruction there which could work injury, and the only legal question which could possibly be involved is whether the situation of this mound was such that one, in landing from the car, would reach it, and be likely to be injured by stepping upon the edge of the mound; and that question the request does not submit, and was therefore properly refused.

In the main, the cause was very carefully presented to the jury; but we think the court committed one error which is important, in view of the defendant's testimony, and the theory upon which it contested the case before the jury. The defendant requested the court to charge the jury as follows: "If the jury find that the injury was occasioned by

some one stepping on plaintiff's dress as she was alighting, and she was thereby caused to fall, she cannot recover." This request presented the defendant's theory of the case, and should have been given. The plaintiff denied any such occurrence, and described in detail how she claimed the injury occurred, while the defendant produced a number of witnesses who testified that her first statement of the occurrence was that some person stepped upon her dress, and caused her to fall from the car, and produced three witnesses who witnessed the occurrence, and who gave testimony in the same line. This presented the issue for the jury. There was no middle ground. There was no claim of two concurring causes. There could be no recovery unless the plaintiff's theory of the manner in which the accident occurred was found to be sustained by the proof; and if the testimony offered by the defense, which tended strongly to show that the injury occurred by reason of some person stepping upon her dress, was believed, there was no testimony in the case connecting the cause of the injury with the fault attributed to the defendant in the declaration. The omission to give this request is not cured by the general instruction that, if the injury was caused by accident or misadventure, without fault of either the plaintiff or defendant, there could be no recovery. The defendant had a right to have its theory of the case covered by specific instructions. *Dikeman v. Arnold*, 71 Mich. 656; *People v. Jacks*, 76 Mich. 218; *O'Callaghan v. Boeing*, 72 Mich. 669; *Cooper v. Mulder*, 74 Mich. 874; *Willey v. Crane*, 69 Mich. 17; *Babbitt v. Bumpus*, 73 Mich. 831; *Miller v. Miller*, 97 Mich. 151.

The other questions presented are not likely to arise upon a new trial, but, for the error pointed out, *the judgment will be reversed*, with costs, and a new trial ordered.

*Hooker, J.*, did not sit; the other Justices concurred.

## ILLINOIS SUPREME COURT.

Walter P. WARREN *et al.*, *Appts.*,  
v.

FIRST NATIONAL BANK OF COLUMBUS.

(149 ILL. 32)

1. A part of a debt or a chose in action may be assigned in equity creating a trust in favor of the assignee and an equitable lien upon the fund.
2. A fund that exists potentially, although it is not yet due, is subject to an equitable assignment of a portion of it which will be operative as soon as the fund is acquired.
3. The charter alone of a foreign corporation and not the general legislation of the

**NOTE.**—As to validity of preferences among creditors given by insolvent corporations, see *note* to *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex.) 23 L. R. A. 803.  
25 L. R. A.

state in which it was created will have effect to limit its powers outside of that state.

4. The New York statute prohibiting assignments or transfers by insolvent corporations has no extraterritorial force and does not affect the validity of an assignment by an insolvent corporation executed in Ohio as a transfer of a fund in Illinois.
5. The mere insolvency of a corporation does not *eo instanti* deprive its directors and officers of power to dispose of the corporate property in good faith as payment or security of corporate debts, although the effect may be to give some creditors a preference over others.
6. A factor's lien cannot attach to goods which never came into his actual possession but were delivered or consigned by the owner directly to the purchasers, even if the factor's contract provided that the goods should be consigned to him for sale.

(October 26, 1903.)



**A**PPEAL by defendants, claimants of a fund in the hands of Pullman's Palace Car Company which belonged to the Ohio & Western Coal & Iron Company, other than the First National Bank of Columbus from a decree of the Appellate Court, First District, reversing a decree of the Circuit Court for Cook County giving appellants' claims priority over that of the bank in an interpleader proceeding by Pullman's Palace Car Company to determine the right to such fund. *Reversed.*

The facts are fully stated in the opinion.

**Messrs. Warren & Cox and Flower, Smith & Musgrave,** for appellant Walter P. Warren:

There are five objections to the bank's claim:

1. The order was drawn by H. C. Stanwood, who signed as assistant treasurer, but who had no authority whatever to draw such a draft.

Taylor, Corp. § 286; *Koch v. National U. Bldg. Assn.* 85 Ill. App. 465; *Adams v. Cross Wood Print Co.* 27 Ill. App. 818; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 287; *Thomas v. Morgan County*, 59 Ill. 479; *Read v. Buffum*, 79 Cal. 77; *Titus v. Cairo & F. R. Co.* 37 N. J. L. 98; *Morawetz, Priv. Corp.* §§ 585 *et seq.*; *Leggett v. New Jersey Mfg. & Bkg. Co.* 1 N. J. Eq. 541, 23 Am. Dec. 728; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Hyde v. Larkin*, 85 Mo. App. 365; *Chicago & N. W. R. Co. v. James*, 22 Wis. 194; *Hoyt v. Thompson*, 5 N. Y. 320, 19 N. Y. 207; *Watworth County Bank v. Farmers Loan Co.* 14 Wis. 325.

2. The order was a partial assignment of a particular fund to become due, to the drawer, and is not good unless accepted.

*Mandeville v. Welch*, 18 U. S. 5 Wheat. 278, 5 L. ed. 87; *Chapman v. Shattuck*, 8 Ill. 49; *Crosby v. Loop*, 18 Ill. 625, 14 Ill. 880; *Chicago & N. W. R. Co. v. Nichols*, 57 Ill. 464.

3. The draft is void under the New York statute, because at the time it was given the Ohio & Western Coal & Iron Company had refused the payment of its notes, and the order was drawn and delivered with the intent, and such was its effect, of assigning or transferring the property of the company for the benefit of John M. Glidden, who was a stockholder in and the president of the company.

N. Y. Rev. Stat. 1827-28, § 4, chap. 18; *Lippincott v. Shaw Carriage Co.* 25 Fed. Rep. 577; *Adams v. Kehler Mill Co.* 85 Fed. Rep. 438.

4. The order or draft is void under the New York statute because it was given in contemplation of the insolvency of the Ohio & Western Coal & Iron Company.

N. Y. Rev. Stat. 1827-28, § 4, chap. 18; *Robinson v. Bank of Attica*, 21 N. Y. 406; *Brouwer v. Harbeck*, 9 N. Y. 589; *Bowen v. Lease*, 5 Hill, 221; *Harris v. Thompson*, 15 Barb. 62; *Sibell v. Remsen*, 88 N. Y. 95; *Paulding v. Ochrome Steel Co.* 94 N. Y. 834; *Pierce v. Crompton*, 18 R. I. 312; *Starkweather v. American Bible Soc.* 72 Ill. 50, 22 Am. Rep. 138; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 385, 56 Am. Rep. 776; *Metropolitan Bank v. Godfrey*, 28 Ill. 579, and note; *Ewing v. Toledo Soc. Bank*, 48 Ohio St. 81; *Walt, Insolv. Corp.* § 328.

5. The order or draft is invalid under the 25 L. R. A.

common law, as declared by the decisions in the state of Ohio, because it was a preference given by an insolvent corporation, which had ceased doing business.

*Morawetz, Priv. Corp.* § 808; *Walt, Insolv. Corp.* §§ 162, 654; *Rouse v. Merchants' Nat. Bank of Cincinnati*, 5 L. R. A. 878, 46 Ohio St. 498; *Kankakee Woolen Mill Co. v. Kamppe*, 88 Mo. App. 229.

Glidden & Curtis, as sales agents, never had such possession of the property out of which this fund arises as to acquire a lien thereon.

*Mechem, Agency* §§ 676 *et seq.*; *Strahorn v. Union Stock Yard & T. Co.* 48 Ill. 427, 92 Am. Dec. 143; *Winne v. Hammond*, 37 Ill. 99.

Glidden & Curtis acquired no right to a lien on this fund by virtue of the contract of November 8, 1887.

*Boomer v. Cunningham*, 22 Ill. 320, 74 Am. Dec. 155; *Hunt v. Hullock*, 23 Ill. 320; *Allen v. Montgomery*, 48 Miss. 101; *Strong v. Krebs*, 63 Miss. 388; *Hoffman v. Brungs*, 83 Ky. 400; *Cook v. Brannin*, 87 Ky. 101; *City F. Ins. Co. v. Olmsted*, 38 Conn. 476; *Clay v. East Tennessee & V. R. Co.* 6 Helsk. 421; *Read v. Mosby*, 5 L. R. A. 123, 87 Tenn. 759; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Chynoweth v. Tenney*, 10 Wis. 403; *Stearns v. Quincy Mut. F. Ins. Co.* 124 Mass. 63, 26 Am. Rep. 647; *Chase v. Denny*, 180 Mass. 566; *Christmas v. Russell*, 81 U. S. 14 Wall. 69, 20 L. ed. 763; *Ford v. Garner*, 15 Ind. 298; *Rogers v. Hosack*, 18 Wend. 319; *Holt v. Bank of Augusta*, 13 Ga. 341; *Bromwell v. Turner*, 37 Ill. App. 561.

The contract of November 8, 1887, was not a valid contract, because procured by Glidden for the benefit of his firm when the company was insolvent and he the president thereof.

*Beach v. Miller*, 180 Ill. 170; *Atwater v. American Exch. Nat. Bank*, 40 Ill. App. 501; *1 Beach, Priv. Corp.* § 241b.

**Mr. E. R. Jewett** for appellant Baltimore & Ohio R. Co.

**Mr. John S. Cook** for appellant Evan T. Ellicott.

**Messrs. Smith, Helmer & Moulton** for appellant Marcus A. Thompson.

**Messrs. Lynden Evans and Frederick Arnd**, for appellants, the trustees of Glidden & Curtis:

When the goods are consigned to a factor, and he makes advances on them, he has the right to sell them, and may, out of the proceeds, satisfy his lien.

2 Kent. Com. § 44, p. 642; *Zoit v. Millandon*, 4 Mart. N. S. 470.

The lien also extends to proceeds of the goods.

*Hudson v. Granger*, 5 Barn. & Ald. 27; *Keiser v. Topping*, 72 Ill. 226; *Jarvis v. Rogers*, 15 Mass. 889.

An agreement to pledge property to come into being makes the pledge attach immediately upon the property coming into being.

*Macomber v. Parker*, 14 Pick. 497; *Donald v. Hewitt*, 83 Ala. 534, 73 Am. Dec. 481; *Smith v. Atkins*, 18 Vt. 461; *Goodenow v. Dunn*, 21 Me. 86; *Ayers v. South Australian Bkg. Co. L. R.* 8 P. C. 548; *Wisner v. Ocumpaugh*, 71 N. Y. 118; *Coates v. Donnell*, 16 Jones & S. 461; *Barnard v. Norrwich & W. R. Co.* 4 Cliff. 351; *Kirksey v. Means*, 42 Ala. 426; *Bibend v. Liverpool & L. F. & L. Ins. Co.* 30 Cal. 78.

On future property this lien is good against subsequent contract creditors of the lineor.

Jones, Liens, § 42; Jones, Chattel Mortgages, § 157; *Tedford v. Wilson*, 8 Head, 811; *Polk v. Foster*, 7 Baxt. 98; *Grange Warehouse Assn. v. Owen*, 86 Tenn. 355; *Read v. Mosby*, 5 L. R. A. 122, 87 Tenn. 759.

The pledgee does not lose his lien by permitting the pledgor to have the property for a special and limited purpose.

*Cooper v. Ray*, 47 Ill. 58; *Hutton v. Arnett*, 51 Ill. 198; *Langton v. Waring*, 18 C. B. N. S. 815; *Way v. Davidson*, 12 Gray, 465, 74 Am. Dec. 604.

*Messrs. Norton, Burley & Howell*, for appellees:

The order or draft in question operated as an equitable assignment, *pro tanto*, of the fund in the hands of the Pullman company from the time of its delivery. Notice to the drawee was not necessary to perfect the title of the bank as against any party to this cause.

8 Pomeroy, Eq. Jur. §§ 1280, 1281, and notes; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 893; *National Bank of America v. Indiana Bkg. Co.* 114 Ill. 488; *Phillips v. Edsall*, 127 Ill. 547.

The fact that the debt against which the draft was drawn was not then due and payable is immaterial.

8 Pomeroy, Eq. Jur. § 1288, and cases cited; *Anderson v. DeSoer*, 6 Gratt. 384. See also 1 Am. & Eng. Encyclop. Law, 830, 840; 2 Story, Eq. Jur. 18th ed. § 1044; 1 Daniel, Neg. Inst. 8d ed. § 38.

An insolvent corporation may deal with its creditors by making payment, etc.

Walt, Insolv. Corp. § 162; 2 Morawetz, Priv. Corp. §§ 802, 804; Cook, Stock & Stockholders, § 691; *Paulling v. Chrome Steel Co.* 94 N. Y. 334; *Dutcher v. Importers & T. Nat. Bank*, 59 N. Y. 12; *Reichwald v. Commercial Hotel Co.* 106 Ill. 439; *Ragland v. McFall*, 187 Ill. 81; *Glover v. Lee*, 140 Ill. 102; *Weber v. Mick*, 181 Ill. 526.

**Bailey, J.**, delivered the opinion of the court:

On the 5th day of October, 1889, Pullman's Palace-Car Company, being a debtor of the Ohio & Western Coal & Iron Company, a corporation organized under the laws of the state of New York, in the sum of \$31,695.68, filed its bill of interpleader in the circuit court of Cook county against the First National Bank of Columbus, Ohio, the trustees of the late firm of Glidden & Curtis, the Ohio & Western Coal & Iron Company, and James A. Hall, its assignee, and divers creditors of that corporation, who were seeking to reach the indebtedness in question by process of garnishment, praying to have these various claimants upon the fund in its hands brought into court, and required to interplead as to their respective interests and priorities. The defendants having appeared and answered, the cause was heard on pleadings and the master's report, and it was decreed that a proper case for an interpleader was presented; and, the complainant having paid into court the full amount of the indebtedness in question, the defendants were perpetually enjoined from proceeding further against it for

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the collection of the same, and it was ordered that the fund thus paid into court stands in lieu of the complainant's liability as garnishee or otherwise. The cause, as between the several defendants, being afterwards heard, it was adjudged and decreed that the claims of four of the attaching creditors, viz., those of Walter P. Warren, the Baltimore & Ohio Railroad Company, Evan T. Ellicott, & Marcus A. Thompson, aggregating \$23,771.97, were entitled to priority, and those claims, with interest thereon from the date of the decree were ordered to be paid in full; and it was further decreed that the First National Bank of Columbus was entitled to the residue of the fund after the payment in full of these four attaching creditors. From this decree the First National Bank of Columbus and the trustees of Glidden & Curtis appealed to the appellate court; and in that court the decree was reversed, and the cause was remanded to the circuit court, with directions to enter a decree giving priority to the claim of the bank, amounting to \$16,676.79, and ordering that claim, with interest thereon from March 1, 1889, to be first paid in full, and ordering payment of the residue of the fund to the trustees of Glidden & Curtis. From the judgment of the appellate court the four attachment creditors and the trustees of Glidden & Curtis have appealed to this court.

The facts in relation to the claim of the First National Bank of Columbus, Ohio, as shown by the evidence, are substantially these: On February 8, 1889, and prior to that time, the trustees of the Ohio & Western Coal & Iron Company resided in Massachusetts, Maine, New York, and Pennsylvania, and one of their number, James A. Hall, who was also vice-president of the company, resided at Columbus, Ohio. John M. Glidden, the president, and George R. Chapman, the treasurer, resided and had their office at Boston, Mass., and Chester Griswold, the secretary, resided and had his office in the city of New York. The company had an office in New York City, where its corporate meetings were held, and it also had an office in Boston, where its principal financial business was transacted, and also one at Columbus, where its principal operative business was carried on; its mines and furnaces being all situated in Ohio. Books of account of the transactions in Ohio were kept at the Columbus office, and books of account were also kept at Boston. The representatives of the company residing at Columbus were Hall, the vice-president, and H. C. Stanwood, whose office or agency, as he was known and held out to the world, was that of assistant treasurer; and he had, ever since the organization of the company, which was then about six years, been performing the duties appropriate to that position, and had been recognized by the company in many ways as holding that office. It is now claimed, however, that no such office as assistant treasurer was provided for by the by-laws of the company, and that there is no record upon the books of the company of Stanwood's appointment to that office; but the evidence clearly warrants the conclusion that, from the first organization of the com-

pany down to the time of the transactions in question in this suit, he had actual charge of the financial affairs of the company at Columbus, and was, *de facto*, its treasurer at that place. In transacting its financial business in Ohio, the company, from the first, kept its bank account with the First National Bank of Columbus; the business with the bank being all transacted, on the part of the company, by Stanwood. All deposits were made by him, and all checks bore his signature, although a part of the checks seem to have been also countersigned by Hall, the vice-president, while others were signed by Stanwood alone. Among other financial transactions between the bank and the company, Stanwood drew, through the bank, a large number of drafts in favor of the company on Glidden & Curtis, of Boston, which were honored. In January, 1889, the company was indebted to the bank in the sum of \$20,000 for money previously borrowed, and in renewal of which indebtedness it gave its two promissory notes for \$10,000 each, one dated January 10, and the other January 12, 1889, and each payable thirty days after date, to the order of Glidden & Curtis, and indorsed by them. This loan was made at the earnest solicitation of Stanwood, and the business with the bank in relation to it was transacted by him. The loan seems to have been made principally upon the financial standing and credit of Glidden & Curtis, who were then reputed to be wealthy and responsible, the bank having declined to make the loan on the credit of the coal and iron company alone. On the night of February 8, 1889, the officers of the bank having learned that Glidden & Curtis had failed, and had made an assignment for the benefit of their creditors, and being alarmed about their security upon the notes, sent for Stanwood, who was the only officer of the company then in Ohio, and demanded further security from the company. No security was given that night, but, at about 9 o'clock the following morning, Stanwood executed and delivered to the bank the following instrument: "Columbus, Ohio, February 8, 1889. To the Pullman Palace-Car Company, Pullman, Ill.: Please pay to the First National Bank of Columbus, Ohio, or order, the sum of twenty thousand dollars of the money owing by you, and to become due to us on or about the 15th day of February and the 15th day of March, 1889, value received by us, and charge the same to our account. The Ohio & Western Coal & Iron Co., by H. C. Stanwood, Asst. Treasurer." Notice of the execution of this instrument was at once given to the Pullman Company by telegraph, and on February 11th it was presented to that company, and protested for nonacceptance; and on the 15th day of February, and again on the 15th day of March, it was presented, and protested for nonpayment. On February 9th, Thompson began his suit by attachment, in the circuit court of Cook county, against the coal and iron company, and caused the Pullman Company to be summoned as garnishee. This attachment was followed at different dates by those of the other attaching creditors, and on February 11th the coal and iron company

made an assignment to James A. Hall, assignee; the deed of assignment being delivered to Hall, and filed for record in the probate court of Franklin county, Ohio.

The first proposition affecting the claim of the bank to priority, raised by counsel for the appellants, is that Stanwood had no authority to execute to the bank the instrument above set forth, and that such instrument therefore was ineffectual as an assignment to the bank of any portion of the fund in the hands of Pullman's Palace-Car Company. The question thus raised is one of fact to be determined from all the evidence, and it must be confessed that the testimony of the various witnesses, applicable to that question, is far from being harmonious. It is to be noticed, however, that both the circuit and the appellate court, after considering the evidence, have reached the conclusion that Stanwood was vested by the coal and iron company with competent authority to execute the order on its behalf. While, in cases in chancery, where, as in the present case, the evidence has not been taken orally in open court, in the presence of the chancellor, we are not concluded by the decision of the court below, but may examine and pass upon the evidence *de novo*, still some degree of weight is properly due to the concurring decisions of the two courts to whose judicial investigation the evidence in the case has already been subjected. We have nevertheless given the evidence an earnest and careful consideration, and, while it must be said that the question is not altogether free from doubt, we are inclined to concur with the conclusion reached by the courts below. The evidence in the case is very voluminous, the abstract of the record constituting a volume of over 540 printed pages. It is manifest, therefore, that any attempt on our part to give such an analysis of the evidence as will adequately show the grounds upon which our conclusion is based would involve an expenditure of time and space which, in view of the pressure of other duties, we can but ill afford, and which, after all, would subserve no useful purpose. It may be said, briefly, that it is clearly shown that, in his position of assistant treasurer, Stanwood had general control of the fiscal concerns of the company in Ohio, especially in the absence of Hall, the vice-president; and it appears that, at the time the instrument in question was executed, Hall had gone to New York to attend a corporate meeting, leaving the entire charge of the financial concerns of the company in Ohio in Stanwood's hands. Hall testifies that, as to financial matters,—matters in respect to loans and their payment,—Stanwood had always been authorized to act for the company; that, in the absence of the witness, Stanwood conducted the financial business of the company; and that witness had no recollection of having ever notified the bank of any limitation upon Stanwood's power to manage financial matters. On further examination he says that the particular part of the company's business at Columbus which Stanwood attended to was the money part; that he had charge of all matters of money at the Columbus office, including the ac-

counts at the bank; that he negotiated the \$20,000 loan, and was in the habit of negotiating loans at Columbus; that he signed checks on the bank, which the witness countersigned while there, but that, when he was away, Stanwood drew checks without his countersigning them. Stanwood himself testified that the duties he performed as assistant treasurer were all the financial duties,—the entire business of the company, so far as it related to the disbursing of money, the collection of accounts, and the care of property under his charge; that he attended to the building of some 150 houses; that he bought the most of the supplies of all kinds, and had the general conduct of the business, up to the time Hall came to Ohio, which was in July, 1887, except the operation of the furnaces and coal mines; that he had charge of the financial business entirely, and of everything connected with that department; that he kept the accounts with the bank, looked after deposits, and drew the checks; that he negotiated the \$20,000 loan, and also other loans; that on certain occasions he signed notes for the company, in pursuance of special directions for that purpose; that Hall, after coming to Columbus, had general supervision of the mines and furnaces, but had nothing whatever to do with the financial affairs of the company; that there was never a single transaction, of any sort or nature, connected with the financial department of the company, that anybody attended to, except himself, from the organization of the company to the date of its failure. John M. Glidden, the president of the company, testifies in cross-examination that, as he understands it, Stanwood managed the financial affairs of the company at Columbus generally and continuously for several years, ending at the time of the failure, in the capacity of assistant treasurer; that he was recognized by the officers of the company, and by its agents and employes and the public generally, as the assistant treasurer of the company; that witness himself recognized Stanwood as assistant treasurer of the company, and recalls no instance where he dissented from his acts as such. The foregoing is not, and is not intended to be, a complete statement of the evidence applicable to the question under consideration; but it is sufficient, we think, to show, that Stanwood, under the designation of "assistant treasurer," was a fiscal officer or agent of the coal and iron company, clothed with very broad and general powers. The fund in the hands of the Pullman Company consisted of money due and to become due for products of the coal mines of the coal and iron company; and it seems, therefore, to have properly pertained to the department of the financial business of that company, which was under the control and supervision of Stanwood. We are of the opinion, then, that in view of all the evidence it must be held that the appropriation of a portion of that fund to the satisfaction or securing of the \$20,000 loan was within the scope of the powers conferred by the company upon him. Nor do we think it necessary, in order to sustain this view, to resort to the doctrine of estoppel, or to draw any distinction between the actual and the ap-

parent scope of his authority as agent. The case does not rest, as it seems to us, upon proof of the acts of the company in holding him out as its agent possessing sufficient authority to enable him to execute on its behalf the instrument in question, but the evidence tends to establish an actual delegation of powers broad enough for that purpose.

It is next contended that the order upon the Pullman Company was only a partial assignment of the fund due or to become due to the drawer, and that as it was not accepted by the drawee it was ineffectual to pass the title thereto to the bank in whose favor the order was drawn. In this view we are unable to concur. While a part of a debt or chose in action is not assignable at law, it may be assigned in equity, and in such case a trust will be created in favor of the equitable assignee of the fund, and will constitute an equitable lien upon it. *Phillips v. Edsall*, 127 Ill. 535. On this question, Mr. Pomeroy, in his treatise on Equitable Jurisprudence, says: "Equity recognizes an interest in the fund, in the nature of equitable property, obtained through the assignment, or the order which operates as an assignment, and permits such interest to be enforced by an action, even though the debtor or depositary has not assented to the transfer. It is an established doctrine that an equitable assignment of a specific fund in the hands of a third person creates an equitable property in such fund." And again: "The agreement, direction, or order being treated in equity as an assignment, it is not necessary that the entire fund or debt should be assigned. The same doctrine applies to an equitable assignment of any definite part of a particular fund. The doctrine that the equitable assignee obtains, not simply a right of action against the depositary, mandatory, or debtor, but an equitable property in the fund itself, is carried out into all its legitimate consequences. Thus, the assignee may not only recover the money from the original depositary (the drawee), but may pursue it or its proceeds, under any change of form, as long as it can be certainly identified, into the hands of third persons who have acquired possession of it from the depositary, as volunteers, or with notice of the assignee's prior right. The fund, in this respect, resembles a fund impressed with a trust." 8 Pom. Eq. Jur. § 1280. See also *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 898; *National Bank of America v. Indiana Bkg. Co.* 114 Ill. 483. Nor is it material that the fund upon which the draft is drawn is not due, in that it is not actually in being, if it exists potentially, for even in that case the order will operate as an equitable assignment of the fund as soon as it is acquired, and will create an interest in it which a court of equity will enforce. 8 Pom. Eq. Jur. § 1283.

It is further urged that the order in question contravenes the provisions of a statute of the state of New York in relation to corporations, and is therefore void. The Ohio & Western Coal & Iron Company was organized under a general statute of the state of New York, authorizing and providing for the formation of corporations for manufactur-

ing, mining, mechanical, or chemical purposes, passed February 17, 1848. That statute contains no provision prohibiting preferences by insolvent corporations. But there seems to be a general statute in force in that state in relation to corporations, passed in the year 1825, and which forms a chapter in the "Revised Statutes of New York passed in the years 1827 and 1828, and certain former acts which had not been revised." That statute contains a section which provides as follows: "Whenever any incorporated company shall have refused the payment of any of its notes, or other evidence of debt, *in specie*, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever; and every such transfer and assignment to such person, stockholder, or other person, or in trust for them or their benefit, shall be utterly void." There can be no doubt that the coal and iron company, at the time the draft was drawn, was in contemplation of insolvency. On that very day, or the day before, a meeting of the trustees was held in the city of New York, at which Hall, the vice-president, was present, and at which it was determined that the company should make an assignment for the benefit of its creditors,—a step which was taken very shortly afterwards. If, then, the New York statute above quoted is to be enforced extraterritorially, the draft must be held to be void. Should it be so enforced? It is the charter alone which, by the law of comity, is recognized and enforced in other jurisdictions, and not the general legislation of the state in which the company is formed. The general laws and regulations of a state are intended to govern only within the limits of the state enacting them, and the state can have no power to give them extraterritorial force. Such provisions do not, as a rule, enter into contracts made within the state, if they are to be performed in another jurisdiction. It follows, therefore, that where a state statute is enacted for the enforcement of a local policy only it will not be presumed that such statutory provisions were intended by the state, or by the shareholders forming the corporation, to enter into the charter contract, and to regulate the company in its transactions outside of the state, and they will not affect the validity of the dealings of the company in foreign states. 2 Morawetz, Priv. Corp. § 967.

In *White v. Howard*, 88 Conn. 342, a question arose as to the power of a New York corporation to take a devise in the state of Connecticut, devised to corporations being forbidden by the New York statute of wills. The court, in sustaining the devise, said: "If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion contended for would be legal and logical. But the inability does not so arise. There is no prohibition in the charter. The

inability is created by the New York statute of wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York statute of wills, and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take, created by the statute of a state, which is local, and a prohibitory clause in a charter, which everywhere cleaves to the corporation." In *Ellencorth v. St. Louis, A. & T. H. R. Co.*, 98 N. Y. 553, the corporation in question was organized under the laws of Illinois, and the point in dispute was whether a provision in its charter prohibiting it from selling its bonds at less than 80 cents on a dollar would apply, as a statutory provision, to a sale made in the state of New York. In deciding this question in the negative, the court said: "There is nothing in the laws of New York which renders the contract illegal. Even if the charter of the defendant should be so construed as to contain prohibitions which would have rendered the contract illegal in Illinois, if made there, they do not have that effect in this state." In *Hoyt v. Sheldon*, 3 Bosw. 267, the charter of a corporation created by the laws of New Jersey contained no prohibition upon the disposition of its property in case of insolvency. A general statute of the state, however, prohibited incorporated companies, after becoming insolvent or in contemplation of insolvency, from selling, assigning, or transferring any of their property or effects, and declared all such sales to be utterly null and void as against creditors. The question was as to whether the title of a citizen of New York, derived through a transfer of a portion of its property by such corporation, the transfer being made outside of New Jersey, was affected by such prohibition. The court, in deciding that question in the negative, held that the power of disposing of its property was one of the powers incident to corporate existence, and was not destroyed by insolvency, unless so expressly provided in the act of incorporation, and that a citizen of New York, dealing with a New Jersey corporation, might rely upon the act of incorporation, and was not chargeable with notice of the general laws of New Jersey restraining the powers of corporations. See also *National Bank of America v. Indiana Bkg. Co.* 114 Ill. 498; *Hoyt v. Thompson*, 19 N. Y. 207.

In view of these authorities, and of many others of like character which might be cited, we are of the opinion that the general statute of New York prohibiting the assignment or transfer of property by a corporation in contemplation of insolvency is only a part of the local law of that state, which New York corporations organized under the Act of 1848 do not carry with them when they go to other jurisdictions to do business, and that, having no extraterritorial force, it has no application to an assignment of a fund in Illinois executed in Ohio by a New York corporation. In *Starkweather v. American Bible Soc.*, 72 Ill. 50, 22 Am. Rep. 138, it was held that a New York corporation could not exercise a

power in this state which was denied to it by the general statutes of the state of its creation, and to that extent the rule in this state must be held to be in conflict with that laid down in *White v. Howard, supra*. We are aware of no decision in this state, however, which holds that the local statutes of another state, regulating the mode in which corporate powers shall be exercised, or determining the validity of corporate acts performed in the exercise of such powers, are to be given any extraterritorial effect.

But it is contended that, even if the draft in question is not affected by the New York statute, it should, under the circumstances, be held to be void on general principles of equity. The theory upon which this contention rests is that the assets of a corporation, the instant the corporation becomes insolvent, become a trust fund for the benefit of its creditors, and that the officers of the corporation, in possession of the corporate property, being trustees for all the creditors, cannot lawfully dispose of it otherwise than for the equal benefit of all the corporate creditors. In support of this view the case of *Rouse v. Merchant's Nat. Bank of Cincinnati*, 46 Ohio St. 498, 5 L. R. A. 878, is referred to; and this decision, among others, was read in evidence at the hearing for the purpose of showing, as a matter of fact, the conclusion adopted by the highest court of the state of Ohio in relation to the equitable rule contended for. It is there held that a corporation organized for profit under the laws of Ohio, after it has become insolvent and ceased to prosecute the business for which it was created, cannot, by giving some of its creditors mortgages to secure antecedent debts, without other consideration, create valid preferences in their behalf over other creditors, or over a general assignment thereafter made for the benefit of creditors. The court, in the opinion, recognizes the fact that the decisions on the question in the other states are conflicting, and admits that it is a matter of first impression in that court. In this state, however, where the fund assigned had its *situs*, where the drawee resided, and where the order, as the parties must have contemplated, was to be executed, a somewhat different rule prevails. The doctrine is recognized here that the property of an insolvent corporation is a trust fund, in such sense as precludes the directors and officers of the corporation from dealing with it in such manner as to secure preferences for themselves. *Roseboom v. Whitaker*, 183 Ill. 81; *Beach v. Miller*, 180 Ill. 163. But we have not gone so far as to hold that the mere insolvency of a corporation, *eo instanti*, deprived the directors and officers of the power to dispose of the corporate property, in good faith, by way of paying or securing corporate debts, even though the result may be to give certain creditors a preference over others. In *Reichwald v. Commercial Hotel Co.*, 106 Ill. 499, a corporation organized under the laws of Iowa, and doing business in this state, being insolvent, turned out a part of its property in payment of one of its creditors; and it was held that a corporation, like a natural person, in the absence of any positive law to the

contrary, may turn out a part or the whole of its property in payment of its debts, and in so doing may prefer creditors, if done in good faith, and not for a fraudulent purpose. In *Ragland v. McFall*, 137 Ill. 81, the question arose between a judgment creditor of an insolvent corporation and a creditor to whom the corporation had turned out a portion of its property in payment of that creditor's claim; and such disposition of the corporate property was sustained, the decision in *Reichwald v. Commercial Hotel Co. supra*, being cited and approved. In *Glover v. Lee*, 140 Ill. 102, creditors of an insolvent Iowa corporation brought suit against it by attachment, and caused certain insurance companies to be summoned as garnishees. A creditor, to whom the insolvent corporation had assigned the policies of insurance sought to be reached by the garnishment proceeding, intervened, and set up title under such assignment; and this court, in affirming a judgment in favor of the intervener, said: "The mattress company had an undoubted right to pay any and all of its creditors any debt which it justly owed, or it might secure a creditor. Here the policies were in good faith transferred to the bank, a creditor, with the approval of the insurance companies, before any other creditor acquired any lien, or took any steps to reach the assets of the mattress company, and we are aware of no principle which would prevent the bank from securing its debt in the mode adopted." In *Cook on Corporations* the rule is laid down as follows: "Corporations, unless restricted by their charters, or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may. In making the assignment the corporation may make preferences for one or more creditors over others, or of one class of creditors over other classes. A preference by the directors, of themselves, is generally held to be fraudulent." *Cook, Corp.* § 691; and see authorities collected in *notes*. Our conclusion, then, is that the order drawn by Stanwood on the Pullman company in favor of the bank was valid, and that it vested in the bank a first lien upon the funds in the hands of the Pullman company, if, under the evidence, it can be held that that fund at the time belonged to the coal and iron company, and was subject to its disposition. And this brings us to a consideration of the claim of Glidden & Curtis, now represented by the trustees of that firm.

The contention is that Glidden & Curtis were the general selling agents of the coal and iron company, and as such had advanced to that company large sums of money, for which the company, at the time of its failure, was indebted to them in the sum of nearly \$400,000, and that they had a first lien on the fund in the hands of the Pullman Company for the payment of that indebtedness. It appears that in March, 1887, the company, being in need of money, adopted a resolution authorizing its treasurer to execute a contract with Glidden & Curtis to advance money for the use of the company upon such terms as should be approved by certain officers of the company, and that it also at

the same time adopted a resolution appointing Glidden & Curtis "fiscal and general selling agents of the company." Glidden & Curtis thereupon loaned to the company \$300,000, and took as security \$400,000 of its bonds, with the option to purchase the bonds, within a certain time, at 75 cents on a dollar,—an option which was duly exercised. The indebtedness created by this loan, however, as it seems, forms no part of the indebtedness for which the lien is now claimed. Afterwards, on the 8d day of November, 1887, a written contract between the company and Glidden & Curtis was executed, the material portions of which were as follows: "Whereas, by a vote of the trustees of said company, the said firm of Glidden & Curtis were duly appointed fiscal and general selling agents of said corporation: Now, therefore, it is hereby agreed by and between the said corporation and the said firm that the said agency shall be carried on and conducted upon the following agreements and conditions, to the faithful performance of which they, the said corporation and the said firm, mutually bind themselves, each to the other, its successors and assigns, firmly by these presents. First. The said firm are to sell or supervise and control all sales of said corporation's articles and products, and they are to furnish advances on said corporation's products according to its needs, to such an extent as they shall consider themselves safely secured therefor, at current rates of interest and exchange; and they are to render accounts of sales monthly to said corporation, and charge their commissions at the rate of ten cents per ton on the sales of coal, and two and one-half per cent on sales of iron. Second. All articles and products of the said corporation are to be, and are hereby, consigned to said firm. Third. This contract is to continue for five years from the thirty-first day of October, 1887." This contract was executed on behalf of the corporation by James A. Hall, vice-president, and consent to its execution seems to have been given by a large majority of the stockholders, but it does not appear to have been authorized by the trustees of the corporation. Glidden & Curtis, after being appointed general selling agents, appointed William C. Wyman their agent at Chicago to sell coal. There is very considerable evidence, however, both direct and circumstantial, tending to show that Wyman acted also as agent of the coal and iron company. But the business of his agency seems to have been conducted substantially as follows: Coal was shipped by the company to him, or, as was most generally the case, directly to the parties to whom he had sold it, and he collected the money therefor, and remitted it to Glidden & Curtis. He had on his office door the following sign: "Ohio and Western Coal and Iron Company, Walter C. Wyman, Agent,"—and the name of the company was also printed on his letter heads. Where the coal was shipped directly to the purchaser, the only document issued to Wyman was an instrument called a "Manifest of Mine Shipments," made out by the employés of the coal and iron company at the mines, which was in the nature of a letter of

advice, containing a statement of the date, nature, and amount of the shipment, the name of the railroad by which the shipment was made, the number of cars, and the name of the purchaser, who was therein designated as consignee, and the printed heading of which was as follows: "From the Ohio and Western Coal and Iron Company to Glidden & Curtis, General Selling Agents. Walter C. Wyman, Manager Sales Department. These instruments seem to have borne no signature. On the 26th day of November, 1888, the following agreement was entered into between the coal and iron company and the Pullman Company:

"Chicago, Ill., November 26, 1888. Pullman's Palace Car Company, Chicago, Ills.—Gentlemen: The Ohio & Western Coal & Iron Company, for convenience hereinafter called the, 'coal company,' hereby proposes to furnish you with coal of the kind and quality hereinafter mentioned, for steam and hammer shop purposes at your works at Pullman, Ills., until June 1st, 1889; the coal to be of the best Ohio XX Shawnee, uniform in quality, and free from dirt, stone, slate, and other impurities, and subject to inspection and approval of your representative at Pullman, at the following price, f. o. b. cars at Pullman Junction, Ills.: One and one-quarter (1¼) inch screened lump, three dollars (\$3.00) per ton. Three-quarters (¾) inch screened lump, two dollars and ninety-five cents (\$2.95) per ton. Screened nut, two dollars and sixty-five cents (\$2.65) per ton. Payment to be made for the coal delivered in each month in cash on your regular pay day, namely, the 15th day of the second month following the deliveries. It is the intent and meaning of this agreement that the coal company shall at all times supply coal of proper quality, and in sufficient quantities, to fully meet your current requirements, and under all contingencies, and also for at least ten days beyond your current needs; and whenever it shall partially or wholly fail to do so, or whenever you shall have reason to believe it will fail to do so, then it is understood and agreed that you shall have the right, in anticipation of such failure, to purchase in the market the required quality and quantity of coal necessary for your use, and to charge to the coal company any sum that the cost of such coal is in excess of the price herein agreed upon, which the coal company agrees to pay you. It is also understood and agreed that the above prices shall also apply to all coal that the coal company has furnished you since the completion of the delivery of coal under contract between our respective companies dated November 7, 1887, and that the coal company shall refund to you the amount you have paid it in excess of the price above named during said period. It is further agreed that, in the event the freight rates on the coal furnished under this contract between the coal mines of this company and Pullman Junction shall at any time during the continuance of this agreement be less than \$2.00 per ton of 2,000 lbs., this company will at once notify you of such fact; and from the date of such reduction, and so long as it may continue, you will be entitled to a credit on the



price of each ton of coal furnished equal to the difference between such reduced rate and the rate of \$2.00 per ton. Your written acceptance of this proposition will make the contract mutually binding upon both companies hereto. Executed in duplicate. The Ohio and Western Coal and Iron Company, By W. C. Wyman.

"Approved: James A. Hall, Vice Pres't.

"Accepted: Pullman Palace Car Company, by George F. Brown, General Manager."

After the execution of this agreement the coal sold and delivered thereunder was shipped by the coal and iron company from its mines in Ohio to the Pullman company, at Pullman, Ill.,—the Pullman company, or one of its agents, being in all cases named as the consignee,—and the contract price was credited by that company, on its books, to the iron and coal company. The indebtedness thus created, prior to that in controversy here, seems to have been collected from the Pullman company by Wyman, and by him remitted to Glidden & Curtis. But, at the time the order in favor of the First National Bank of Columbus was drawn, no attempt so far as appears, had been made by Wyman to collect of the Pullman company the accounts for coal maturing February 15 and March 15, 1889; and the question is whether, under the facts proved, Glidden & Curtis had such a claim to or lien upon those accounts as precluded the coal and iron company from appropriating or assigning them for the purpose of paying or securing the \$20,000 loan. The claim is now made that the form in which the instrument of November 26, 1888, above set forth, purporting to be an agreement between the coal and iron company and the Pullman company, was executed, was a mistake; that it was drawn up by the Pullman company, and that, when presented to Wyman to be executed, the typewritten signature of the coal and iron company was already at the bottom of it, and that Wyman hastily and unadvisedly executed the instrument by adding his own signature to that of the company, already typewritten, although it was his intention to execute it on behalf of Glidden & Curtis, and that it should be treated as the contract of Glidden & Curtis, and not that of the coal and iron company. It will be noticed that the mistake, if there was one, was not in the signature alone, but that it pervades the entire instrument. The coal and iron company is named and referred to throughout as one of the contracting parties, and Glidden & Curtis are not referred to, either as principals, factors, selling agents, or in any other relation; and their signature to the instrument, without further explanation, would have been unmeaning. Even if it were admissible to change the legal effect of a written instrument by parol evidence, as is attempted to be done, proof that there was a mistake in the mode of signing comes quite short of obviating the difficulties which the tenor of the instrument presents. To accomplish the result contended for, the entire agreement must be reformed, and that, too, in such a way as to make it an agreement between other parties; and, even if that could be done by parol, there is no evidence in the

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record, so far as we are advised, upon which such reformation could be based. We see no sufficient ground for holding that this instrument was not executed precisely as it was intended to be, and that, so far as it goes, it does not truly represent the transactions and relations of the parties to which it applies. If, then, Glidden & Curtis were entitled to or had a lien upon the money due from the Pullman Company for coal February 15 and March 15, 1889, upon what was that right based? We are unable to see how it could result from the terms of the contract of November 8, 1887, except so far as that contract must be deemed to recognize the lien which the common law gives to factors upon the goods consigned to them for sale, and upon the proceeds thereof when sold. The only provision in the contract having any bearing upon the question is the one by which Glidden & Curtis agreed "to furnish advances on said corporation's products, according to its needs, to such extent as they shall consider themselves safely secured therefor, at current rates of interest and exchange." How this security was to be effected, is not stated, but the contract provides for a consignment of the products of the coal and iron company to Glidden & Curtis for sale on commission, thus constituting them the factors of the company, and it is left to be inferred that the security intended is the one which the law gives to factors. In no other way does the contract assume to pledge the products of the coal and iron company as security for such advances as Glidden & Curtis might make under it.

This branch of the case, then, is reduced to the single inquiry whether, under the circumstances shown by the evidence, Glidden & Curtis were entitled to a factor's lien upon the particular coal sold to the Pullman company, and for which the indebtedness now in question accrued, or upon the proceeds of the coal after it was sold. Doubtless, if their agent had collected the money of the Pullman company, as he had the moneys due for previous sales, so as to get it into their possession, or that of their agent, before third parties had acquired liens upon it, they would have been entitled to hold it, and apply it in satisfaction of their advances to the coal and iron company. But that was not done. Were they entitled to a lien as factors? By the common law a factor has a general lien upon all the goods of his principal in his possession, and upon the price of such as are lawfully sold by him, and upon the securities received therefor, to secure the payment of the general balance of the accounts between himself and his principal, as well as for the advances, charges, and disbursements made upon or in reference to the particular goods. *Mechem, Ag. § 1033; 8 Am. & Eng. Encyclop. Law, 833.* But to obtain such lien the factor must have the goods lawfully in his possession. *8 Am. & Eng. Encyclop. Law, 835.* Actual possession is of course sufficient, and delivery to the factor's own servant or agent will suffice. So, putting the goods upon the factor's dray to be drawn to his warehouse is a sufficient delivery. *Mechem, Ag. § 1055.* Some of



the authorities go further, and hold that where, before the goods have come into the possession of the factor, he has made advances upon them, or incurred liabilities in respect thereto, potential or constructive possession is sufficient. Bishop, Cont. § 1140. Thus, while some of the cases hold that his lien will not attach until the goods are actually in his possession, others maintain the doctrine that, where advances have been made in reliance upon a promise to subsequently consign the goods, a delivery to a common carrier consigned to the factor is sufficient. *Elliott v. Oas*, 48 Ga. 89; *Hardeman v. De Vaughn*, 49 Ga. 596; *Wade v. Hamilton*, 80 Ga. 450; *Mechem*, Ag. § 1085.

But no cases can be found, we think, which hold that the factor's lien can attach to goods which have never come into his actual possession, and have never been consigned to him, but which have been delivered or consigned by the owner directly to the purchaser. In such case the possession of the factor,—if, indeed, as to such goods, he can be called a factor,—is not actual, nor is it constructive or potential. The goods do not come into his possession or under his control, nor is it within the contemplation of the parties that they should do so. The principal yields possession directly to the purchaser, and no possession of the goods or control over them by the factor intervenes. Such seems to have been the precise condition of things in the present case. The coal was all consigned by the coal and iron company directly to the Pullman company or its agent, and it never came into either the actual or constructive possession of Glidden & Curtis. True, there was an agreement on the part of the coal and iron company to consign all of its products to them for sale, but a mere agreement to consign does not operate as an assignment. If the agreement was broken in this respect, Glidden & Curtis had their remedy for a

breach of contract, but it was only through the actual performance of the agreement that their factor's lien could arise. If it be admitted that Wyman, in executing the contract of November 26, 1888, between the coal and iron company and the Pullman company, acted in fact as the agent of Glidden & Curtis, and that the contract is to be treated as though executed on behalf of the coal and iron company by Glidden & Curtis, their relations to the coal and iron company in executing that contract would seem to be that of brokers rather than that of factors. That contract clearly contemplated the consignment of the coal to be delivered under it directly to the Pullman company, and not to Glidden & Curtis, and the mode in which the contract was afterwards carried out as clearly indicates that such was the understanding of the parties. One of the essential differences between a factor and a broker is that, while the former has the possession of the goods to be sold, the latter has not; and it therefore follows that the common-law lien, which necessitates and grows out of possession, is given to the former, but is denied to the latter.

We are of the opinion, then, that under the facts, as shown by the evidence, Glidden & Curtis had no lien upon the fund in question in this suit. The lien of the bank became perfected by notice to the Pullman company before any other lien attached, and their claim must therefore be paid first, with interest. After its payment the residue of the fund should be distributed among the four attachment creditors above named in the order of priority fixed by the statute.

*The decree of the Circuit Court and the judgment of the Appellate Court will be reversed, and the cause will be remanded to the circuit court, with directions to enter a decree as above stated.*

## MINNESOTA SUPREME COURT.

STATE of Minnesota, *ex rel.* W. H. CHILDS, Atty-Gen.,

*v.*  
Village of MINNETONKA *et al.*

(.....Minn.....)

\*1. "Any district, sections, or parts of sections which has been platted into

\*Headnotes by MITCHELL, J.

lots and blocks, also the land adjacent thereto . . . said territory containing a resident population of not less than 175, may become incorporated as a village." Laws 1885, chap. 145. *Held*, that "lands adjacent thereto" include only those which lie so near the center or nucleus of population on the platted lands as to be somewhat suburban in their character, and to have some community of interest with the platted portion in the maintenance of a village government. The act does not authorize the incorporation

NOTE.—Physical characteristics necessary to municipal organization.

If the legislature itself undertakes to create a municipality the number of inhabitants and the size and character of the territory embraced in it are of very little importance.

For in the absence of special constitutional provisions the power of the legislature to fix the boundaries of municipalities is uncontrollable by the courts. *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661.

The legislature may fix any boundaries which it chooses. *Norris v. Waco*, 57 Tex. 685.  
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The legislature may alter and change boundaries at will. *Galesburg v. Hawkinson*, 75 Ill. 152.

The propriety of establishing a municipal corporation and of including within its boundaries a particular territory, is in general a political question for the legislative part of the government. If the course pursued in establishing a municipality is substantially such as is pointed out by the law the courts do not interfere. *People v. Riverside*, 70 Cal. 461.

The legislature might compel the acceptance of municipal organization at its pleasure regardless of the wishes of the people, or of the character of the

of large tracts of rural territory having no natural connection with any village and no adaptability to village purposes.

**2. Ordered that a writ of ouster issue.**

(June 15, 1894.)

**PETITION** for a writ of quo warranto to ouster the defendant village from exercising the privileges of a municipal corporation. *Granted.*

The facts sufficiently appear in the opinion. **Mr. Charles E. Vanderburgh**, for the State:

The Act of 1885, providing for the incorporation of villages, is unconstitutional, for the following reasons:

1. Because it delegates legislative functions to thirty electors, private citizens, residing upon the lands to be incorporated.

2. Because it is in violation of article 3 of the Constitution, which declares that the "powers of the government shall be divided into three distinct departments, legislative, executive and judicial; and no person belonging to or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution."

3. Because it violates section 1, article 9: "All taxes to be raised in this state shall be as

nearly equal as may be; and all property on which taxes are to be levied, shall have a cash valuation, and be equalized and uniform throughout the state."

4. Because it violates section 13, article 1, of the Constitution, which declares that "private property shall not be taken for public use without just compensation therefor, first paid or secured."

5. Because it violates section 7, article 1, of the Constitution, which declares that "no person shall be deprived of life, liberty, or property, without due process of law."

A village is a political subdivision of the state, a municipal corporation, the creation of which has been intrusted by the people to the legislature. This power residing in the legislature, cannot, however, be delegated by it to another person or body.

*State v. Simons*, 32 Minn. 542.

The legislature cannot confer upon any body or person the power to determine what the law shall be.

*Ibid.*; *State v. Young*, 29 Minn. 474; *Cooley*, Const. Lim. § 117; *Shumway v. Bennett*, 29 Mich. 451.

In *Shumway v. Bennett*, *supra*, the village law was declared unconstitutional, because it delegated to private citizens the legislative function of fixing boundaries and compelling the incorporation of separate villages and inter-

inhabitants, or the territory for establishing useful manufactures. *Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. 385.

But compulsory incorporation can come only from direct legislative action. *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107.

And in Wisconsin there seems to be an inclination to restrict even the power of the legislature to some extent. For it has been held that a town cannot be made to consist of non-contiguous territory. *Chicago & N. W. R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840.

And that an unoccupied tract of country nowhere adjoining a village cannot be made part of it for the purpose of increasing the revenues of the village. *Smith v. Sherry*, 50 Wis. 210.

If the legislature provides a general law under which municipalities may incorporate then the municipalities are held somewhat strictly within the terms of the statute, or if such terms are not definite the courts will give the statute a reasonable construction and hold the incorporation within such construction.

It has been held that if the legislature had provided that cities proposing to incorporate under a general law should be empowered to embrace territory lying beyond their actual limits, it may be that in the clear abuse of the power it would be the duty of the courts to respect the legislative will and to hold the incorporation including such additional territory valid. But if no such power is granted the court has the power to determine whether or not the attempted incorporation is one within the authority granted by the legislature. *Ewing v. State*, 51 Tex. 177.

So the legislature may make the question of incorporation depend on the determination of some persons to be designated by it, whose finding will be conclusive on the courts. *State v. Goowin*, 39 Tex. 55.

But in the absence of such statutory provisions which are sufficient to control the question the courts will not countenance unreasonable attempts at incorporation.

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A municipal corporation cannot cover territory already covered by a legal effective prior incorporation. *State v. Winter Park*, 25 Fla. 371; *Taylor v. Fort Wayne*, 47 Ind. 281.

A new corporation cannot be made to include a portion of an old one without direct legislative authority which shall extend to the restriction of the boundaries of the old one. *Darby v. Sharon Hill*, 112 Pa. 66.

So if the settlement has been recognized as a corporation by the legislature it must, under the New Jersey statutes, proceed in the way pointed out for incorporated villages to change their form in order to secure wider powers. *State v. Van Valen*, 55 N. J. L. 85.

The authority to incorporate has generally been applied to reach only those communities which have already become villages or dense settlements and which need nothing but corporate existence to complete their character. *People v. Bennett*, *supra*.

An attempted incorporation will be invalid if so much unoccupied land is embraced as to indicate a fraud on the law, or which cannot be fairly treated as part of the town. *McCleary v. State*, 4 Tex. Civ. App. 322.

Territory containing a town covering more than two square miles of territory is not authorized to incorporate an area of twenty-eight square miles including farms, ranches, and unoccupied tracts of land. *State v. Eldson*, 7 L. R. A. 733, 76 Tex. 303.

A city covering two miles square cannot incorporate territory to the extent of ten miles square including farms and unoccupied country. *Ewing v. State*, *supra*; *Mathews v. State*, 32 Tex. 577.

In Pennsylvania the court has no authority to incorporate three square miles of territory containing two settlements, one of which opposes the incorporation, and also containing for the most part unoccupied farm land not connected by lines of buildings or improvements with the villages. *Re Larksville*, 7 Kulp, 84; *Re Swyersville*, 5 Kulp, 191.

There may be in any township a small region

vening farms against consent and without any opportunity for hearing.

See also Dillon, Mun. Corp. 4th ed. § 188.

The legislature here proposes to put it in the power of a small hamlet to provide itself with conveniences, the greater portion of the expense of which it taxes upon farm lands which cannot possibly have any benefit from or connection with such conveniences; it amounts to a gift to the hamlet, and the imposition of a tax upon other territory for the purpose of raising the money necessary to purchase the gift. The law allowing such a condition of things is unconstitutional and void.

*Sanborn v. Rice County Comrs.* 9 Minn. 278.

The unplatted lands are not adjacent to the platted lands, and there is no one body of platted lands which, with the lands adjacent thereto, contains a resident population of one hundred and seventy-five persons.

*Illinois Cent. R. Co. v. Williams*, 27 Ill. 48; *Toledo, W. & W. R. Co. v. Spangler*, 71 Ill. 568; *Smith v. Sherry*, 50 Wis. 210; *Enterprise v. State*, 29 Fla. 128; Dillon, Mun. Corp. 4th ed. § 188.

As used in the act, the word "adjacent" has a well known and clearly defined meaning. It means "lying close, bordering upon, or adjoining."

*People v. Schermerhorn*, 19 Barb. 540; *Re Municipality No. 2 for Opening of Rossignac Street*, 7 La. Ann. 76; *Continental Imp. Co. v.*

*Phelps*, 47 Mich. 299; *Re Little Meadows*, 28 Pa. 256; *Re West Philadelphia*, 5 Watts & S. 281; *Vestal v. Little Rock*, 11 L. R. A. 778, 54 Ark. 321.

The organization was void, because the statute was not complied with.

*Potter's Dwar*, Stat. 224; *Corwin v. Merritt*, 8 Barb. 341; *People v. Brooklyn*, 23 Barb. 404; *Sherman v. Dodge*, 6 Johns. Ch. 107, 2 L. ed. 69.

Where the state is proceeding against a *de facto* municipal corporation by quo warranto, and the respondent admits that it is exercising a municipal franchise, and claims the right to do so, the burden rests upon it to show a grant of power, and that it has brought itself within the prescribed legislative conditions.

*State v. Parker*, 25 Minn. 219; High, Extr. Legal Rem. § 712; *State v. Sherr*, 27 Minn. 39; *State v. Reynolds*, 61 Mo. 211.

Under general laws, "the authority to incorporate is usually restricted to cases in which communities more or less dense and populous already exist, which require a corporate character to exercise the powers of local government."

Where the legislature exercises the power by direct legislation, it may probably include such lands as it deems proper within the limits of a municipal corporation; but where the power is delegated it is usually restricted to the populous districts and lands immediately contiguous.

densely populated with more people than all the rest. Any question on which they united could be carried by their votes at a township election; but it would be tyrannical to allow them to determine for themselves what property should be made tributary to their local interests in which the rest of the town had no concern. *People v. Bennett*, *supra*.

There can be no incorporation of a tract of country one and three-fourths miles square, some of the lines of which run through a wilderness, where it is not shown what the number of inhabitants is. *Re Little Meadows*, 28 Pa. 256, 35 Pa. 336.

Under the statute permitting incorporation of villages containing 300 inhabitants, to make up that number it is not permissible to include two distinct collections of houses with a tract of farm land lying between them. *Re West Philadelphia*, 5 Watts & S. 281.

In *Osgood v. Clark*, 26 N. H. 307, it was held that under the New Hampshire statutes the whole village must be included in the incorporation.

The legislature cannot give municipal corporations the power to arbitrarily fix its own limits so as to absorb so much of the property and so many of the people of the county as it may suit their wishes to make subject to their taxation and ordinances. *Prince George's County Comrs. v. Bladenburg*, 51 Md. 465.

The inhabitants of a hamlet, village, or town, recognized by the Florida statutes as a community of persons authorized to form a municipal government, include persons living on contiguous territory, and an attempt to incorporate two distinct detached tracts of land as corporate territory under one government is unauthorized and void. *Enterprise v. State*, 29 Fla. 128.

In *Ashley v. Calliope*, 71 Iowa, 466, it was held that if a village incorporates territory two miles long by a mile wide, and a rival village afterwards springs up in a portion of the territory so included and the interests of the villages, whose centers are a mile apart, are antagonistic, and the land lying 25 L. R. A.

between them is not platted, a severance of the two shall be granted upon the petition of the inhabitants of the second village.

In *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107, where a hamlet sought to incorporate with itself a hamlet a mile away and about one thousand acres of farm land, the court held that the law which permitted them to determine absolutely what the size of the municipality would be and what it would include, was void.

Under the New York statutes, to entitle a village to incorporate there must be at least 300 inhabitants, and if it contains more than one square mile of territory there must be 300 additional for each additional square mile or fraction thereof. *Re Elba*, 30 Hun. 543.

The Florida statutes provide for reducing the territory of a municipality if there is included in it an undue amount of vacant farm land. *Jacksonville v. L'Engle*, 20 Fla. 344.

The extent and character of the land are not proper controlling objections if the persons to be affected unite in the petition. *Re Blooming Valley*, 56 Pa. 66.

There is no designation as to number of inhabitants required under the Pennsylvania statutes passed in 1851 and 1863. *Re Sewickley*, 36 Pa. 30.

Three centers of population may be incorporated into one borough if they virtually form but one village connected by three main highways and the intervening lands are not used exclusively for farm purposes but some of them are already divided into building lots. *Re Yeardon*, 3 Pa. Dist. R. 609.

A ravine dividing two centers of population is not such a natural barrier as to prevent including both in one village, if the inhabitants of both demand it, and if such action will not remove part of the territory from its natural place as a part of some other municipality. *Re Edgewood*, 130 Pa. 343.

An Indian reservation may be included in the boundaries of a town. *Schreiber v. Langlade*, 66 Wis. 616.

H. P. F.

15 Am. & Eng. Encyclop. Law, 1011.

Such general legislation must receive a strict construction; and any ambiguity or doubt arising out of the terms used by the legislature must be construed against the corporation.

Boone, Corp. § 26.

The petitioners cannot arbitrarily fix boundaries, and in case the boundaries are clearly unwarranted or unreasonable, there is a departure from the statute, and an abuse of the incorporating power. No franchise passes, and the proceedings are void.

The petitioners fix the boundaries, and the county commissioners have nothing to do with that matter. They can determine nothing which the legislature has not authorized them to do.

*Evring v. State*, 81 Tex. 172.

The course pursued must be such as is pointed out by the statute.

*People v. Riverside*, 70 Cal. 468.

The word "adjacent" in the connection found in the statute, is used in the obvious sense of contiguous and adjoining in—

*Re Camp Hill*, 143 Pa. 511.

There can be no inflexible rule to determine when the incorporated territory is unreasonable in extent; that will depend upon the facts of each case.

*State v. Eldson*, 7 L. R. A. 738, 76 Tex. 808;

*Evring v. State*, 81 Tex. 178.

The question of boundaries is jurisdictional in its nature.

*Page v. Los Angeles County Supra*, 85 Cal. 54; *People v. Riverside*, 66 Cal. 290.

In a case of a clear abuse of the power to fix the corporate limits, in an attempt to incorporate under the general law, the court will not hesitate to annul the proceedings.

*Vestal v. Little Rock*, 11 L. R. A. 778, 54 Ark. 831; *Evring v. State*, 81 Tex. 177; *State v. Baird*, 79 Tex. 64; *People v. Riverside*, *supra*.

*Messrs. H. W. Childs, Atty-Gen., Rea, Hubachek & Healy and A. D. Smith* also for the State.

*Messrs. Young, Fish & Dickinson and Hale, Morgan & Montgomery*, for respondents:

This act has been before the court upon various points, in at least the following cases:

*State v. Cornwall*, 85 Minn. 176; *State v. Spaulde*, 87 Minn. 322; *Bradish v. Lucken*, 88 Minn. 186; *Stemper v. Higgins*, 88 Minn. 222; *Baldwin v. Robinson*, 89 Minn. 244; *Bradley v. West Duluth*, 45 Minn. 4; *St. James v. Hingten*, 47 Minn. 521.

Many cases have also been reported, to which such villages were parties, and in which public and private rights have been determined.

*Wayzata v. Great Northern R. Co.* 50 Minn. 488; *Buffalo v. Harling*, Id. 551.

Considering these frequent interpretations, the extent of such litigation and the very large number of villages now existing under the act, it would at this late day be as surprising as disastrous to destroy the legislative foundation upon which all such villages stand.

The legislature may, in the exercise of its undoubted power to create village corporations, leave it to the people immediately concerned, and to the local authorities, to determine for themselves, under specified condi-

tions and on proper terms, whether territory of their selection shall be formed into such corporation or not.

The acceptance or rejection of city charters, the location of county seats, the division of counties, towns, and school districts and many local concerns of similar character, have habitually been made to depend upon a vote of the resident electors.

8 Am. & Eng. Encyclop. Law, 696; *State v. Hennepin County Dist. Ct.* 83 Minn. 235; *Cooley, Const. Lim.* § 141; 1 Dillon, Mun. Corp. § 44; *State v. Cooke*, 24 Minn. 247, 51 Am. Rep. 844.

In the case at bar, no power to legislate is delegated.

1 Dillon, Mun. Corp. § 41.

The term "adjacent" is not restrictive, but the contrary. It is not a measure of space or distance.

*United States v. Northern Pac. R. Co.* 29 Alb. L. J. 24.

As the corporators have a special and peculiar interest in the question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held, in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their decision should be conclusive, unless for strong reasons of state policy or local necessity it should seem important for the state to overrule the opinion of the local majority.

*Cooley, Const. Lim.* \*118.

Whether cities, towns, or villages should be incorporated, and, if incorporated, whether enlarged or contracted, in boundaries, presents no question of law or fact for judicial determination.

*Galesburg v. Hawkinson*, 75 Ill. 157.

*Mitchell, J.*, delivered the opinion of the court:

It is conceded that the respondent exists, if at all, by virtue of the petition and other exhibits attached to the information, and purporting to be proceedings under Laws 1885, chap. 145, entitled "An act to provide for the incorporation of villages," etc. The language of the statute is: "Any district, sections, or parts of sections which has been platted into lots and blocks, also the lands adjacent thereto, . . . said territory containing a resident population of not less than 175, may become incorporated as a village." The territory claimed to have been incorporated as the village of Minnetonka is that inclosed in blue pencil lines on the map annexed to the information. It lies between the western boundary of the city of Minneapolis and the eastern shore of Lake Minnetonka, and contains nearly 85 square miles, being nearly equal in area to a full government township. Within this territory there were, at the time of its alleged incorporation, 17 or more tracts which had been platted, as indicated on the map, into lots and blocks, but these were in no way connected, but were separated, each from the other, by quite an extent of farm or uncultivated lands; and one peculiarity of the petition is that it does

not indicate which of these numerous plats was to be the nucleus of the proposed village. Many of these platted tracts are entirely vacant and uninhabited, and on most of the others there are only a very few permanent inhabitants, not sufficient to constitute a "village," in the popular and ordinary sense of the word. The only one which has inhabitants enough to constitute any considerable nucleus of either business or population is "Minnetonka Mills," situated on section 15. This contains about twenty families, and a population variously estimated from 60 to 105, and, together with the whole of sections 14 and 15, contains a population of only about 120. There are several post-offices, and as many as eight railway stations, within the boundaries of the alleged village. There is a considerable number of summer cottages and boarding houses along the shore of Lake Minnetonka, but these are mainly occupied by temporary summer visitors, who have no business or other relations with "Minnetonka Mills" during their sojourn. The northwesterly part of the territory is naturally tributary to the considerable village of Wayzata, situated just outside of the respondent village; while the southwesterly portion is in like manner tributary to the village of West Minneapolis, just outside its east boundary. There are 23 sections, including the south 10, within the boundaries of the corporation, which contain neither platted lands nor collections of houses in the nature of villages. The greater part of the resident population is strictly rural or agricultural, and the greater part of its territory consists of either wild lands or cultivated farms, of which there are about 150. It is apparent that this large territory, essentially rural, has no fitness for village government, and absolutely no community of interest in respect to the purposes for which such a government is designed.

The validity of respondent's incorporation is assailed on the grounds (1) that the act is unconstitutional; (2) that the act does not authorize the incorporation of such territory into a village. The point made against the validity of the act is that the legislature has neither itself determined how much or what character of land shall be included in a village, nor delegated the power to do so to any proper subordinate official body, but has left it wholly to the arbitrary determination of any 80 private citizens who may sign the petition, subject only to the conditions that the territory contains a population of 175, and that there be somewhere within its boundaries a tract of land platted into lots and blocks, and that the majority of the electors, within the territory whose boundaries are thus arbitrarily fixed by the petitioners, vote in favor of incorporation. It would be difficult to sustain the act if the word "adjacent," as used in the third section, is to be given the meaning contended for by the respondent, for under such a construction it would be left to the petitioners, subject only to the above limitations, to arbitrarily determine how much and what character of territory should be included in the proposed village. They might include a rural territory 50 or 25 L. R. A.

100 miles square, provided "they did not skip over any as they advanced." But clearly this was not the intention of the legislature. The purpose evidently was to authorize the incorporation of "villages," in the ordinary and popular sense, and not to clothe large rural districts with extended municipal powers, or subject them to special municipal taxation for purposes for which they were wholly unsuited. A "village" means an assemblage of houses, less than a town or city, but nevertheless urban or semiurban in its character; and the object of the law was to give these aggregations of people in a comparatively small territory greater powers of self-government and of enacting police regulations than are given to rural communities under the township laws. The law evidently contemplates, as a fundamental condition to a village organization, a compact center or nucleus of population on platted lands; and, in view of the expressed purposes of the act, it is also clear that by the term "lands adjacent thereto" is meant only those lands lying so near and in such close proximity to the platted portion as to be suburban in their character, and to have some unity of interest with the platted portion in the maintenance of a village government. It was never designed that remote territory, having no natural connection with the village, and no adaptability to village purposes, should be included. Whether the word "adjacent" is to be given a more limited and definite meaning of universal application, or whether, as is my own impression, there is no inflexible rule, except the general one already laid down, as to what lands are adjacent, and that each case will depend somewhat on its own particular facts, it is not necessary to consider in the present case. There is no difficulty in determining, as a matter of law, that this territory is not "adjacent," within any meaning of the word, and that its attempted incorporation into a village was wholly unauthorized by the act.

*Let a writ of ouster issue.*

**Buck and Canty, JJ.**, took no part.

STATE of Minnesota, *Resp't.*,  
v.

Frank S. HOSKINS, *Appl.*

STATE of Minnesota, *Resp't.*,  
v.

Dow S. SMITH, *Appl.*

(..... Minn.....)

\***Laws 1893, chap. 63**, entitled "An act to compel street railway companies to protect certain of their employes from the inclemency of the weather," is constitutional.

\*Headnote by GILFILLAN, Ch. J.

**NOTE.**—*Constitutionality of laws to secure safety and comfort of employes.*

In the case of **STATE V. HOSKINS** the court holds that this act to protect street railway employes is not invalid on the ground of class legislation, that

(June 28, 1894.)

**A** PPEAL by defendant from a judgment of the Municipal Court of St. Paul convicting him of violating the provisions of the statute requiring street railway companies to protect their employes from the inclemency of the weather. *Affirmed.*

**A** PPEAL by defendant from a judgment of the Municipal Court of Minneapolis convicting him of violating the provisions of the statute requiring street railway companies to protect their employes against the inclemency of the weather. *Affirmed.*

The facts are stated in the opinion.

*Messrs. Munn, Boyeson & Thygeson* for appellant Hoskins.

*Messrs. Koon, Whelan & Bennett* for appellant Smith.

*Messrs. H. W. Childs, Atty. Gen., Frank M. Nye, and Pierce Butler* for the state.

*Gillfillan, Ch. J.*, delivered the opinion of the court:

In these two cases the validity of Laws 1893, chap. 63, entitled "An act to compel street railway companies to protect certain of their employes from the inclemency of the weather," is called in question. That act requires of street-railway companies operating electric, cable, or steam cars, requiring the constant service of persons on any part of the cars except the rear platform, to provide each car with an inclosure, constructed of wood, iron, and glass, or similar suitable material, sufficient to protect such employes from exposure to the inclemency of the weather, but not so as to obstruct the vision of the person operating the car, at all times between November 1st and April 1st in each year. What are called "trailing cars" are excluded from this requirement, so that it applies only to cars on which the motive power is operated or controlled. The law was passed with reference to the fact that the man operating or controlling the motive power of such cars was required to stand where his person was almost wholly exposed to cold, storm, and wind, having but little protection except such as the clothing affords. The act is assailed as unconstitutional, on the grounds—First. That it is not an exercise of the police power of the state. Second. It is class legislation. Third. It

impairs the obligation of a contract. Fourth. It interferes with the liberty of contract between street-railway companies and their employes. Fifth. It imposes an excessive fine.

It is stipulated as a fact, what everybody knows, that electric cars are run at a rate of speed of from four to fifteen miles an hour, and at an average rate of between eight and nine miles an hour. Any one acquainted with the extreme cold of much of the weather in this climate between the 1st of November and the 1st of April, and who knows, as everybody does, that the motorman on an electric car is obliged to stand in one place, always on the alert, his whole attention given to the means of controlling the motive power and the brake, and to looking out ahead, and unable, with due regard to his duties, to give attention to protecting himself from the cold, must appreciate that, when going at the rate of eight or nine miles an hour, perhaps against a head wind, and with the mercury below zero, the position of the motorman is one not merely of discomfort, but of actual danger to health, and sometimes to life, and the tendency of which is to disable him to some extent to perform his duties in the way that care to safety of his passengers and of travelers on the streets requires. It has never been questioned that the police power of the state extends to regulating the use of dangerous machinery, with a view to protecting, not only others, but those who are employed to use it; and if it be conceded, as it must be, that the state may intervene by regulations in such a case, we do not see why it may not in such a case as this. The act is within the police power. When a subject is within that power, the extent to which it shall be exercised, and the regulations to effect the desired end, are generally wholly in the discretion of the legislature. The legislature might in this case have required the use of the prescribed inclosure only at such times when the cold reached a certain degree, or when storms prevailed, but it was thought fit to make sure of the result aimed at by covering the time of year when extreme cold and bitter storms may occur at any time; and that was within its exclusive province.

The objection that this is class legislation is based on the fact that the act is confined to street-cars propelled by cable, steam, or

the care and control of the cars by the employes, allowing protection from the weather, is different with cars propelled by motors as distinguished from those drawn by horses; and it is further held not to impair the obligation of the contract, where the contract only required cars of the best modern style and construction; on the ground that this contract is held to be subservient to the police power of the state and there is nothing in the act showing that the state intended to yield up the police power.

A great many states have laws affecting employes and workingmen, as factory inspection laws, mining safety acts, fire escapes and the like; but the decisions regarding the validity of these acts are very few. It seems to be admitted that where the state has passed a law for the safety and health of employes that is reasonable, such laws have been generally unchallenged as regards their validity

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The Pennsylvania Act of March 8, 1871, for ventilation of coal mines, is constitutional as it is within the police power of the state and only means that the operators of coal mines shall so work them as not to injure the health nor endanger the lives of employes. *Com. v. Bonnell, Jr.* 8 Phila. 534.

The Illinois Act of May 23, 1879, entitled miners providing for escapement shafts, was passed in obedience to Ill. Const., art. 4, § 23, and was for the health and safety of employes and not for the benefit of owners. *Loose v. People*, 11 Ill. App. 443.

But in *Re Jacobs*, 38 N. Y. 93, 50 Am. Rep. 633, it was held that the New York Act, Laws 1884, chap. 272, prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses in certain cases was unconstitutional as not within the police power, and was not made for the health and safety of employes and was not a health law.

L. E.

electricity, and does not include street-cars drawn by mules and horses, or carriages or wagons; and it is assumed that here is an attempt at purely arbitrary classification for the purpose of the act. The evil sought to be remedied does not exist in case of the slowly going mule or horse car, or carriage or wagon, to the same degree as in the case of cable, electric, or steam cars. But, where an evil exists in a variety of cases, it is a sufficient ground for classification in legislating, so as to include some and exclude others, that in the former the evil can be remedied, while in the latter it cannot be. The man in control of the cable, electric, or steam railway car may be boxed in without impairing his power of control in the slightest degree; but to box in the driver of a horse or mule car, or of a stagecoach or carriage or wagon, separating him from his animals, while of course it could be done, would bring about greater evils than those sought to be remedied. The difference in this respect between cars included in this act and those not included is such as to justify difference in legislating.

The claim that the act impairs the obligation of a contract is based on the fact that in each case the railway company had a contract with the city, made before the passage of the act, in which the former bound itself to run cars of "the best modern style and construction," and this act requires something in ad-

dition thereto. We need only say of that, where parties contract on matters within the police power of the state, they do so subject to the exercise of that power whenever the legislature chooses to exercise it. If one contract with the state or a municipal corporation, acting under authority of the state, even if it were conceded that the legislature can, by contract or by giving authority to make a contract, bind the state not to exercise the police power, the legislative intent to do so would have to appear unmistakably. There is nothing to suggest such intent in the charter of either city.

What we have said on the third point made by appellants applies with equal force to the fourth.

The act imposes a fine of not less than \$50, nor more than \$100, for a violation of the law, and makes each day that cars shall be run without complying with the law a separate offense. A fine of from \$50 to \$100 could not be called excessive. It is true the party may, by repeatedly committing the offense, add up a large aggregate of fines; so might the offender against any other law,—the law against larceny or embezzlement, or any other; but that would not make the punishment excessive.

*Judgments affirmed.*

**Collins and Buck, JJ.**, took no part in the decision.

## DISTRICT OF COLUMBIA COURT OF APPEALS.

William W. AVERELL

v.

SECOND NATIONAL BANK OF WASHINGTON, *Appt.*

(.....D. C. App.....)

**1. Testimony that if a post-dated check had been presented during business hours it would not have been received as a deposit, is not admissible upon the question whether or not when presented after business hours the bank agreed to apply to its payment any funds standing to the drawer's credit when it became due and hold them subject to the check of the holder.**

**2. One who goes into a bank after business hours, and finds in a room used for the transaction of business after usual hours the paying teller of such bank, who is the only officer with whom he is acquainted, and deposits with such teller for collection a post-dated check upon such bank upon the teller's promise to hold the proceeds subject to his check, the transaction being substantially in the presence of the cashier**

though he is separated by a wire partition, is entitled to hold the bank liable.—especially where such teller has, to the knowledge of the cashier, occasionally acted as receiving teller, and the depositor is not aware of any limitations upon his authority.

**3. A bank which receives a post-dated check upon itself for collection, under a promise to hold the proceeds subject to the check of the depositor, is liable to the latter where, when the bank opens on the day of the date of such check, the drawer has funds sufficient to discharge the debt, although at the closing hour on such day the account of the drawer is overdrawn.**

(March 5, 1894.)

**A PPEAL** by defendant from a judgment of a Special Term of the Supreme Court of the District of Columbia in favor of plaintiff, in an action for money had and received.

*Affirmed.*

The facts are stated in the opinion.

**Mr. W. F. Mattingly**, for appellant:

There is no privity of contract between the

**NOTE.**—The above case is peculiar in the fact that the check deposited with the drawee bank was post-dated and not yet due as well as in the fact that the transaction was after banking hours, but these facts do not seem to have been particularly considered. Whether such a deposit of a check with the bank on which it is drawn be regarded in any case as a deposit for collection or as a deposit with a conditional acceptance and credit to be charged back if not paid, is a question which does

not seem to be very material although in some of the cases cited above the transaction is spoken of as a deposit for collection, while in others it is regarded as a deposit for credit or payment. The important point is that the bank must regard it as paid by the first funds in its possession which may be applied thereon.

As to indorsement of a check "for deposit," see *note to Ditch v. Western Nat. Bank of Baltimore* (Md.) 23 L. R. A. 164.

holder of a check and the bank on which it is drawn. The bank owes no duty and is under no obligation to the holder, and he cannot sue the bank for refusing payment in the absence of proof that the check was accepted by the bank or charged against the drawer.

*National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897; *First Nat. Bank of Washington v. Whitman*, 94 U. S. 243, 24 L. ed. 229.

Drinkard, the paying teller, was the agent of the plaintiff and not of the bank. The check might as well have been left with the janitor or any other employé of the bank. No banking corporation will be safe if such acts could be construed an acceptance of commercial paper by a bank.

*Morrow v. James*, 8 Mackey, 27, 4 Mackey, 59; *Morse, Banks & Banking*, § 174a; *Thatcher v. Bank of the State of New York*, 5 Sandf. 122; *Manhattan Co. v. Lydig*, 4 Johns. 377, 4 Am. Dec. 289; *Clarks Nat. Bank v. Bank of Albion*, 52 Barb. 592; *Pickle v. Muse*, 7 L. R. A. 98, 88 Tenn. 880; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Security Bank of New York v. National Bank of the Republic*, 67 N. Y. 458, 28 Am. Rep. 129; *Bullard v. Randall*, 1 Gray, 605, 61 Am. Dec. 433; *Wyman v. Hollowell Bank*, 14 Mass. 58, 7 Am. Rep. 194; *Terrell v. Branch Bank at Mobile*, 12 Ala. 502; *State v. Commercial Bank of Manchester*, 6 Smedes & M. 218, 45 Am. Dec. 280; *Franklin Bank v. Steward*, 87 Me. 519.

A bank has the undoubted right to reject or accept a depositor.

*Morse, Banks & Banking*, § 178.

There can be no such thing as an acceptance of a post-dated check.

*Morse, Banks & Banking*, § 889c.

*Messrs. A. A. Birney and E. A. Newman*, for appellee:

The question is, Was Mr. Drinkard acting within the apparent scope of his agency, and did General Averell have the right to believe him empowered to do what he did?

And this is the rule even though the act is in fact fraudulent, provided the customer has no knowledge of the fraud, but is himself dealing bona fide, and believes the official to be dealing in like good faith in the business of his principal.

*Morse, Banks & Banking*, p. 205.

Those dealing with a bank in good faith have a right to presume integrity on the part of its officers when acting within the apparent sphere of their duties, and the bank is bound accordingly.

*Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 650, 19 L. ed. 1020; *Farmers & M. Bank of Kent County v. Butchers & Drovers Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Barnes v. Ontario Bank*, 19 N. Y. 156; *East River Nat. Bank v. Gove*, 57 N. Y. 597; *Hotchkiss v. Artisans Bank*, 42 Barb. 517; *Munn v. Burch*, 25 Ill. 35; *Lloyd v. West Branch Bank*, 15 Pa. 172, 53 Am. Dec. 581.

In the case of a deposit of a check drawn upon itself the bank becomes at once the debtor of the depositor, and the title to the deposit passes to the bank.

*Oddie v. National City Bank*, 45 N. Y. 735, 25 L. R. A.

6 Am. Rep. 160; *Tinkham v. Heyworth*, 31 Ill. 519.

If at the time the holder hands in the check he demands to have it placed to his credit and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.

*First Nat. Bank of Cincinnati v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766.

In the case of checks not good when presented, either for lack of funds or because the check is not due, the bank, if it receives the check for collection from itself, will be bound so soon as the check is payable and there are funds to meet it, and the depositor may sue as for money had and received.

*Bank of New Hanover v. Kenan*, 76 N. C. 345; *Kiloby v. Williams*, 5 Barn. & Ald. 815; *Morse, Banks & Banking*, p. 321; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *National Gold Bank & Trust Co. v. McDonald*, 51 Cal. 64; *City Nat. Bank of Selma v. Burns*, 68 Ala. 275, 44 Am. Rep. 138; *First Nat. Bank of Cincinnati v. Burkhardt*, *supra*.

The evidence showed that Mr. Drinkard had repeatedly performed acts like that in question, with the knowledge and acquiescence of the cashier. This was enough to entitle the court to leave to the jury the question of his authority.

*Morse, Banks & Banking*, p. 206; *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 19 L. ed. 1006.

The action is not upon the check. It is a suit for money had and received based upon the duty of the bank to carry to the credit of the plaintiff on the 19th of May the amount of the check, there being then sufficient funds to the credit of the drawer.

*Kiloby v. Williams*, *supra*; *Munn v. Burch*, 25 Ill. 35.

*Shepard, J.*, delivered the opinion of the court:

This is an action for money had and received. On May 16, 1884, one George H. Levis, in the city of Washington, a depositor of the defendant bank, executed and delivered two checks on said bank, in the usual form, for \$1,000 each, payable to the order of M. D. Helm, who, for value, on the same day endorsed them to the plaintiff Averell. One of these checks bore date as of the 18th of May. The check dated May 16th was paid by the bank on the same day after its closing hour, and this suit is to recover the amount of the second or post-dated check, with \$2.05 protest fees.

The testimony of the plaintiff Averell, which was not contradicted, is substantially as follows:

"I had dealings with the defendant bank in reference to said checks on the 16th day of May, 1884. I received that check and another check for \$1,000, one bearing date the 16th day of May, 1884, and the other bearing date the 18th day of May, 1884, from M. D.



Helm, about 8 o'clock, P. M. I went to the defendant bank to get them cashed, and arrived there about 9:30 P. M. The outside door of the bank was closed, but upon my knocking it was opened by the watchman of the bank and I was invited into the rear room occupied by the bank, through a door leading therein from the hall; I went into the rear part of said room occupied by the bank, and from there into a private compartment partitioned off from the main room of the bank; this private room was used by, and in connection with, and contiguous to the bank. While there I was approached by Mr. Robert M. Drinkard, one of the officers of the defendant bank, with whom I was acquainted, and he asked me what he could do for me. In reply I stated that my nephew was very ill in New York and that I was anxious to leave the city that evening to visit him and needed the money for that purpose. At his suggestion I endorsed the checks which I had received from Helm, as I have stated, and presented them to him for payment. Mr. Drinkard received them and immediately went to the counter of the bank, a few steps from the private apartment where I was, and returned with \$1,000 in payment of the check dated May 16th, 1884. He then called my attention to the fact that the check dated May 18, 1884, was dated May 18th, which fell on Sunday, and would not be due and payable until Monday, May 19. I told Mr. Drinkard that I would not be in the city on the 19th of May, and he then said he would place it to my credit and that I could check against it. Thereupon, at his suggestion, I wrote my name in the signature book of the bank.

"Mr. Drinkard retained the check, and I left it with him with the distinct understanding that an account was opened between the bank and myself on the said check, and that the same was placed to my credit in the account.

"On or about the 23d day of May, 1884, I returned to the city of Washington and went to the bank for the purpose of getting some money, and while I was writing a check for it Mr. Drinkard called me to the counter and presented me with the check, with the protest attached thereto, and stated that it had been protested, and that there was due and payable to the bank the sum of \$2.05 for the said protest, which I paid, and received the check and the certificate of protest.

"On the first visit the bank was closed for the day's business, but was opened to oblige me by admitting me to the rear entrance by a side door leading from the main hall. Mr. Drinkard and other officers of the bank were still busy with their books and papers when I arrived there."

It was further proved that on May 19 (the day of the maturity of the check in question) at the opening of the bank there was to the credit of Levis the sum of \$5,126.48 subject to his checks. On that day the bank paid \$3,928.83 on other checks of Levis, some of them bearing date that day, one of these being for \$2,000. It also reserved the amount of two drafts on New York which it had discounted and forwarded for collection, one for \$790.10, due May 17, the other for \$801.20, 25 L. R. A.

due May 19, the latter being dishonored at 8 o'clock on that day.

The bank learned of the non-payment of the draft maturing May 17th by mail on the morning of the 19th about 9 o'clock. It learned of the non-payment of the second about its closing hour on the 19th. These drafts had been placed to the credit of Levis by the bank as cash; and the bookkeeper had been instructed by the cashier not to let his account be drawn below the amount thereof.

The bank had, besides the paying teller, Drinkard, a receiving teller and a collection clerk, the window of each of whom at the bank counter in front being indicated by a sign. Drinkard had been both paying and receiving teller up to 1879. Between that time and the date of the transaction in controversy, he had with the knowledge and acquiescence of the cashier, occasionally received deposits and opened up new accounts by taking the signatures of depositors in the "signature book." It was shown also that signatures were sometimes taken for the purpose of identifying that upon which the draft is cashed, or to preserve an address, etc.

Plaintiff had no account with the bank, and his name nowhere appeared on its books as a depositor. The usual course of business at the bank for depositors was to deliver post-dated or undue checks to the collection clerk, and those payable at once to the receiving teller to be charged to the drawer and credited to the depositor.

The small room in which Drinkard met plaintiff and received the check was separated from the main office by a wire partition, in which there was a door and a small arched opening for the passage of papers. It had a door also communicating with the president's room. Drafts had been cashed and deposits received in this room occasionally, after the regular closing hour; and it was customary at such times to transact business there with such customers as the bank was willing to accommodate.

The case has been tried three times in the special term, and twice, on appeal, in the general term of the supreme court of the District of Columbia. On the first trial the jury were directed to find for the defendant; but the judgment was reversed. 6 Mackey, 358.

On that trial the only evidence regarding the protest of the check on the 19th of May was the certificate of the notary that it had been presented at the bank for payment at the request of the bank. The trial justice was of the opinion that Drinkard was the agent of the plaintiff in the transaction and not of the bank. The court, in general term, reversed this judgment in a short opinion, in which great stress was laid upon the fact that the check was protested at the request of the bank, and that this was a ratification of the paying teller's act in receiving it for deposit to plaintiff's credit.

On the second trial proof was offered by the defendant tending to show that after 3 P. M. on Monday Drinkard, accompanied by the notary, carried the check to the cashier, and asked him what to do with it, and that the cashier suggested to him that he had better hand it to the notary, in order to save the

rights of the parties and hold the indorser; in other words, that the protest was made for the benefit of the plaintiff. The trial justice, following, as he supposed, the opinion of the general term, submitted the case to the jury to find from the evidence whether the act of Drinkard had been recognized or ratified by the defendant, and refused an instruction, asked by defendant, to the effect that if the jury should believe the evidence above mentioned to be true, they would regard the protest as no evidence of ratification by the bank of the act of Drinkard; and further would find that, upon the evidence in the case, Drinkard was to be considered the agent of the plaintiff, and not of the bank. The jury found for the plaintiff and, on appeal, the general term held that the refusal of said instruction was error, and again reversed the judgment. 8 Mackey, 246. The court was of opinion that the additional evidence, explaining the protest, made a radical change in the case and took it out of the ruling upon the first appeal.

On this, the third trial (and for the first time), testimony was introduced respecting the time when defendant's cashier first learned of the possession of the check by Drinkard. The cashier was called by the plaintiff and testified as follows, as appears from the notes of his testimony in the bill of exceptions: "Q. When did you first learn of this check? A. I do not remember. I think I knew of it though before the 19th. I knew that the check was there on Mr. Drinkard's counter. Q. What did he tell you about it? A. I do not know that he told me anything of the fact. I knew that he had it in his possession. Q. You knew that it was in his possession? A. Yes, sir. Q. Did you know that General Averell's signature was upon the book of the bank? A. No, sir; that did not come to my knowledge until afterwards. Q. At what time? A. I cannot tell—I think when the inquiry began to be made there afterwards about the check; I do not think I had any knowledge; I do not remember that I had any knowledge of General Averell's signature being upon the book at all. Q. Well, can you state on what date you learned that Mr. Drinkard had it? A. I think that I knew that probably on the 16th; I think that I knew of it on the evening of the 16th; I had knowledge that he had that check in his possession. Q. On his desk? A. Yes, sir. Q. Did Mr. Drinkard tell you from whom he had received it? A. I think so; yes, sir. Q. That he had received it from General Averell? A. Yes, sir. Q. And did you know why he had it? A. No, sir; I knew nothing of the fact that he had gotten a check cashed there that evening. Q. He had one check cashed, and Mr. Drinkard had the other? A. Yes, sir. Q. You knew that the check did not belong to Mr. Drinkard, did you not? A. I did not think of it in that way. Q. Did you know at that time that that check was to be presented on the 19th? A. No, sir; I do not think I did, sir; it was a post-dated check that he had in his possession. Q. Did you know what he had it there for? A. The inference was that it

was there to be paid, if I had thought of it at all?"

Upon the close of the testimony, the defendant prayed the court to instruct the jury that upon the whole evidence the plaintiff was not entitled to recover. This was refused, and the defendant excepted.

At the request of defendant the court gave the following special instructions to the jury: the first is the same for the refusal of which the judgment had been last reversed.

1. "If the jury believe from the evidence that Mr. Drinkard, the paying teller of the bank, after three o'clock on May 19, when there was no money to Levis' credit, as shown by the proof, in company with General Balloch, the notary, consulted Mr. Swain, the cashier, as to whether the check should be protested, and that the cashier stated to him that in order to save the rights of the parties to the check he had better have it protested, and Mr. Drinkard handed the check to the notary to protest it, that is not sufficient evidence of a ratification by the bank of the act of Drinkard, and will not enable the plaintiff to recover."

2. "If the jury believe from the evidence that the cashier of the defendant bank on the evening of the 16th of May, 1884, knew that the paying teller had possession of the check in question, and that it so remained in his possession, but the cashier did not know of any agreement or arrangement between the paying teller and the plaintiff, to the effect that said check should be placed to the credit of the plaintiff on the following Monday morning, subject to his check, then the same is not evidence from which an acceptance of said check by the bank may be inferred, and will not entitle the plaintiff to recover."

The court then gave the following special instruction at the request of the plaintiff:

"If the jury believe from the evidence that the check in question, bearing date on the 18th day of May, 1884, was deposited by the plaintiff with the defendant bank, and by it received through its officer, Drinkard, on the 16th day of May, 1884, to be placed to the plaintiff's credit, and further that the bank by its cashier knew of such transaction and assented thereto, and the same was in defendant's possession at the opening of the said bank on the 19th day of May, 1884, and that there were then sufficient funds to the credit of the drawer in said bank to pay the same, the plaintiff is entitled to recover, and the measure of his recovery should be the face of the check, one thousand dollars, and two dollars and five cents protest, with interest from the 28d day of May, 1884."

The court also gave another instruction in obedience to the opinion of the general term on the last appeal as follows: "Upon the evidence in the case, Drinkard, the paying teller, in receiving the check, is to be considered the agent of the plaintiff, and not the agent of the bank."

But this instruction, in order to harmonize with the instruction given on behalf of the plaintiff, was accompanied by this qualification:

"That is a true, and a correct statement of

the law, that in receiving it, he was the agent of the plaintiff, and not the bank; yet Mr. Swain had the power and the right to convert Mr. Drinkard's act into the act of the bank; and the question for you to determine is, as I have said before, whether he did so or not, and in determining that question, you are to take into consideration all the facts and circumstances in the case."

To the addition of the foregoing qualification, as well as to the grant of the plaintiff's special prayer aforesaid, the defendant excepted.

The jury found for the plaintiff, and judgment was rendered for the full amount of the sum claimed, with interest. From this judgment the appeal has been duly prosecuted.

1. The first error assigned is based upon the refusal of the court to permit the defendant to prove by its cashier, who had been examined as a witness by plaintiff, that if the plaintiff had brought the post-dated check to the bank on the 16th or 17th, and presented it during business hours, it would not have been received as a deposit from him as a depositor and an account opened. There is no doubt that a bank has the right to reject or accept a depositor at will. *Morse, Banks & Banking*, § 178.

But this right was not in issue. The question to be determined by the jury was this: Did the defendant receive this check after business hours, for collection, out of any funds the drawer might have in its possession when it should become payable, and promise to hold the money when collected, to the plaintiff's credit and subject to his check? In other words, did the paying teller, Drinkard, receive the check from plaintiff for the purposes aforesaid; and did the cashier, with knowledge thereof, ratify or acquiesce in his action. The question was, what had been done under certain circumstances; not what might have been done under others. The evidence was not relevant, and the court was right in excluding it.

2. The doctrine is unquestioned that where a corporation is engaged in a business requiring the services of several agents, whose powers are limited and whose duties are separate and distinct, and a party knowingly deals with one of them in a matter beyond his authority, he cannot hold the principal bound by the agent's act unless the same shall have been ratified. Had the plaintiff met Drinkard away from the bank and intrusted the check to him, relying upon him to collect it and deposit the proceeds to his credit, clearly the bank would not have been bound by Drinkard's action, without some act of ratification. Under such circumstances Drinkard would be his own agent and not the bank's. *Manhattan Co. v. Lydig*, 4 Johns. 877, 4 Am. Dec. 289. The facts in this case, however, show that the check was delivered to the teller at the bank where he and all the officers of the bank were engaged in attention to their duties. He was the paying teller, it is true, but he had occasionally acted as receiving teller within the knowledge of the cashier and without any objection from him. By acquiescence of the principal in the exercise of authority beyond his 25 L. R. A.

agency the powers of a limited agent may sometimes become greatly extended. *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008. If the facts in this record had all been before the general term on the last appeal before this, it is not probable that the court, in its opinion would have gone so far as it did in the limitation given to Drinkard's agency. That opinion, too, was based almost wholly upon the case of *Thatcher v. Bank of the State of New York*, 5 Sandf. 122, a decision by the supreme court of New York, the authority of which has since been overturned by the court of appeals in the well-considered case of *East River Nat. Bank v. Gove*, 57 N. Y. 597.

In that case the bank sued Gove to recover \$1,100 that had been paid him by mistake. By some error he had been credited with that sum in excess of his deposits and had drawn it. When the mistake was discovered he was asked to return the money. Failing to do so for some days, the paying teller wrote him a note asking him to call and pay the amount due. Gove knew that there was both a paying and a receiving teller in the bank. He came to the bank and paid the money to the paying teller, who failed to report it. It does not appear where the receiving teller was at the time. The proof showed that the paying teller sometimes, in the absence of the receiving teller, had received money paid to or deposited in the bank. The bank was held bound by the receipt of the money by the teller. The court said: "Banks must be held responsible for the conduct of their officers within the scope of their apparent authority. When one goes into a bank and finds behind the counter one of its officers employed in the business, and upon his demand pays a debt due the bank, in good faith, without any knowledge that the officer's authority is so limited that he has no right to receive it, he must be protected and the bank must be bound by the payment." See also *Munn v. Burch*, 25 Ill. 35.

The principle governing the New York case seems to us to be both reasonable and just, and the facts of this case, as we find them in the record before us, are clearly within it. Averell was not a customer of the defendant. He was slightly acquainted with Drinkard, but knew no one else connected with the bank. He called after the doors were closed for the day, as others frequently did for the transaction of business, and was admitted and shown into the ante-room. This room was next the main office where the officers and clerks were still at work, and persons therein could see through the wire partition. Drinkard went to meet the plaintiff, ascertained his business and took the two checks which he presented. He went back to the main office, procured the money and paid the check which bore date that day. He retained the post-dated check, promising to pay it when due and enter it to plaintiff's credit as a deposit. As is usual in the case of receiving a deposit he brought out the "signature book" and had plaintiff to write his signature so that the genuineness of his checks might be established by comparison

in case of need. These transactions were had, it may be said, in the very presence of the cashier, or more nearly so than similar transactions during the ordinary business opening of the bank.

Though not charged with the particular duty of receiving such checks for collection and deposit, Drinkard had nevertheless occasionally performed the duties of the receiving teller within the knowledge of the cashier and without his objection. It is not shown as a fact that the plaintiff intended to make Drinkard his own agent; nor does it appear that he was aware of any limitations upon his authority in that regard.

The cashier testified that he saw the check on Drinkard's desk on the same afternoon and knew that he had received it from plaintiff; that he did not think it belonged to Drinkard, but inferred it was there to be paid. He made no further inquiry and said nothing with respect to Drinkard's exercise of authority beyond the scope of his employment.

The trial justice, following the decision on the last appeal, charged the jury that in the transaction Drinkard was the agent of plaintiff and not of defendant. But, he further instructed them substantially to the effect that if the cashier knew of the transaction immediately after it occurred and assented thereto, the defendant would be liable for the amount of the check and protest fees if, on the 19th, the drawer had sufficient funds in the bank to meet it. We find no error in the charge with which the case was given to the jury, either in the instructions given on behalf of plaintiff or in the qualification attached to defendant's special instruction. Had the court instructed the jury to find as a fact from all the evidence, whether or not in the transaction itself, Drinkard was acting as the agent of the defendant, we would not hold it to be error. The effect of the charge as given was substantially the same as that,

but the form in which it was put made it more favorable to the defendant.

3. When the bank opened on the 19th the drawer had funds therein more than enough to discharge the check. This was sufficient to make the bank liable, and it made no difference that at the closing hour the account of the drawer had been overdrawn. The money must be considered as if in fact collected and placed to the credit of the plaintiff, and the failure to recognize his right to it gave him his right of action as for money had and received. *Kiloby v. Williams*, 5 Barn. & Ald. 815; *Oddis v. National City Bank*, 45 N. Y. 785, 6 Am. Rep. 160; *City Nat. Bank of Selma v. Burns*, 68 Ala. 275, 44 Am. Rep. 138; *Tinkham v. Heyworth*, 81 Ill. 519. It was well said in *Kiloby v. Williams* that: "When they received the check from him they became his agents to receive the money upon it as soon as possible, and if they could be allowed to appropriate the money received by them to the payment of subsequent checks it would be doing great injustice and injury to their own customers." In *First Nat. Bank of Cincinnati v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766, it was held that if at the time a check is handed in to the bank, the holder demand to have it placed to his credit, the bank may refuse to do so. But if it retains the check it is bound to the depositor; and no usage or custom that checks shall be held and only credited at the close of the day's business, provided there are then funds on hand to meet it, will be suffered to prevail against it. It was also said that in such a case the ordinary rule that a day is an indivisible unit will be disregarded, and the actual priority of the transaction permitted to be shown.

No error having been found in the proceedings below, the judgment must be affirmed, with costs to the appellee; and it is so ordered.

## OHIO SUPREME COURT.

James D. CASE, *Plff. in Err.*,

v.

E. Jason HALL, Admr., etc., of Benjamin Bartholomew, Deceased, *et al.*

(.....Ohio.....)

\*1. Where land is devised in fee simple with direction to the devisee to pay certain legacies as each legatee attains the age of twenty-one years, the devisee, on accepting the devise, becomes personally liable to pay the same as directed by the testator.

2. And where, in such case, the devisee dies before all the legatees attain the requisite age, his estate, as an entirety, remains liable to such as thereafter become of age;

Headnotes by the Court.

NOTE.—The above case presents an unusual question as to the merger of legacies in an estate in fee in land, on which they constitute a lien, which descends to them from a devisee who was bound to

and it is the duty of his administrator, having assets, to pay the same.

3. Again, in such case, where the legatees become the owners of the land, not by the provisions of the will but by descent, the legatees, remaining unpaid, are not extinguished by merger or otherwise, but must be paid from the personalty of the deceased devisee, where that is sufficient, as any other debt of his estate.

(October 16, 1894.)

**ERROR** to the Circuit Court for Delaware County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendants in an action brought to compel payment of money which defendants' intestate had promised to pay in consideration

pay the legacies. Many cases as to charges of legacies on land are collected in a note to *Davidson v. Coon* (Ind.) 9 L. R. A. 554. See also *Evans v. Foster* (Wis.) 14 L. R. A. 117.

of a devise made by a third person to himself.  
*Reversed.*

The facts are stated in the opinion.

*Messrs. Jones, Lytle & Jones*, for plaintiff in error:

Benjamin F. Bartholomew, by accepting the devise of real estate under said will and by taking possession of the same, is by implication personally and absolutely liable for the payment of said legacies; the acceptance of the estate devised to him, charged with the payment of these legacies, made them his personal debt, and rendered him personally liable for their payment.

*Dunne v. Dunne*, 66 Cal. 157; *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Dodge v. Manning*, 1 N. Y. 298; *Olmead v. Brush*, 27 Conn. 530; *Williams v. Nichol*, 47 Ark. 254; *Brown v. Knapp*, 79 N. Y. 143; 2 Redf. Wills, p. 209; *Mensch v. Mensch*, 2 Lans. 235; *McLachlan v. McLachlan*, 9 Paige, 534, 4 L. ed. 805; *Wood v. Wood*, 28 Barb. 356; *Reynolds v. Reynolds*, 16 N. Y. 257; *Gridley v. Gridley*, 24 N. Y. 180; *Harris v. Fly*, 7 Paige, 421, 4 L. ed. 218; *Birdsall v. Hewlett*, 1 Paige, 82, 2 L. ed. 550, 19 Am. Dec. 892; *Fox v. Phelps*, 17 Wend. 393; *Glen v. Fisher*, 6 Johns. Ch. 38, 36, 2 L. ed. 45, 46, 10 Am. Dec. 810.

With respect to "all claims founded upon any obligation, contract, debt, covenant, or other duty the right of action on which the testator or intestate might have been sued in his lifetime survives his death, and is enforceable against his executor or administrator."

8 Williams, Executors, pp. 1721-1723.

One who accepts an estate devised to him, under a charge or condition of his paying a legacy or annuity, is liable in contract for the legacy or annuity, even without any express promise to pay.

2 Williams, Executors, 1272-1273, note N, and authorities cited; 8 Williams, Executors, p. 1931, note K, and cases cited; 2 Woerner, Administration, p. 1099, and authorities cited.

If the payment of the legacy by the acceptance of the provisions of the will became an obligation of Benjamin F. Bartholomew there can be no doubt that the personal estate of said Benjamin F. Bartholomew, deceased, in the hands of his executor, is the primary and natural fund, which must be resorted to for its payment.

8 Williams, Executors, 1704, 1705.

"If for any reason the debt becomes the debt of the owner of the land, it must be paid out of his personalty."

Bispham, Equity, p. 409, and note 1, p. 411; *Thompson v. Thompson*, 4 Ohio St. 333; 1 Chitty, Pl. 4-6; *Crumbaugh v. Kugler*, 3 Ohio St. 549.

Although at the death of Benjamin F. Bartholomew, the fee of the real estate went to his son Leslie Bartholomew, and at his death, subject to the life estate of Amanda Bartholomew, went to the heirs of Emily Jane Case, the doctrine of merger does not apply.

Bispham, Eq. p. 210.

*Mr. George L. Converse* also for plaintiff in error.

*Mr. J. T. Holmes*, for defendant in error: To take from the son's widow his separate, personal estate, which by operation of law has 35 L. R. A.

become hers, and add it to the testator's estate, in the form of legacies would be to make a new will for Major Bartholomew and rob his son's widow in a way of which he never even dreamed.

The cases which suggest that the devisee is liable personally, hold that the lien continues on the land, and may be enforced even against the vendees of the devisee.

*Clyde v. Simpson*, 4 Ohio St. 459.

The testator intended the provisions of items four and five to be beneficial, not alone to the Case heirs, his grandchildren, but to his son. These provisions constituted his method of dividing his property. The course of events natural and legal has provided for those grandchildren; they hold and own the bounty designed for the son and themselves; it is no longer necessary to have the legacies paid, or if they must be paid, the land should be sold for that purpose.

The testator will be held to have meant that Benjamin should have the full title which the words of "gift, bequest, and devise," carried to him after he had paid the legacies, and not until he had paid them.

*Linton v. Laycock*, 33 Ohio St. 128; Schouler, Wills, § 562; 2 Redf. Wills, \*283 et seq.; *Lupton v. Lupton*, 2 Johns. Ch. 614, 1 L. ed. 512; 2 Lomax, Exrs. 90; 2 Redf. Wills, 209, note 9; *Hoyt v. Hoyt*, 85 N. Y. 142.

This land is the primary, and sufficient, the intended and the only equitable source or property, for the payment of the plaintiff's legacy.

*McOullough v. Copeland*, 40 Ohio St. 329; *Fuller v. Fuller*, 84 Me. 475.

*Minshall, J.*, delivered the opinion of the court:

The suit below was an action for the recovery of a legacy, brought by the legatee against the administrator of a devisee, who, as is claimed, was personally bound to pay it. Judgment was rendered for the defendant, which, on error, was affirmed by the circuit court and the plaintiff excepted. Error is prosecuted here to reverse both these judgments. The facts are as follows: On October 30, 1874, Major Bartholomew died leaving a will which was shortly afterward admitted to probate and recorded. By his will he devised to his wife all his personal estate, and an estate for life in one third of all his real estate, "save that this day deeded by myself and wife to Benjamin F. Bartholomew," and at her death to go to my son Benjamin F. Bartholomew. Then follow the items on which the question arises in this case; and which are as follows:

"4th. I give, bequeath, and devise to my son all the remainder of my real estate, being two thirds of the same after he shall pay to the heirs of my daughter, Emily Jane Case, the several amounts hereinafter bequeathed to each of said heirs.

"5th. I give and bequeath to the heirs of my deceased daughter, Emily Jane Case, one thousand dollars each, to be paid to each of them by my son, B. F. Bartholomew, as they become twenty-one years of age."

On the probate of the will, November 8, 1874, Benjamin took possession of the land

devised to him, used and occupied it as his own to the time of his death, receiving all the rents and profits amounting to some \$13,500. He died April 27, 1888, leaving a widow and an only son, Leslie Bartholomew, who died December 1, 1888, intestate and without issue. The heirs of Emily J. Case were her children, eight in number, all of whom became of age and were paid their legacies during the lifetime of Benjamin, except the plaintiff, who became of age March 7, 1890, and W. P. Case, who, though he became of age February 29, 1888, had received but one half of his legacy. Hall was duly appointed administrator of Benjamin, accepted the trust and qualified as such; and the plaintiff, on arriving at age, presented his claim for the payment of his legacy with interest from the time he became of age which was rejected.

Whereupon the plaintiff brought his suit, and the widow of Benjamin having been made a party at the instance of the administrator, both answered. There is, however, no controversy as to the facts. On the death of Leslie, the son of Benjamin, intestate and without issue, the land inherited from his father passed by descent to his cousins, the heirs of Emily Jane Case, deceased, and of whom the plaintiff is one. His mother took the personalty, and, as widow, was entitled to her portion of his father's estate. The question presented is, whether in view of the facts and the language of the will, the legacy bequeathed the plaintiff by the will of his grandfather became a personal obligation of Benjamin Bartholomew on his accepting the devise of the land made to him. The plaintiff claims that it did; the defendants claim that it did not; that no personal obligation attached until the time appointed for the payment of the legacy; and, this not having arrived until after the death of Benjamin, no personal obligation can be asserted against his estate; and that the plaintiff must look to the land on which his legacy is simply a charge and no more. This view seems to have prevailed in both the lower courts, but we are unable to adopt it. Whilst many cases may be found in which a question was made as to whether a certain legacy had, by a fair construction of the will, been charged on land devised, none has been cited, where, in a case like this, the entire fee simple is devised to one with direction to pay certain legacies, an acceptance of the devise does not, without question, impose a personal obligation on the devisee to pay the legacies. Thus in *Glen v. Fisher*, 6 Johns. Ch. 83, 2 L. ed. 45, 10 Am. Dec. 810, it is held that, where land is devised charged with the payment of a legacy, and the devisee accepts the devise, he is personally and absolutely liable for the legacy; and he has no right to require of the legatee, before payment, a security to refund, in case of a deficiency of assets, to pay debts. And in *Fuller v. McEhren*, 17 Ohio St. 289, this court stated the rule in substantially the same language, and held that, in an action to enforce such personal obligation the fact that the devisee or legatee is or is not also the executor of the will, makes no difference in the case. The

rule is also recognized and stated in *Yearly v. Long*, 40 Ohio St. 27. The rule is thus stated in *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704: Where lands are devised to one who, by the will, is directed to pay a legacy, the legacy is charged upon the land devised, and when payment of the legacy is made a condition of the devise, its acceptance creates also a personal liability to the legatee which may be enforced without resorting to the land, the lien still remaining as a security. Many other cases might be cited to the same effect; and are sustained by text-writers of standard authority. Woerner, Administration, 1099; Williams, Executors, 1272, 1704.

The rule rests upon the reasonable principle, that he who takes a benefit under a will must take it subject to its provisions; any other construction would necessarily defeat the intention of the testator. So that, where a devise is required to pay legacies to others, an acceptance of the devise imparts a promise to pay the legacies; and the legatees have the right to maintain an action thereon for its non-performance, as though the promise had been made to themselves.

There is, we think, no ground for the contention that the estate in the land, devised to Benjamin, did not vest until the payment of the legacies had been made. Payment is not made a condition precedent to the vesting of the estate; the effect of the language employed is simply to charge the land as a security for the payment of the legacies. *Thompson v. Hoop*, 6 Ohio St. 480, 489; Woerner, Administration, 592. Therefore, Benjamin took an estate in fee simple in the land, devised to him, on the death of the testator.

It is claimed, however, that while such is the general rule, the facts bring this case within the principle on which *Decker v. Decker*, 8 Ohio, 157, was decided. That was regarded by the court as a novel case. The land was devised by his father to Jacob Decker with direction to pay certain legacies at different times in the future to the other children of the testator, with a limitation that if Jacob should die without issue, the estate should go to those other children. By this provision the court held that the devisee took simply a life estate in the land, and that this negatived any intention to make the legacies, before they became due, a personal liability of the devisee. The apparent injustice of charging the devisee personally with the legacies, though the estate might terminate by his death before he received any benefit therefrom, influenced the court in making the holding it did. And the judge delivering the opinion observed that "a devise of the fee, has been considered as sufficient to show an intention in the testator, to create a personal charge, while a devise of any inferior interest, as an estate for life, is taken to indicate an intention to charge the land, and not the person of the devisee." In the case before us the land was devised in fee, and was of much greater value than the legacies the devisee was required to pay. Subject to the payment of the legacies he could deal with it as he pleased, and did so.

At his death it passed, by operation of law, to his son as his heir, and not by the provisions of the will of his father; and this marked distinction in the facts clearly distinguishes the case from that of *Decker v. Decker*. Here the entire subject of the devise became, by its acceptance, the property of the devisee, charged, however, with the payment of the legacies. It went to increase the amount of his estate, less only the sum of the legacies to be paid. The fact that he might die before the time fixed for the payment of any or all of the legacies was not, under the provisions of the will, in any way to affect the quantity of his estate in the land. Whether he paid any or all of the legacies during his lifetime, his estate in the land would be none the less; and it would, and did, descend to his heir in fee simple, subject only to the payment of such legacies as had not been paid. Such, without doubt, was the intention of the testator; and to give the will any other construction would defeat that intention. He designed that his son would have the land, for he in plain terms gives it to him; but he also designed that the children of his deceased daughter should have their legacies, as a part of his bounty, for he directs his son, as devisee, to pay them as they attain twenty-one years of age. His son and these children were the immediate objects of his bounty; they were the only ones that concerned him. He cannot be supposed to have foreseen all that afterwards happened,—the death of his own son, and the heir of the latter, intestate and without issue, before all of the children of his deceased daughter had arrived at twenty-one years of age; and to speculate as to what he would have done, had he foreseen these remote contingencies, is useless, as it can shed no light upon the construction of his will. But it is well, in this connection, to observe that he had provided liberally for his own son—having given him the greater portion of his estate; and no reason is perceived why he should have had more concern for the widow of his son, so provided for, than for those of his own blood, related to him as grandchildren.

But again it is claimed that the direction being to pay each of the legatees as they became twenty-one years of age, the legacy to each did not vest until the legatee attained that age; and, therefore, that no personal obligation attached to pay any particular legatee until he attained the age of twenty-one; and, therefore, the personal estate of Benjamin is not liable for the payment of the legacy to the plaintiff as he did not attain twenty-one years of age until after the death of Benjamin. It is not necessary, as we think, to decide whether these legacies vested at the death of the testator, or not; though, under the settled rule in such cases, we see no reason for saying that they did not. *Bingham, Descents*, 59. If they did not, still a conditional liability, personal in character, was created as to each, which became absolute on the legatee attaining the requisite age; the legacy then became an absolute personal liability of the devisee, if living, or of his estate, if dead. Now it is the settled rule of

the law that the personality of an estate is the primary fund for the satisfaction of all the personal obligations of the deceased. *Williams, Executors*, 1705. And that it was the personal duty of Benjamin Bartholomew to pay this legacy to the plaintiff on his arriving at twenty-one years of age, has been already shown to have arisen from his acceptance of the devise under the will of his father. And although he died before the time arrived for making the payment, the obligation attended his estate as an entirety, to be performed by his administrator as his personal representative. It frequently happens that a conditional obligation, assumed by a person in his lifetime, does not become absolute until after his death, and must be, and is, satisfied by his administrator, though not named in the contract. *Williams, Executors*, 1724. In addition to the many instances given by this author, the obligation of a principal to indemnify his surety may be noticed. No absolute obligation arises in such case until the surety has paid the debt, and this may be after the death of the principal; and the state of the principle then becomes liable to indemnify the surety. The case of *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669, grew out of such a state of facts, and was prosecuted against the heirs for assets received, because the liability of the deceased did not, by the payment of the surety, become absolute until after the administrator had settled the estate, and the suit as to him had become barred.

There remains the further contention, that the legacy to the plaintiff has merged in the legal estate, which, by operation of law, has descended to him and his brothers and sisters, co-legatees, by the death of Leslie Bartholomew, intestate and without issue. This, we think, is entirely erroneous. It is true as a general rule, that where the equitable and legal estate unite in the same person in the same right, the former will merge in the latter. But this is simply a rule of convenience to the owner of the two estates, and is never applied where it would be to his interest to treat the equitable interest as subsisting. Here, as shown, the plaintiff has the right to have his legacy satisfied from the personal estate left by Benjamin Bartholomew, though, by so doing, it will diminish a fund that would otherwise go to his widow. His right in this regard is that of a creditor of the deceased. The fact that, by inheritance, he with his co-legatees, has become an owner of the land, that may be treated as a security for the payment of the legacy, does not change the equity of the case. It is not by any provisions of the will that this has occurred; and the fact, as before shown, cannot, therefore, in any way influence its construction. The condition of the plaintiff is, in law, no way different from what it would have been, had he and his brothers and sisters purchased and paid full value for the land. In such case, as it would be to his interest to treat the legacy as existing, though a lien on the land, for the purpose of enabling him to compel it to be satisfied by his debtor, or his estate, the law would treat it as existing for such purpose. The legacy and the lien

are not inseparable. The legacy is the principal, the lien is an incident, and may be extinguished by merger in the estate of the creditor, although the legacy is not.

*Judgment of the lower courts reversed, and judgment on the pleadings for the plaintiff in error.*

## OHIO SUPREME COURT.

BOARD OF EDUCATION OF MARION TOWNSHIP, *Plff. in Err.*,

v.

STATE of Ohio, *ex rel.* A. C. LINDSEY.

(51 Ohio St. 531.)

\*1. Where no obligation, legal or moral, rests upon a board of education, to pay a claim asserted against it by a private individual, an act of the general assembly, procured by the claimant, commanding such board to levy a tax for its payment, is unconstitutional and void.

2. In such case, if the board of education disputes the facts asserted by the claimant as the foundation of his claim, the general assembly, while it may make inquiry to ascertain, in the first instance, the truth of the facts so asserted, yet is without authority to conclusively find and recite in the act providing relief, the facts in dispute, so as to estop the board of education from contesting them in a court of justice where the act is sought to be enforced.

(June 19, 1894.)

**E**RROR to the Circuit Court for Fayette County to review a judgment, granting a writ of mandamus to compel the Board of Education of Marion Township to levy a tax to pay a claim which relator held against the township and which the legislature had by special act directed to be paid. *Reversed.*

**Statement by Bradbury, J.:**

The defendant in error brought an action of mandamus against the plaintiff in error in the circuit court of Fayette county to compel it to levy a tax under and by virtue of the following act of the general assembly of this state:

"Section 1. *Be it enacted by the General Assembly of the State of Ohio*, That the board

\*Headnotes by the COURT.

**NOTE.**—On the question of implied restrictions on legislative power in cases somewhat similar to the above, see *note* to *Staton v. Norfolk & C. R. Co.* (N. C.) 17 L. R. A. 888, in which most of the authorities deny that the power of the legislature to take private property or interfere with vested rights is unlimited.

Somewhat akin to these authorities are those found in the *note* to *Louisville, N. O. & T. R. Co. v. Jordan* (Miss.) 18 L. R. A. 254, respecting the constitutionality of private statutes to authorize disposal of property, and those in the *note* to *Lowe v. Harris* (N. C.) 22 L. R. A. 379, concerning the constitutionality of a statute legalizing an invalid private contract.

In respect to the public purposes for which money may be appropriated or raised by taxation, see numerous authorities collected in a *note* to 25 L. R. A.

of education of Marion township, Fayette county, Ohio, shall, at the next regular meeting of the said board of education, after the passage of this act, levy upon the taxable property of said Marion township, Fayette county, Ohio, not to exceed one mill on the dollar, as and for a contingent fund, for the purpose of refunding to A. C. Lindsey, former treasurer of said township, the sum of one hundred and ninety-seven dollars and seventy-six cents, with interest thereon from April 1, 1882, which said sum was charged to said A. C. Lindsey, as treasurer, and said sum paid over to his successor in office, by mistake, and has not been refunded to him; that said board of education shall certify said levy to the auditor of said Fayette county, Ohio, as required by law, and the clerk of said township shall draw an order upon the treasurer of said township in favor of said A. C. Lindsey for said sum of one hundred and ninety-seven dollars and seventy-six cents, with interest from April 1, 1882, to be paid out of the contingent fund of said Marion township, Fayette county, Ohio."

In his petition he states in substance that on and before September 29, 1874, and for several years thereafter, he was the treasurer of said township of Marion, and as such was *ex officio* treasurer of the school fund of said township. That the clerk of said township on said 29th day of September, 1874, pursuant to the order of said board of education, issued to one William Clark a warrant for the sum of \$197.76, payable out of the school fund of said township, which the relator paid from said fund to the person in whose favor said order was drawn. That afterwards, when he came to settle with the county auditor, the said warrant having been lost, he was charged with the amount thereof, and that he has never been reimbursed for the same, and that when he came to settle with his successor in said office the amount of this warrant was charged to and paid by him to such successor.

*Daggett v. Colgan* (Cal.) 14 L. R. A. 474, most of which, however, are cases of attempted action by municipalities rather than by the legislature. For other cases as to the power of the legislature in this respect, see *Waterloo Woolen Mfg. Co. v. Shanahan* (N. Y.) 14 L. R. A. 481.

For constitutional restrictions on the power of the legislature in this respect, see *Bourn v. Hart* (Cal.) 15 L. R. A. 481; *Patty v. Colgan* (Cal.) 18 L. R. A. 744; *Cutting v. Taylor* (S. Dak.) 15 L. R. A. 681; *Synod of Dakota v. State of South Dakota* (S. Dak.) 14 L. R. A. 418; *Institution for Education of Mute and Blind v. Henderson* (Colo.) 18 L. R. A. 898; *Wasson v. Wayne County Comrs.* (Ohio) 17 L. R. A. 705; *Conlin v. San Francisco Bd. of Suprs.* (Cal.) 21 L. R. A. 474.

See also the following case of *State v. Moore* (Neb.) *post*, 774.



That in the year 1892 the relator found said warrant, presented the same to said board of education, together with full proof of its having been paid by him and his never receiving credit therefor, and requested that a warrant be issued to him for the sum due to him by reason of the premises, which said board refused to do, though admitting the facts to be as he claimed they were, on the ground that they had no power to go behind the settlements previously made. Whereupon he applied to the general assembly of the state and procured the act aforesaid, to be passed, and that said board have refused to levy a tax according to its requirements.

To this petition the board of education answered as follows:

"Now comes the defendant, the board of education of Marion township, Fayette county, Ohio, and for answer to the petition of the plaintiff, says:

"It denies that the said J. V. Cutright, clerk of said township, pursuant to any order or resolution of said board, issued in favor of the said William Clark the warrant mentioned in the petition. Said defendant denies that it by any order, resolution, or otherwise, authorized the said clerk to issue the said warrant. It denies that said order was ever delivered to the said William Clark, or by him presented to the said relator, as such treasurer, or that the said relator ever paid the same to the said William Clark, or to any one else. It says that at the date of said warrant, said defendant was not indebted to the said Clark, nor was the said Clark asserting any demand or claim against it.

"It denies that in paying to his successor in office the amount of school funds charged against him as such township treasurer the said relator paid said sum of \$197.76, or any other sum of his own funds; but on the contrary, the said defendant charges the fact to be that the said relator became a defaulter in his said office, and was by the township trustees of said township, about the \_\_\_\_\_ day of \_\_\_\_\_, 1878, removed from his said office, and one C. C. McCray was appointed his successor, and the said relator was unable to and did not pay to his said successor the amount so charged against him of school funds; and there still remains a balance of \$60 of said school funds so charged against the said relator as such treasurer, which has never been paid to the said successor or any other treasurer of said township, by the said relator or any one for him.

"Said defendant further says it is true that at some time in the year 1892, the relator presented the said warrant to the defendant and requested the defendant to order its clerk to issue a warrant for the payment of the same, and the said defendant refused so to do; but it denies that the said relator ever presented any proof of payment of the same, or the failure of the said auditor to give credit; or that they admitted the facts, as stated in the petition, but the said defendant always denied the facts to be as claimed by the relator.

"Said defendant says the facts in regard to said order are as follows:

"Prior to the 1st day of August, 1874, the

said board of education of Marion township had instituted in the probate court of Fayette county, Ohio, certain proceedings to condemn lands for school-house site in said township. The awards made in said proceedings, together with the costs taxed to the said board therein amounted to the said sum of \$197.76. The said board had in said proceedings incurred an expense of \$15.00 for the services of H. B. Maynard, an attorney, all of which was by said board apportioned between the two school districts interested, and was paid by two orders, one for \$108.48, and one for 109.88, which were on said first day of August, 1874, issued by the clerk, upon the order of said board, to said William Clark, who was at that time a member of said board, and said orders so issued to the said Clark were paid by the said relator, and the money was thereupon disbursed by the said Clark in payment of said award, costs, and attorney fee; and said orders so paid by the said relator were duly credited to him in his annual settlement with the county auditor.

"Afterward, on the 29th day of September, 1874, the said clerk by mistake issued another order for the amount of the said award and costs, being the warrant mentioned in the petition, but said warrant was not delivered to the said Clark, the payee named therein, and was not paid by the said relator, the mistake having been discovered in the mean time. But said warrant in some way unknown to the defendant came into the hands of the relator, and he has ever since retained the same, and never until the year 1892, claimed to have paid the same, or that he was entitled to credit for the same in his settlements with the county auditor.

"The defendant says the said board of education was never legally, equitably nor morally bound to pay to the relator the amount of said warrant, or any sum on account thereof. The said defendant further says: It is true that the general assembly of the state of Ohio, on the 16th day of February, 1898, passed the act mentioned in the petition; but it avers that said enactment commanding the levy of a tax, and the payment of a claim of the character of that of the relator, for which the defendant was not bound legally, equitably or morally, as appears from the facts hereinbefore set out, was not a legal exercise of the taxing power of the said general assembly, said tax ordered to be levied not being for any public purpose, and said act is for that reason wholly void and of no effect.

"The defendant further says that at the time when the act of the general assembly mentioned in the petition was passed, the defendant denied and still denies the existence of the facts which would furnish the basis for the relator's demand, or which would render the said defendant equitably and morally, if not legally, bound to pay the same; but then, as now, asserted the facts to be as set out in this answer. The said general assembly, in said enactment, did not provide any means of determining the facts on which the demand of the relator is founded, either by the trial in court, before a board of audit constituted for that pur

pose, or otherwise; but said general assembly attempted, by said enactment, to pass upon the facts, to adjudge the said defendant liable on said demand, and to enforce payment by taxation, which action on the part of said general assembly was an attempt to exercise judicial and not legislative power, and said enactment is for that reason void, and can furnish no basis for the relief prayed for in the plaintiff's petition.

"Wherefore the said defendant says that a peremptory writ ought not to issue in this case, and it asks to be discharged and to recover its costs."

To this answer a demurrer was interposed by the relator and sustained by the court; whereupon a peremptory writ of mandamus was awarded commanding the board of education to levy a tax according to the provisions of the act under which the proceedings had been commenced.

This action of the circuit court the board of education brings into this court for review.

**Messrs. Hidy & Patton**, for plaintiff in error:

Governments are charged with the accomplishment of great objects, necessary to the safety and prosperity of the people. If a tax is levied without the existence of some of these purposes of government to which to apply it, there can be no doubt it would involve a usurpation of authority which would render it illegal.

*Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 102.

The power of taxation was delegated to be used for these purposes and these alone.

*Debolt v. Ohio Life Ins. & T. Co.* 1 Ohio St. 581.

It is not difficult to give the most reckless robbery for private purposes the form of constitutional action, and it is as easy to call it a tax as it was in former periods to call those exactions which were enforced by prisons and physical suffering and the quartering of a ruthless soldiery upon the people, by the gentle name of benevolences.

Cooley, Taxation, 698.

The determination of the question whether the purpose for which the tax is levied is a public one does not lie wholly in the province of the legislature.

*Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 82; *Marbury v. Madison*, 5 U. S. 1 Cranch, 137, 2 L. ed. 60.

The legislature cannot, by declaring the use to be public, when it is, within the constitution, a private one, authorize the property of one citizen to be taken from him and given to another.

Burroughs, Taxation, § 18.

The power of taxation exercised by legislative bodies in this country is limited to public purposes and whether the purpose is a public one is a question for the courts.

*Coster v. The Tide Water Co.* 18 N. J. Eq. 54; *Bankhead v. Brown*, 25 Iowa, 540; *Loughbridge v. Harris*, 42 Ga. 500; *Concord Railroad v. Greely*, 17 N. H. 47; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 89; *Weisner v. Douglas*, 64 N. Y. 99, 21 Am. Rep. 586; *Talbot v. Hudson*, 16 Gray, 421; *Hampshire County v.* 25 R. L. A.

*Franklin County*, 16 Mass. 84; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 632; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Brunswick v. Litchfield*, 2 Me. 28; *Debolt v. Ohio Life Ins. & T. Co.* 1 Ohio St. 584; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77.

The legislature is not a proper auditing board as between the municipality and third persons, though it may undoubtedly prescribe the rules of liability for all cases.

Cooley, Taxation, 787.

The legislature has no right to direct a municipal corporation to pay a claim for damages for breach of contract out of the funds or property of such corporation without the submission of such claim to a judicial tribunal.

*People v. Howe*, 87 Barb. 440.

The legislature has no power to compel a municipality to levy taxes for any of the foregoing purposes until the liability to pay the same has been adjudged by a court of competent jurisdiction.

*State v. Tappan*, 29 Wis. 687, 9 Am. Rep. 632; *Mills v. Charleston*, 29 Wis. 400, 9 Am. Rep. 578; *People v. Saginaw County Suprs.* 26 Mich. 22; *Sandborn v. Rice County Comrs.* 9 Minn. 278; *Brunswick v. Litchfield*, 2 Me. 28; *Hampshire County v. Franklin County, supra.*

**Messrs. Mills Gardiner and John Logan**, for defendant in error:

If by mistake Lindsey paid with his own money a debt of the township of which he was treasurer, the taxing power may properly be exercised to reimburse him. The public has had the benefit of the payment, and the burden should not be borne by one citizen, but by the whole public.

Cooley, Taxation, 1st ed. 42; *Warder v. Clark County Comrs.* 38 Ohio St. 643; *State v. Board of Education of Wooster*, 38 Ohio St. 3; *State v. Hoffman*, 85 Ohio St. 435; *State v. Circleville*, 20 Ohio St. 362; Cooley, Const. Lim. \*488; *Board of Education of Scioto v. McLandsborough*, 36 Ohio St. 227.

The legislature may conduct the inquiry to ascertain the existence of the purpose for exercising the power of taxation.

Cooley, Const. Lim. 3d ed. \*488.

In some instances the levy is made contingent upon the act of persons or bodies designated to execute the legislative will, attaining the end sought indirectly and conditionally through these subordinate agencies.

*Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77; *State v. Harris*, 17 Ohio St. 608; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *State v. Circleville, supra.*

In other instances the legislature has acted directly and absolutely without the employment of any of its subordinate agencies.

*State v. Franklin County Comrs.* 35 Ohio St. 458; *State v. Hoffman*, 85 Ohio St. 435; *Board of Education of Scioto v. McLandsborough*, 36 Ohio St. 227.

Where a statute does not impinge upon any constitutional inhibition, the legislature is the sole judge as to the form it may be made to assume.

*Kumler v. Silsbee*, 38 Ohio St. 447; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.*

*supra*; *State v. Hawkins*, 44 Ohio St. 109; *Metcalfe v. State*, 49 Ohio St. 586; *State v. Harmon*, 81 Ohio St. 250; *People v. Flagg*, 46 N. Y. 405; 8 Am. & Eng. Encyclop. Law, pp. 691, 692; *State v. Hoffman*, 35 Ohio St. 435; *State v. Franklin County Comrs.* 35 Ohio St. 458.

There is no remedy by judicial process for a statute which may be considered merely an abuse of the taxing power; the authority to and duty to prevent abuse is entrusted to the legislature and not to the courts.

*Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *State v. Franklin County Comrs.* *supra*; *Lehman v. McBride*, 15 Ohio St. 578.

**Bradbury, J.**, delivered the opinion of the court:

The answer of the respondent, if true, shows that the demand of the relator has no foundation, whatever, in fact or justice; that the board of education was under no obligation, legal or moral, to pay the same, and that the fund to be raised by virtue of the act of the general assembly differed in no essential particular from a mere gratuity, provided for his benefit. The demurrer admits the truth of the averments of the answer. In such a state of things the act must be held invalid unless the general assembly has authority to command a local subdivision of the state to raise by taxation a fund for the benefit of an individual to whom it is under no obligation whatever, or where in such case a dispute exists, the enacting of a statute, wherein the facts are declared to be as contended by the claimant, is to be taken to be a legislative determination of the dispute in his favor, binding upon the parties, so that the alleged debtor will be estopped from contesting the existence of the disputed facts in the courts of justice. If either of these alternatives is true, there is no constitutional limitation on the power of the legislature to levy exactions on the public as a whole, or on subdivisions of it for political or governmental purposes, for the benefit of favored individuals.

It may be true that the responsibility the individual members of the legislature are under to their constituents, or their sense of public duty is a sufficient guaranty against any great injustice in this direction, and, therefore, that unlimited power of taxation vested in that body would not be followed by vicious results generally, though it might be in exceptional instances. However this might be, we, in the present inquiry, are more concerned in determining whether such unlimited power does exist that in the question of the wisdom and expediency of granting it.

Whatever power of taxation resides in the general assembly does so as an incident of the general legislative authority delegated to that body by section 1 of article 11, of the Constitution of 1851. This court holding in *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521, that the provisions of article 12, of that instrument, though they relate to finance and taxation, are limitations upon rather than grants of power of taxation; and this, too, although section 4 of this statute expressly requires the general assembly to provide

revenue to defray the yearly expenses of the state and pay the interest of its public debt. The power of taxation vested in the general assembly would have been just the same without, as with, this section.

That the authority to impose taxes is in its nature legislative, is established by the uniform current of judicial opinion. *Cass Twp. v. Dillon*, 16 Ohio St. 38; *State v. Harris*, 17 Ohio St. 608; *State v. Wilkesville Twp. Trustees*, 20 Ohio St. 288; *State v. Richland Twp. Trustees*, Id. 362; *State v. Circleville*, 20 Ohio St. 363; 25 Am. & Eng. Encyclop. Law; 18-71; Cooley, Taxation, 41-53.

That the legislative branch of the government is necessarily clothed with a broad discretion in determining the character, whether public or private, of the purpose for which funds may be raised by taxation is equally well settled. Cooley, Taxation, 43; 25 Am. & Eng. Encyclop. Law, 72; Cooley, Const. Lim. 599.

In doubtful cases the courts should not interfere with the exercise of this legislative discretion, and in all cases the legislative determination is entitled to great respect. *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Brodhead v. Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; 25 Am. & Eng. Encyclop. Law, 89, 90. That the power, however, is not unlimited is, we think, clearly established by the great weight of authority as well as of reason. *State v. Franklin County Comrs.* 35 Ohio St. 468.

The power of taxation is given to the general assembly as an indispensable means of providing for the public welfare, government could not be carried on without such power, and the power should be commensurate with the objects to be attained, but no good reason can be assigned for vesting it with power to take portions, large or small, of the property of one or a number of persons and granting it as a benevolence to another. Where a legislature attempts this, directly or indirectly, it passes beyond the bounds of its authority, and the parties injured may appeal to the courts for protection. The same constitution which grants the power of taxation to the general assembly recognizes the sanctity of private property, and declares that the courts shall be open for the redress of injuries.

This limitation on the legislative power of taxation is generally recognized by the authorities. The rule supported by a long array of adjudicated cases is laid down in 25 Am. & Eng. Encyclop. Law, 74, as follows: "It is within the province of the courts, however, to determine in particular cases whether the extreme boundary of legislative power has been reached and passed." In *Weisner v. Douglas*, 64 N. Y. 99, 21 Am. Rep. 586. Folger, J., says: "But to tax A and others to raise money to pay over to B, is only a way of taking their property for that purpose. If A may of right resist this, as surely he may, how is he to make resistance effective and peaceable save through the courts, which are set to be his guardians? How may the courts guard and aid him unless they have power, upon his complaint, to examine into the legislative act, and to de-

termine whether the extreme boundary of legislative power has been reached and passed?"

It may be conceded that the general assembly may authorize one of the political subdivisions of the state to levy a tax to pay a demand not legally enforceable, but founded upon a moral consideration, or may even command that the levy shall be made for that purpose, and yet deny to it the power to determine conclusively the existence of such obligation.

On the other hand it may be contended that if the power to levy a tax for a private purpose is denied to it, it follows as a corollary that it had no power to determine the character of a demand, for if it had the latter power it could defeat the limitation by falsely finding the claim to be founded, at least, on a moral consideration. We do not think the conclusion follows, for that would be to impute bad faith to a co-ordinate branch of the government which is not permissible.

We think, however, that whenever a contention arises between an individual and some public body respecting the existence of a claim against the latter the controversy falls within the province of the judiciary. We do not deny the power of the general assembly to inquire into the merits of any claim sought to be asserted through its agency, before granting relief to the claimant by legislative action. Not only has it such authority but its exercise should be carefully and rigidly observed.

Such investigation, subsequent determination and resulting action, however, do not

estop the parties from appealing to those judicial tribunals of the country that have been established under our constitution and by it vested with the judicial power of the state, and by our laws provided with an appropriate procedure to conduct such inquiries. *Cooley, Const. Lim.* 115, and cases cited; 3 *Am. & Eng. Encyclop. Law*, 681.

If, in the case under consideration, the relator has paid out money for the benefit of the respondent, for which, by some mistake, accident, or error, he has never received credit, it is morally bound to make it good and this moral obligation is sufficient to support the statute in question. *Lewis Merchants & Traders Bank Trustees v. McElcasin*, 16 Ohio, 355; *Ouyahoga Falls Real Estate Assn. Trustees v. McCaughy*, 2 Ohio St. 152; *Burgett v. Norris*, 25 Ohio St. 308; *Rairden v. Holden*, 15 Ohio St. 207; *Cass Twp. v. Dillon*, 16 Ohio St. 38; *State v. Harris*, 17 Ohio St. 608; *Board of Education of Scio v. McLandborough*, 86 Ohio St. 227; *Cooley, Taxation*, 127, 128; *State v. Richland Twp. Trustees*, 20 Ohio St. 362; *State v. Hoffman*, 35 Ohio St. 435; *Ward v. Clark County Comrs.* 38 Ohio St. 643; *Cooley, Const. Lim.* 288.

Where, however the facts, out of which a moral (or legal) obligation is claimed to arise, are disputed, the contention falls within the province of the courts, under the distribution of governmental powers prescribed by our constitution. *Const.* 1851, art. 4, § 1.

*Judgment reversed and cause remanded with instructions to overrule the demurrer to the answer of the respondents.*

## NEBRASKA SUPREME COURT.

STATE of Nebraska, *ex rel.* Edward W. SAYRE, Treasurer of Scott's Bluffs Co.,

v.

Eugene MOORE, State Auditor.

(.....Neb.....)

\*1. An attorney's lien for services rendered his client cannot be successfully asserted against money appropriated to such client by an act of the legislature while such money is in the custody or under the control of the state treasurer.

2. The legislature, by an act duly passed and approved April 5, 1893, appropriated "the sum of \$7,495.73 for the relief of Scott's Bluff county, and to reimburse said county for expenses incurred in the trial of one George S. Arnold upon the charge of murder." In a mandamus proceeding in this court to compel the auditor to draw his warrant in favor of the treasurer of Scott's Bluff county for the amount appropriated.—*Held*: (1) That the act was not in conflict with either the letter or spirit of the constitution. (2) That the appropriation of this money was in the nature of a donation, and that no inquiry or objection is ad-

\*Headnotes by RAGAN, C.

NOTE.—On the question of appropriations of public money, see cases and annotation referred to in footnote to the preceding case of *Board of Education of Marion Twp. v. State* (Ohio) *ante*, 770, 25 L. R. A.

missible on the part of the auditor as to whether the appropriation was just, whether it was bestowed upon an undeserving recipient, or what motives influenced the legislature to make it; that the only duty left for the auditor, in the premises, was a ministerial one; and that he had no authority to supervise the action of the legislature by an inquiry into the actual expenditures of the county in the prosecution of Arnold.

(Norval, Ch. J., dissents from the second clause of proposition 2.)

(June 5, 1894)

APPLICATION for a writ of mandamus to compel defendant as auditor of public accounts to issue a warrant to relator for the amount which had been appropriated by the state legislature for the relief of the county of which relator was treasurer. *Granted*.

The facts are stated in the commissioner's opinion.

Messrs. M. J. Huffman, County Atty., and Field & Holmes, for relator:

There could be no such thing as an attorney's lien upon funds appropriated by the legislature.

Weeks, Attorneys at Law, p. 738, § 383; *Brooke's Case*, 12 Ops. Atty-Gen. 216; *Flint v. Van Dusen*, 26 Hun, 606; *Dodge v. Schell*, 20 Blatchf. 517.

If the congress of the United States under its implied powers is authorized to pass laws of a similar character to the one in question there can be no question as to the constitutionality of such laws when enacted by state legislatures when the constitution of the state has no provision prohibiting such legislation.

This appropriation was extended by the legislature as a charity and the amount of the relief was fixed and determined by the legislature and the sole and only duty of the auditor in relation to this claim is to satisfy himself that the law was legally enacted and if so to issue his warrant for the amount fixed and determined by the legislature; the act of the auditor is purely ministerial and he has no discretion in the premises.

*Moses*, Mandamus, pp. 84, 85; *Divine v. Harvie*, 7 T. B. Mon. 440, 18 Am. Dec. 194; *Merrill*, Mandamus, § 105; *High*, Extr. Legal Rem. § 84; 2 *Spelling*, Extr. Relief, chap. 42, §§ 1481 *et seq.*; 14 Am. & Eng. Encyclop. Law, pp. 99, 147; *State v. Cleveland*, 22 Ohio L.J. 118; *Hewitt v. Craig*, 86 Ky. 23; *State v. Staud*, 61 Conn. 558.

A liquidated account is one the amount of which is agreed upon by the parties, or is fixed by operation of law.

*Hargroves v. Cooke*, 15 Ga. 321; *Bull v. Bull*, 43 Conn. 469; *Warren v. Skinner*, 20 Conn. 562.

The word "settle" when applied to a liquidated account or demand means to pay it.

*Pinkerton v. Bailey*, 8 Wend. 600; *Stihwell v. Coope*, 4 Denio, 225.

The word "adjust" when used in reference to a liquidated claim has the same meaning, though perhaps not quite so clearly.

The word "settle" when applied to an unliquidated claim or demand means its mutual adjustment between the parties and an agreement upon the balance.

*Baxter v. State*, 9 Wis. 89.

In reference to an unliquidated demand, the word "adjust" means "to determine what is due; to settle; to ascertain; as to adjust a claim, a demand, or a right."

*Anderson*, Law Dict.

When a claim is liquidated in the sense that its amount is fixed by operation of law, it is difficult to see how the comptroller can use any discretion in respect to it. When the law fixes definitely the amount of any claim, and also fixes the manner and time of payment, and the person to whom it is due, and the claim is presented to the comptroller by that person, and at that time, he has in respect to it "no discretion to exercise, no judgment to use, and no duty to perform" but to draw his order in payment of it.

*State v. Bordelon*, 6 La. Ann. 68; *Kendall v. United States*, 87 U. S. 13 Pet. 534, 9 L. ed. 1181; *Rios v. State*, 95 Ind. 38; *Angle v. Runyon*, 88 N. J. L. 403.

*Mr. George H. Hastings, Atty-Gen.*, for respondent.

*Ragan, C.*, filed the following opinion:

The Legislature of 1898 passed an Act (House Roll No. 278) in words and figures as follows: "An Act for the relief of Scott's Bluff county, Nebraska, and to appropriate \$7,495.78 to said

county. Be it enacted by the legislature of the state of Nebraska: Section 1. That there is hereby appropriated out of any funds in the state treasury, and not otherwise appropriated, the sum of \$7,495.78 for the relief of Scott's Bluff county, and to reimburse said county for expenses incurred in the trial of one George S. Arnold upon the charge of murder, at the adjourned July term, 1899, of the district court within and for said county; and the auditor is hereby authorized to draw his warrant upon the state treasurer for the above amount in favor of said Scott's Bluff county." On August 5, 1898, the treasurer of Scott's Bluff county duly demanded of the auditor of public accounts that he draw his warrant upon the state treasurer, payable to the treasurer of said Scott's Bluff county, for the amount so appropriated by the legislature. The auditor declined to comply with this request, and thereupon the treasurer of Scott's Bluff county, as relator, filed in this court an application for a peremptory mandamus commanding the auditor to draw such warrant. The auditor answered the application, and alleged the following as reasons for declining to draw his warrant: "And this respondent further says that under the provisions of the constitution and laws of the state of Nebraska the auditor of public accounts has authority to examine and adjust all claims against the state, when presented to him, and to refuse to pay the same when, in his opinion, the same are illegal or unjust. And this respondent alleges that he found said claim for said Scott's Bluff county unjust and illegal; that the act making the appropriation is contrary to the letter and spirit of the constitution of the state of Nebraska; that the said county of Scott's Bluff was put to some expense by reason of said trial, but the amount thereof, this respondent alleges, upon information and belief, was a much less sum than the sum alleged to have been appropriated by the legislature. . . . This respondent further alleges that heretofore, to wit, on the 30th day of June, 1898, one Nellie M. Richardson . . . served upon this respondent . . . a notice of an attorney's lien upon said sum . . . appropriated by the legislature of the state of Nebraska for the use and benefit of said Scott's Bluff county, which said notice is in words and figures following: 'Notice. To Eugene Moore, Auditor Public Accounts of the State of Nebraska: You will take notice that I, Nellie M. Richardson, do claim an attorney's lien upon the funds appropriated by the legislature of the state of Nebraska to reimburse Scott's Bluff county for expenses incurred in the trial of George S. Arnold, in the sum of \$1,500. [Signed] Nellie M. Richardson.' To this answer the relator demurs. We will first dispose of the question of the attorney's lien attempted to be filed against this appropriation. Section 8, chap. 7, p. 90, Comp. Stat. Neb., provides: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of the giving notice of the lien to that party." Now,

this money is not in Richardson's hands. It is in the hands of the treasurer of the state of Nebraska. And neither the state nor its treasurer are, or have been, adverse parties to any action or proceeding brought or had by Scott's Bluff county, for whom, it appears, Richardson is attorney. Richardson, then, has not brought herself within this statute, and that is one reason, at least, why she can have no lien on this money. But, if Richardson has rendered services for Scott's Bluff county, she can file her claim against the county, with the county clerk thereof, and have the county authorities of that county pass upon its merits. This court cannot audit her claim against Scott's Bluff county. The law has provided ample remedies and methods of procedure for all persons having claims against a county, and these remedies must be pursued. An attorney will not be permitted to use this court, in a mandamus proceeding, for the purpose of having the merits or amount of his claim against a county adjudicated. It may well be doubted if in any case an attorney's or other lien can be successfully asserted against money appropriated by the legislature to any person or corporation, public or private, while in the hands of, or under the control of, an officer of the state. It would be contrary to good public policy, and detrimental to the due administration of the affairs of the state, to permit its officers to be harassed and hindered in the discharge of their duties by parties asserting rights, either by way of attorney's liens, attachments, or garnishment proceedings, or otherwise, to funds in the hands of, or under the control of, such officers. The claim of Richardson filed with the auditor is not a lien on the money appropriated by the legislature to Scott's Bluff county, and the auditor may disregard such lien with impunity.

The next reason assigned by the auditor for not drawing the warrant to pay the appropriation is "that the Act making the appropriation is contrary to the letter and spirit of the constitution of the state of Nebraska." We quote Cooley's Constitutional Limitations (4th ed. p. 210), as follows: "When a law of congress is assailed as void, we look into the National Constitution to see if the granting of specified powers is broad enough to embrace it. But, when a state law is attacked on the same ground, it is presumably valid, in any case; and this presumption is a conclusive one, unless, in the Constitution of the United States or of the state, we are able to discover that it is prohibited. We look in the Constitution of the United States for grants of legislative powers, but in the constitution of the state to ascertain if any limitations have been imposed upon the complete powers with which the legislative department of the state is vested in its creation. A congress can pass no laws but such as the constitution authorizes either expressly or by clear implication, while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. The lawmaking power of the state recognizes no restrictions, and is bound by none, except such as are imposed by the constitution. That instrument has been aptly termed a legislative act by the people themselves, in their sovereign capacity, and is therefore a paramount law. Its objects is not

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to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute." Tested by the rule quoted from this eminent jurist, there is nothing in the constitution of Nebraska that prohibits the legislature of the state—representing, as it does, the sovereignty of the people—from appropriating money to reimburse a county for expenses incurred by it in the prosecution of criminals. True there is no legal obligation resting on the state to pay such expenses, but the power of the legislature to appropriate money is not limited by the legal obligations of the state. We quote again from Cooley's Constitutional Limitations (p. 608), as follows: "It must also be stated that the proper authority to determine what should and what should not properly constitute a public burden is the legislative department of the state, . . . and in determining this question the legislature cannot be held to any narrow or technical rule. Certain expenditures are not only absolutely necessary to the existence of a government, but, as a matter of policy, it may sometimes be proper and wise to assume other burdens, which rest entirely upon considerations of honor, gratitude, or charity. . . . There will therefore be necessary expenditures, and expenditures which rest upon considerations of policy alone, and in regard to the one, as much as to the other, the decision of that department to which alone questions of state policy are addressed must be accepted as conclusive." This appropriation may be unjust. In making it, the legislature may have acted unwisely. But of these things the legislature itself is sole judge. The courts cannot inquire into either the motive or justness of the law. Their only concern is with its legality.

Finally, the auditor alleges as a reason for his refusal to draw this warrant, that by the constitution and laws of this state he has authority to examine and adjust all claims against the state, and that, while Scott's Bluff county was put to some expense in the prosecution of Arnold for murder, the amount of such expense, he (the auditor) is informed and believes, is much less than the sum appropriated by the legislature. In other words, the auditor's contention here is that, notwithstanding the legislature appropriated a specifically named sum of money for the relief of Scott's Bluff county, and to reimburse it for the expense incurred by it in the prosecution of Arnold, yet he (the auditor) is invested by the constitution and laws with the discretion to examine into and ascertain the exact amount of money expended by the county in the criminal prosecution, and then draw his warrant for such sum only as he ascertains the county expended. If by the express words of the act, or if by any reasonable construction thereof, it appeared that the legislature intended to appropriate \$7,495.78, or so much thereof as might be necessary to reimburse the county, then doubtless the auditor's position would be tenable. But no such words of limitation of the amount appropriated are in the act, nor can they be read into it by any fair or reasonable construction. What was the intention of the legislature in the premises? Doubtless, to fully reimburse Scott's Bluff county for the expense incurred

by it in prosecuting Arnold for murder. The appropriation of this money—a gift, in fact—was within the power of the legislature; and no inquiry or objection is admissible on the part of the auditor as to whether the appropriation was just, whether it was bestowed upon an undeserving recipient, or what motives influenced the legislature to make it. Nor can the auditor be heard to say that the gift was too large; that the appropriation carried more money than was required to reimburse the county for what it had expended. The only duty left for the auditor in the premises is a merely ministerial one. He has no authority to supervise the action of the legislature by an inquiry into the actual expenditures of Scott's Bluff county in the prosecution of Arnold.

Section 9, art. 9, of the Constitution provides: "The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state before any warrant for the amount allowed shall be drawn: provided that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court." Now, what is meant in this constitutional provision by "claims upon the treasury" which the auditor must examine and adjust? We take it that it means claims which the state is or may be under legal obligation to pay, such as the salaries of its officers and employes, the costs of erecting buildings, and the expense attendant upon the maintenance of its prisons, asylums, schools, and other institutions. We do not think the appropriation of the specific sum by the legislature to a particularly-named person, as a donation, gift, or a reward, and for which the state was under no legal obligation, comes within the claims which the auditor must examine and adjust. True, "he is placed in his position as agent of the state to protect the treasury against demands not lawfully due and payable by the state; and when a claim is presented, he must ascertain whether or not there is authority of law for its payment, and if he finds such authority that should satisfy him. If the legislature has, by express enactment, directed that a certain sum shall be paid to a person, and appropriated the money for such payment, the auditor's duty in the premises becomes then merely ministerial. The power conferred upon him is not to supervise the action of the state, when, by its legislature, it has admitted and acknowledged the claim, and ordered it to be paid. Where the claim is not admitted by the state, he then stands in behalf of the state, and, as its agent, it is his duty to determine whether or not it is admissible, and justly and legally due; but when his principal, the state, whose officer he is, acknowledges the claim, and directs it to be paid, then, inasmuch as the state's regulation for the payment of money requires him to draw warrants upon the treasurer before such money can be paid, his duty is, without questioning, to conform to such direction. Finding the law for its payment to exist, he must regard that as plenary evidence that it is justly due. He cannot properly question the authority of an act of the legislature directing the payment of money by the state, or disregard its authority,

however fully he may be convinced that the money is bestowed upon an undeserving recipient." *Angle v. Runyon*, 89 N. J. L. 403. "Whenever the money necessary to pay a particular claim against a state has been appropriated by the legislature, and the amount of the claim has been definitely ascertained in a manner prescribed by law, a refusal by the auditor of said state to draw his warrant upon the treasurer of the state for the payment of the claim will authorize the interposition of the courts by appropriate mandatory proceedings." High, Extr. Rem. § 100. True, the constitution makes it the duty of the auditor to adjust claims. "'Adjust' means to settle or bring to a satisfactory state, so that the parties are agreed in the result; as, to adjust accounts." Webster, Dict. We are aware that it was said in *State v. Babcock*, 22 Neb. 88, that the constitutional provision requiring claims upon the state treasurer to be examined and adjusted by the auditor applied to all claims, whether by virtue of a specific appropriation or not, and that the making of a specific appropriation by the legislature for the purpose of paying a demand against the state was in no sense the auditing of such claim. But that case should be distinguished from the one here. The appropriation considered in *State v. Babcock*, *supra*, was for paying the expenses incurred by the state in the prosecution of certain persons for crimes committed in an unorganized territory of the state. By the second section of that appropriation act it was provided, "And the auditor is hereby authorized to draw his warrant for the several amounts due to the parties named in this act," and the court said: "This language would seem to indicate that it was the purpose of the legislature that the outstanding indebtedness should be paid to the parties holding the claims, upon the ascertainment by the auditor of the amounts due to each of the parties named, but, of course, not in excess of the sum appropriated." It is also stated in *State v. Babcock*, *supra*: "The legislature has no authority, under the constitution, to audit or adjust a claim against the state; and if money is appropriated to pay an illegal claim, or one which the state does not owe, and the auditor so finds upon examination and adjustment, it is his duty to refuse to issue a warrant, notwithstanding said appropriation." But this point was not necessary to a decision of the case there decided, and the rule there announced should be restricted to such claims and demands as the state is under a legal obligation to pay, and not extended to appropriations of specific sums of money made by the legislature as a donation, gift, reward, or charity. Suppose the governor should offer a reward of \$1,000 for the arrest and return to the state of a fugitive from justice, and A. should arrest and return the fugitive, and the legislature should, after inquiring and ascertaining that A. had earned the reward, appropriate \$1,000 to him for having arrested and returned the fugitive. Could the auditor inquire into the value of the time and outlay of A. in arresting and returning the fugitive, and refuse to draw a warrant for only the value of A.'s time and expenses? In such a case, would there be any adjustment to be made by the

auditor of A's claim? Would the auditor have any duty to perform in the premises, but a mere ministerial one? Would he have any discretion in the premises? The legislature of 1898 (House Roll No. 85) appropriated the sum of \$2,000 for the payment of damages sustained by one Maurer while engaged in the public service as a private in the Nebraska National Guards. It was recited in the act that Maurer was exposed to the cold and freezing weather, and by reason thereof he contracted rheumatism, which became chronic, and from which he suffered great physical pain, and became incapacitated for work, and was prevented from following his vocation and earning a living, and that he was required to pay out large sums of money for medical care and attendance for a period of more than two years. When Maurer presents his claim to the auditor, can the latter institute proceedings to ascertain the value of the time lost by Maurer by reason of his rheumatism and sickness; the expenses paid by him for physicians, nurses, etc.? Can he call experts to testify as to whether Maurer's injury is permanent, and, if so, his expectancy of life, and the present worth of what he probably would have earned, had he not been injured? This legislative gift or donation to Maurer contains an allowance for physical suffering. Can the auditor say that too much was allowed for such suffering, and reduced the appropriation accordingly? We think not. And yet he may do all these things, in Maurer's case, if his contention here is correct, viz., that his duty as auditor requires him to ascertain the amount of actual expenses incurred by Scott's Bluff county in the prosecution of Arnold, and then draw his warrant for that sum only. Such cannot be the law. If it is, then, instead of a government of three co-ordinate departments, the legislative is subordinate to the executive department. The auditor is an able and conscientious officer, and deserving of the highest commendation for the jealous care with which he guards the public treasury, and he acts wisely in shielding himself from liability by the decisions of the courts in cases where he is in doubt; but in the case at bar he may not only legally draw the warrant demanded by the relator, but it is his duty to do so. He has no discretion in the premises.

*The demurrer to the return is sustained, and the writ will issue as prayed for.*  
Judgment accordingly.

**Norval, Ch. J.**, dissenting:

Upon the question of the constitutionality of the act of the legislature under consideration, I express no opinion. While I concur in the views expressed by Ragan, *C.*, relating to the claim of Nellie M. Richardson for an attorney's lien, I am unable to agree to the proposition that the duty of the auditor in the premises is merely ministerial, and that he has no authority to examine into and determine the actual sums expended by the county in the prosecution of Arnold. I deem it proper to state the reasons for my dissent.

It is conceded by the majority opinion that mandamus would not lie "if by the express words of the act, or if by any reasonable construction thereof, it appeared that the legisla-

ture intended to appropriate \$7,495.78, or so much thereof as might be necessary to reimburse the county;" and there can be no doubt of the soundness of the proposition stated. What, then, is the proper interpretation to be placed upon the statute under review? In the body of the act it is provided "that there is hereby appropriated out of any funds in the state treasury, and not otherwise appropriated, the sum of \$7,495.78 for the relief of Scott's Bluff county, and to reimburse said county for expenses incurred in the trial of one George S. Arnold upon the charge of murder, . . . and the auditor is hereby authorized to draw his warrant upon the state treasurer for the above amount in favor of said Scott's Bluff county." It is argued that the legislature, by this act, appropriated a definite, specific amount to be paid the county; that the approval of this claim required of the auditor is merely formal; and that he can exercise no discretion whatever. The statute defining the duties of the auditor, as well as the constitution, requires that officer to examine and audit all appropriations; and it has been the universal practice in the auditor's office, since the adoption of the present state constitution, to do so, and that, too, in cases of appropriations as specific as is the case before us. This custom must have been known to the framers of this act at the time it was adopted, and it is fair to presume that the lawmakers intended that the claim of the county, which this appropriation was intended to pay, should be audited, as had been the custom theretofore. The object of the legislature in passing the act was to reimburse, or make whole, the county for all the legitimate expenses incurred by it in the prosecution and trial of Arnold, and nothing further. The statute regulates the costs in a criminal prosecution for a felony, and when the offense is committed in an organized county the law requires that the county where the trial is had shall pay the costs and expenses thereof. The legislature, by this act, undertook to relieve Scott's Bluff county of this burden. The appropriation reads, "For the relief of Scott's Bluff county and to reimburse said county for expenses incurred," etc. What was meant by the use of the word "reimburse?" Webster defines it thus: "To replace in a treasury a purse, as an equivalent for what has been taken, lost, or expended; to refund; to pay back; to restore; as, to reimburse the expenses of a war." In construing statutes, words should be given their ordinary meaning; and, so interpreting the language of this appropriation, it is clear to my mind that the state is only required to refund or pay to the relator the amount of costs and expenses incurred by the county in the trial of Arnold, not exceeding the sum appropriated for that purpose. The auditor was not directed by the act to draw his warrant upon the treasury for \$7,495.78, but he was authorized to do so if it required that sum to reimburse the county. Was it the duty of the auditor, under the constitution and statute, without discretion, to audit this claim? By section 9, art. 9, of the state Constitution, it is provided that: "The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the sec-



retary of state before any warrant for the amount allowed shall be drawn, provided that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court." In accordance with the requirements of the foregoing constitutional provision, the legislature, in 1877, passed a law providing for the examination and adjustment of claims upon the state treasury. Laws 1877, p. 202, Comp. Stat. chap. 83, art. 8. I here quote the entire act:

"Section 1. All claims of whatever nature upon the treasury of this state, before any warrant shall be drawn for the payment of the same, shall be examined and adjusted by the auditor of public accounts, and approved by the secretary of state: provided, however, that no warrant shall be drawn for any claim until an appropriation shall be made therefor.

"Sec. 2. The auditor of public accounts shall keep a record of all claims presented to him for examination and adjustment, and shall therein note the amount of such claim as shall be allowed or disallowed, and in case of the disallowance of all such claims, or any part thereof, the party aggrieved by the decision of the auditor and secretary of state, may appeal therefrom to the district court of the county where the capitol is located, within twenty days after receiving official notice. Such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts, and shall be prosecuted to effect as in such cases: provided, however, that the party taking such appeal shall give bond to the state of Nebraska in the sum of two hundred dollars, with sufficient surety, to be approved by the clerk of the court to which such appeal may be taken, conditioned to pay all costs which may accrue to the auditors of public accounts, by reason of taking such appeal. No other bond shall be required.

"Sec. 3. In case the appeal shall be taken as provided in section two of this act, and on trial thereof, the district court shall be of the opinion that the decision of the said officers was wrong, either in fact or law, the said court shall reverse the same, and by its order and mandate require the said auditor to issue a warrant, in accordance with the provisions of section one of this act, upon the treasury for such an amount as shall be determined on the trial of such appeal to be legally due thereon. If either party feel aggrieved by the said judgment, the same may be reviewed in the supreme court as in other cases.

"Sec. 4. No claim which shall have once been presented to such auditor and secretary of state, and has been disallowed, in whole or in part, shall ever again be presented to such officers or in any manner acted upon by them, but shall be forever barred, unless an appeal shall have been taken, as provided in section two of this act.

"Sec. 5. When a claim has been in part allowed by such officers, a warrant shall be drawn as in other cases where the whole claim shall be allowed."

It will be observed that we have not only a constitutional provision, but an imperative statute, which requires, before any warrant shall be drawn by the auditor upon the state treasury, that the claim must be examined,

audited, and allowed by the auditor, and approved by the secretary of state; and yet it is here sought to compel by mandamus the issuance of a warrant for the full amount named in the appropriation act, when the claim of the county has not as yet been passed upon by the auditor, nor has such claim ever been presented, either to him or the secretary of state, for approval. If the duty of the auditor and secretary of state, as regards the auditing of this claim, is ministerial merely, still the performance of such act is a prerequisite to the right of the auditor to draw the warrant. This is not a proceeding to require the approval of the claim, but to compel the issuance of a warrant without any approval by either of the officers named. To grant the writ is to disregard the plain requirements of both the constitution and the statute.

It is said the claims upon the treasury which the auditor is required to "examine and adjust," in the sense in which that term is used in the constitution, are "claims which the state is or may be under legal obligations to pay, such as the salaries of its officers and employees, the costs of erecting buildings, and the expense attendant upon the maintenance of its prisons, asylums, schools, and other institutions." We are unwilling to so limit the word "claims," but conclude it was employed in its broadest sense, and embraces every claim against the state for money under an appropriation made by the legislature. The constitution reads, "all claims," and we have no right to inject words into that instrument by judicial interpretation. That it is the right and duty of the auditor to pass upon and audit the claim under consideration, we entertain no doubt. Section 1 of the Act of 1877, above quoted, speaks of "all claims of whatsoever nature." More comprehensive language could not have been employed to express the legislative will. The section is too plain to leave any room for interpretation. Even though the construction adopted by my associates is the correct one, namely, "claims which the state is or may be under legal obligations to pay," are the only ones which the auditor is required to examine and audit, it is the duty of the respondent to pass upon and determine what amount of this appropriation Scott's Bluff county is entitled to receive, since, the moment the act took effect, if it is a valid and constitutional law,—and the majority have so found and declared,—the claim of the county for expenses incurred in the prosecution of Arnold becomes a legal obligation against the state.

It is said the duty of the auditor in the premises is a ministerial one merely, and that he has no authority to inquire into the amount of money actually expended by the county in the criminal case. The constitution and the statute quoted each provides for an appeal to the district court from the decision of the auditor and secretary of state in passing upon all claims upon the state treasury. Sections 6, 7, art. 8, chap. 83, Comp. Stat., are as follows:

"Sec. 6. All persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed within two years after such claims shall accrue; and in all suits brought in behalf of the state,

no debt or claim shall be allowed against the state as a set-off, but such as has been exhibited to the auditor, and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant at the time of trial, is in possession of vouchers which he could produce to the auditor, or that he was prevented from exhibiting the claim to the auditor, by absence from the state, sickness, or unavoidable accident: provided, the auditor in no case shall audit a claim or set-off which is not provided by law.

"Sec. 7. The auditor, whenever he may think it necessary to the proper settlement of any account, may examine the parties, witnesses, or others, on oath or affirmation, touching any matter material to be known in the settlement of such account."

By said section 6 it is made obligatory upon all persons having claims against the state to exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed, within a specified period after the accrual of the claim; and by the seventh section the auditor is clothed with the power to administer oaths, to take testimony, and examine witnesses and the claimant, if he deems it necessary to the proper adjustment of the claim or account. The duty enjoined upon the auditor is not merely ministerial, but, to a great extent, he exercises judicial functions; and from an order rejecting a claim, in whole or in part, an appeal lies to the district court. The conclusion is therefore irresistible, from a consideration of the several sections of the statute already referred to, and the provisions of the constitution quoted, that the duty of the auditor, in examining and adjusting claims presented against the state, requires the exercise of judgment and discretion to determine, not only whether such claim is a legal obligation, but whether the amount asked is justly due. After the auditor has passed upon and adjusted a claim, and the secretary of state has approved the same, we concede the auditor then has no discretion in the matter of drawing his warrant upon the treasury for the amount found due.

This case comes squarely within the decision in *State v. Babcock*, 23 Neb. 88. The Legislature of 1883 passed an act appropriating \$6, 824.14 to pay the expenses incurred in the trial of I. P. Olive and others for murder, which act named the persons and the amount of money each should receive, and authorized the auditor to draw a warrant for the several amounts due the parties named in the act. The relator applied for a mandamus to compel the auditor to audit his claim, and to draw a warrant upon the treasury for the same. The court denied the writ. It was insisted in that case that the duties of the auditor were ministerial, and that he had no discretion in the premises. The court, after quoting section 9 of article 9 of the Constitution says: "This language clearly implies a limitation upon the power of the legislature in the matter of auditing claims against the state. The provision is imperative. The legislature shall provide that all claims upon the treasury shall be examined and adjusted by the auditor, and approved by the secretary of state, before any

warrant shall be drawn or the money paid. These officers are, by the fundamental law of the state, made the examining board, through whose hands all claims must pass, and it is not within the power of the legislature to change this tribunal. It cannot review the decision of those officers, for the section clearly points out the reviewing court. The party aggrieved may appeal to the district court. The fact that the appropriation is specific can have no weight whatever, for section 23 of article 8 of the Constitution provides that 'no money shall be drawn from the treasury except in pursuance of a specific appropriation made by the law,' etc. All appropriations of money from the treasury are specific, and 'all claims upon the treasury shall be examined and adjusted by the auditor,' etc. This is no distinction in appropriations. It is true that, in the section [22, art. 8] above referred to, it is provided that 'no allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriations,' etc.; but this provision can in no way change the fact that each appropriation contained in the general appropriation must be a specific appropriation for the purpose or officers named, and even then an account must be rendered, 'specifying each item.' Nothing can be more specific than such an appropriation. No warrant can be drawn except in pursuance of an appropriation, but the auditor may examine and adjust claims in the absence of such action by the legislature. While it is the duty of the legislature to see that no appropriations are made except for meritorious claims yet such is the character of the safeguards thrown around the state treasury that such appropriation is by no means a final adjustment or auditing of the claim. It simply places so much of the funds in a position to be used by the auditor and secretary when the claim is examined and adjusted by the auditor, and his action is approved by the secretary. While the legislature may set apart money to pay a claim, it cannot pay it out, nor order it to be done, except in the manner provided by law. It has no jurisdiction to audit claims, and it is powerless to apply the money thereon without the quasi judicial concurrence of the officers named. If money is appropriated by that body to pay a claim, such action is not an adjudication upon its validity, to such an extent as to relieve the auditor and secretary from responsibility for their duties remain as fixed by the constitution. This construction of the constitution has been adopted by the legislature, as well as by the supreme court in its former decisions." The above decision was cited with approval, and followed, in *State v. Moore*, 37 Neb. 507.

*Toole v. State*, 3 Fla. 202, was an application for a mandamus against the comptroller of the state, to compel him to audit, allow, and pay a legal claim against the state. The circuit court awarded the writ, and the supreme court, on appeal, reversed this judgment and dismissed the action, holding the claim could not be enforced by mandamus. The statute of Florida defining the duties of the comptroller in the matter of examining, auditing, adjusting, and settling of accounts and claims against the state is substantially the same as

the provisions of our statute. The third and fourth paragraphs of the syllabus in the Florida case are as follows: "Where a purely ministerial act is to be done, and there is no other specific remedy, a mandamus will be granted; but where the person against whom the mandamus is prayed is invested with judicial power, or acts in a deliberate capacity, or has the power and right of deciding, the writ will not lie, except to compel him to proceed to the discharge of his duty, by deciding according to his best judgment. The comptroller of this state, in the administration of the concerns of his office, is required to exercise judgment and discretion; and the courts cannot act directly upon him by mandamus, and thereby guide and control his judgment and discretion."

*Angle v. Runyon*, 88 N. J. L. 408, is relied upon as an authority in the majority opinion. In New Jersey the office of the comptroller of the treasury is created by the legislature, and in that state there is no constitutional provision relating to the auditing of claims against the state; and the statutory provision upon the subject is not, in all respects, the same as our own. There the law directs that the comptroller "shall draw all warrants on the treasury . . . for the payment of all moneys directed by law to be paid out of the treasury." It might well be held under such a provision, that when the legislature makes a specific appropriation of money the auditing officer has no discretion in the matter of his drawing his warrant in favor of the party entitled to the appropriation. I do not think that authority should control the decision in this case, but prefer to follow the former adjudications of this court, to which reference has been already made. Under the construction adopted by the majority, there is nothing to prevent future legislatures from so framing appropriation bills as to completely deprive the auditor of the constitutional power of examining and auditing claims upon the state treasury.

We are of the opinion that the relator mistook his remedy. The statute has afforded him a plain and adequate remedy at law. He

should present the claim of the county to the auditor, and, if rejected, appeal from the decision. Where a party has an adequate remedy by the usual and ordinary proceedings at law, a writ of mandamus will not lie. This is the settled law upon the subject. *State v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108; *State v. Kinkaid*, 28 Neb. 641. While mandamus is the appropriate remedy to enforce the performance of acts on the part of public officers strictly ministerial, it will not issue to control the discretion of a public officer (*State v. Kendall*, 15 Neb. 262; *State v. Boyd*, 38 Neb. 60), nor to compel an officer exercising judicial functions to make a particular decision. *State v. Churchill*, 87 Neb. 702. Mr. High, in his work on Extraordinary Legal Remedies, after stating the rule as to ministerial duties of auditing officers being controlled by mandamus, at section 102 says: "Where, however, auditing officers, intrusted by law with the duty of passing upon and determining the validity of claims against a state, are vested with powers of a discretionary nature as to the performance of their duties, a different rule prevails. In such cases the fundamental principle denying relief by mandamus to control the exercise of official discretion applies, and the officers having exercised their judgment, and decided adversely to a claimant, mandamus will not lie to control their decision, or to compel them to audit and allow a rejected claim. The remedy, if any, for such a grievance, must be sought at the hands of the legislature, and not of the courts. And, where a state comptroller is vested with certain discretionary powers in the adjusting and settlement of demands against the state, he cannot be compelled to issue his warrant for the payment of a particular sum."

Upon principle and authority, I am constrained to hold that the writ should be denied; and the importance of the question involved, and the abuses and evils, as I conceive, liable to result from the construction given the constitution and statute by my associates, prompts me to dissent from the judgment pronounced.

## NEW YORK COURT OF APPEALS.

RE Cancellation from Registry Lists  
of  
The Name of Matilda Joselyn GAGE.

(.....N. Y. ....)

**A school commissioner whose authority is not confined to one school district but extends to many of them with power of superintendence and control is to be classed with the town and county officers within a constitutional provision as to the election of officers restricting the franchise to male citizens.**

(January 23, 1894.)

**A PPEAL** by defendant from an order of the General Term of the Supreme Court,

**NOTE.**—For note on right of women to vote, see *Coffin v. Thompson* (Mich.) 21 L. R. A. 662.  
25 L. R. A.

Fourth Department, affirming an order entered in the office of the Clerk of Onondaga County striking the defendant's name from the registry list of the third election district of the town of Manlius. *Affirmed.*

The facts are stated in the opinion.

*Mr. Louis Marshall*, for appellant:

Chapter 214 of the Laws of 1892 permitting women to vote for school commissioners is constitutional.

For more than seventy years, during which period the constitutional qualification of voters has been defined in substantially the same terms as are now employed, the legislatures of this state have provided for other qualifications than the constitutional ones, for electors for school officers, and the manifest inference is, especially in view of the fact that the state has been divided into thousands of school districts,

in each of which school officers have been annually elected without question by voters not possessing the constitutional qualifications, or at which voters possessing them have been prevented from voting for not possessing the statutory qualifications, that the constitutional provisions under consideration were not deemed applicable to such officers.

It has uniformly been held that the legislature has no power to create disabilities not existing under the constitution or to restrict the right of suffrage which the constitution has established, and it must necessarily follow that it has no right to enlarge the classes of voters specified in the constitution.

*Green v. Shumway*, 89 N. Y. 418; *Goetschius v. Matthueson*, 61 N. Y. 420.

The practical construction given by the legislature to a constitutional provision, for many years acquiesced in and acted upon, unquestioned by the executive and administrative departments is entitled to controlling weight in its interpretation, and has almost the force of a judicial exposition.

*People v. Dayton*, 55 N. Y. 367; *People v. Home Ins. Co.* 92 N. Y. 337; *Southampton v. Meoz Bay Oyster Co.* 116 N. Y. 16; *Sweet v. Syracuse*, 129 N. Y. 345; *People v. Westchester County Board of Suprs.* 189 N. Y. 524; *Fort v. Burch*, 6 Barb. 78.

The qualifications of voters for school officers have never been identical with those of electors as defined by the constitution; hence, a statute permitting women to vote for such officers was not unconstitutional.

*Belles v. Burr*, 76 Mich. 1; *Wheeler v. Brady*, 15 Kan. 26; *State v. Cones*, 15 Neb. 444; *Plummer v. Yost*, 19 L. R. A. 110, 144 Ill. 68. See also *Opinion of the Justices*, 115 Mass. 608.

The right of suffrage at school elections now exists by statute in all of the New England states, in New Jersey, New York, Pennsylvania, Michigan, Indiana, Illinois, Wisconsin, Minnesota, Kansas, Nebraska, Wyoming, Dakota, Colorado, California, and Louisiana.

Fiske's Civil Government of the United States, pp. 44, 45.

The framers of the constitution in using the phrase "all officers" intended to refer to officers *ejusdem generis* with those specified in the earlier portion of the section, viz., county, city, town, and village officers, and such other officers as are referred to in the constitution.

Where general words follow specific words designating certain special things, the general words are to be limited to cases of the same general nature as those which are specified.

*People v. Richards*, 108 N. Y. 148; *Hermanes v. Ulster County Board of Suprs.* 71 N. Y. 431; *People v. New York & M. B. R. Co.* 84 N. Y. 565; *East Oakland Twp. v. Skinner*, 84 U. S. 255, 24 L. ed. 125; *Thames & M. M. Ins. Co. v. Hamilton*, L. R. 12 App. Cas. 484.

No constitutional right to vote for school commissioners is vested in the electors defined by art. 2, § 1. They might have been appointed under legislative authority by the boards of supervisors as in the original act; by a convocation of ministers; by an institute of female teachers; or by any authority designated by the legislature.

*People v. Clute*, 50 N. Y. 458, 10 Am. Rep. 25 L. R. A.

508; *Sturgis v. Spofford*, 45 N. Y. 446; *Re Carboy*, 27 Hun. 82.

*Messrs. Goodelle & Nottingham* for respondent.

Finch, J., delivered the opinion of the court:

The question argued on this appeal is whether a woman may vote for school commissioner in her proper district within the state, and it arose in this manner: An act of the legislature (Laws 1892, chap. 214) provides that "all persons, without regard to sex, who are eligible to the office of school commissioner, and have the other qualifications now required by law, shall have the right to vote for school commissioner in the various commissioner districts of the state." The act further requires that the persons so entitled to vote shall be registered "as provided by law for those who vote for county officers;" that the county clerk shall prepare and distribute the prescribed ballots, and the inspectors of election shall count and receive the same. Acting under this authority, Mrs. Gage was duly registered in the third election district of the town of Manlius on October 21, 1893. The board of inspectors were formally requested to remove her name from the registry, but refused to comply with the demand, whereupon an application was made to a justice of the supreme court, pursuant to section 87, chap. 680, Laws 1892, to strike her name from the registry, on the sole ground that she was not a lawful voter, by reason of her sex. That application was granted, the learned judge holding that the act conferring upon her the right to vote for school commissioner was unconstitutional. The inspectors obeyed the order. Mrs. Gage appealed to the general term, where it was affirmed, and from that affirmation brings her appeal to this court.

While it is true that the election of 1893 has passed, and the possibility of voting on that occasion is absolutely gone, it does not necessarily follow that the question involved has become purely abstract, and divested of any practical results consequent upon its decision. The order made determined the status of the voter under the Act of 1892, and settled her right for future elections; and if a wrong has been done it is not easy to discover any practical remedy except through a reversal of the order which was granted. Both parties concur in seeking a final decision upon the constitutional question involved, and we are of opinion that the case presented requires of us its determination. The learned counsel for the appellant states very frankly and accurately the sole inquiry upon which the decision depends. He concedes that under article 2, § 1, and article 10, § 2, of the Constitution, no woman has the right to vote for constitutional officers, because the franchise is conferred explicitly upon "male citizens;" but he contends that school officers are not such constitutional officers, because the practical interpretation of that instrument has long and invariably been to the contrary. That is true and only true of the officers of the school district, as the fundamental unit of the school system. The

trustees of such a district are the authorized business managers of the school within its boundaries, and the legislature has always assumed, and been permitted to assume, the right to determine who might vote for such trustees, and what qualifications should or should not be requisite and necessary. To that class of school officers intrusted with the government and control of the simple school district by itself alone, and within its own boundaries, the constitutional provisions have never been applied; but I have yet to find an instance in the statutory history of the state prior to the act in question where an officer whose authority was not confined to the school district, but extended over many of them, with a power of superintendence and control, has been regarded as anything other than a town or county officer, and within the constitutional provisions. Under the Revised Statutes the superintending officers were three commissioners and three inspectors of common schools. 1 Rev. Stat. p. 840, § 2. These were town officers, to be chosen by the constitutional electors (section 1), and by ballot. Id. p. 848, § 2. In 1848 these officers were abolished (chapter 183, § 1), and in their place was substituted (section 2) a town superintendent of common schools, to be annually elected in the same manner as "other town officers" are chosen, and upon whom the duties of inspection and superintendence were imposed. He also was a town officer, and chosen by the constitutional electors. In 1856 (chapter 179) the system was again changed by providing first for the appointment and then for the election of school commissioners. The terms of the statute show that they were still regarded as within the constitutional provisions, and were county officers, as their predecessors had been town officers. Where a county constituted a single assembly district the supervisors were to choose "for their county" an officer to be called "school commissioner." Section 1. Where a county had more than one assembly district, a commissioner for each of such assembly districts was to be chosen. Section 2. So far the office created pertained to the known constitutional divisions of the state, and its incumbent was clearly a county officer. The situation was not changed by the further provision allowing in a single county, constituting but one assembly district, the selection of two commissioners, and dividing the county into sections for that purpose. Section 4. No town was to be divided in the process, and the commissioner of one section could discharge his official duty in the other section upon the written request of its commissioner. Section 7. Under the Act of 1864 (chapter 555, title 2, § 11) he is required to do so upon the command of the superintendent of public instruction. Under the Law of 1856 the appointment by the boards of supervisors was but temporary. At the annual general election of 1867 the officers became elective, and it was provided that "all the provisions of law relating to the mode of voting and of canvassing the votes for the county officers shall apply to and govern the election of such

25 L. R. A.

commissioners." If it be a just criticism that this provision was merely modal, that may have furnished a reason why, for a plainer exposition of the intended meaning, the language was changed in the general Act of 1864. It there reads (section 8, title 2): "The laws regulating the election of, and canvassing the votes for, county officers shall apply to such elections." Who may vote for county officers is an essential part of the laws "regulating" their election, for it has been held that into those laws is to be read the constitutional definition of an elector as if it had been specially repeated therein. *People v. Barber*, 48 Hun, 198. It follows that there are two definite and distinct classes of school officers, which are those of the school district, the unit of the system, and those of superintendence over a larger or smaller number of such units aggregated; and that the latter are, and always have been, as clearly either town or county officers as the former have not been. I am unable to see, therefore, that any practical construction, prior to the Act of 1892, has ever been given to the constitution which takes the elective officers charged with superintendence out of the category of constitutional officers, or puts a constituency behind them having other qualifications than those necessary for the election of town and county officers.

The Constitution, in article 2, § 1, prescribes the qualifications of voters "for all offices that now are or hereafter may be elective by the people," and confines the franchise specifically to "male citizens." The office of school commissioner was one thereafter made "elective by the people" through the operation of the alternative given by article 10, § 2, which provides that "all officers whose offices may hereafter be created by law shall be elected by the people or appointed as the legislature may direct." That is, in such cases it may choose between election and appointment, and in the latter event may dictate the authority and mode of appointment. The legislature chose that the office should be elective, and, becoming such, it fell within the scope and terms of the constitutional provisions applicable to elections by the people. The only possible answer is the one which was attempted and derived from a supposed practical construction. We have seen that the facts do not justify that answer. Indeed, the cases cited from other states do not go far enough to support the appellant's argument. In *Belles v. Burr*, 76 Mich. 1, the question was over the election of a school-district trustee. In *Wheeler v. Brady*, 15 Kan. 26, the controversy concerned a school-district treasurer. In *State v. Cones*, 15 Neb. 444, the voting was at a school-district meeting. In *Plummer v. Yost*, 144 Ill. 68, 19 L. R. A. 110, the election was of members of the board of education. And the *Opinion of the Justices*, 115 Mass. 608, related to the right of a woman to be a member of a school committee. On the other hand, when the question arose in Kansas, not of voting at a school-district meeting, but for a county superintendent of schools, the court deemed it almost too clear for argument that

a woman could not vote for the latter officer. *Winans v. Williams*, 5 Kan. 227. It seems to me needless to prolong the discussion. A constitutional convention may take away the barrier which excludes the claimed right

of the appellant, but until that is done we must enforce the law as it is written.

*The order should be affirmed, but, as stipulated, without costs.*

All concur.

## NORTH CAROLINA SUPREME COURT.

Claudius BOTTOMS, by Turner Bottoms,  
His Next Friend,

SEABOARD & ROANOKE R. CO., *Appt.*

(.....N. C.....)

1. A child twenty-two months old cannot be charged with negligence for straying upon a railroad track.
2. The negligence of a parent in permitting an infant to wander upon a railroad track will not be imputed to it so as to preclude a recovery by it for an injury there received.
3. A railroad company is liable for injuring a child of tender years upon its track, if, consistent with the attention demanded by the engine, its danger could have been discovered in time to have avoided the injury by stopping the train.

(May 9, 1894.)

*NOTE.—Care required of railroad companies to prevent injuring small children upon the track.*

- I. Duty of railroads to fence against children.
- II. Duty to discover child on track.
- III. Lookout for children.
- IV. Negligence after discovery.
- V. Failure to give signal.
- VI. Speed.
- VII. City.
- VIII. Foot caught.
- IX. Sudden appearance of child.
- X. Projecting timber or car.
- XI. Gross negligence.

### I. Duty of railroads to fence against children.

There is some conflict of authority as to the duty required of railroad companies to fence their tracks whereby injuries to small children may be prevented, the question arising on what is known as the Stock Fence Law. Some courts hold that the failure to fence as required by statute is negligence where a small child got on to the track through such failure and was injured. (Age eight months) *Schmidt v. Milwaukee & St. P. R. Co.* 23 Wis. 186, 90 Am. Dec. 158; (age two years) *Stuetgen v. Wisconsin Cent. R. Co.* 80 Wis. 498; (age nine years) *Chicago, B. & Q. R. Co. v. Grabin* (Neb.) Oct. 13, 1893; *Keyser v. Chicago & T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405; (age four years) *Williams v. Great Western R. Co.* L. R. 9 Exch. 159, 43 L. J. Exch. 105, 31 L. T. N. S. 124, 22 Week. Rep. 531.

And in *Marcott v. Marquette, H. & O. R. Co.*, 49 Mich. 99, where the court charged that it was negligence if the child was injured through failure to fence, the court said that nothing more could have been asked on that point.

In *Morrissey v. Providence & W. R. Co.*, 15 R. L. 271, it was said that if the child was injured on an unguarded track there might be negligence, but that was not the question involved.

But in *Prnderast v. New York Cent. & H. R. R. Co.*, 58 N. Y. 652, and in *Robertson v. New York*, 25 L. R. A.

**A**PPEAL by defendant from a judgment of the Superior Court for Northampton County in favor of plaintiff, in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was liable. *Affirmed.*

The facts are stated in the opinion.

*Mr. W. H. Day*, for appellant:

Contributory negligence bars a recovery, unless the defendant's negligence was wanton, willful, or reckless; or unless the defendant, by the exercise of ordinary care, after discovering the negligence of the plaintiff, could have avoided the injury.

The first proposition is true, because, in the presence of wantonness, willfulness, or recklessness, the doctrine of contributory negligence has no application.

*Cooley, Torts, 674.*

The second proposition is true, because, after discovering the contributory negligence of the

7 Misc. 645, it is held that it is not negligence to fail to fence the track against stock, whereby a child, having no right, comes on the track and is killed.

And in *Meagher v. Cooperstown & C. V. R. Co.*, 75 Hun. 455, it was said that the negligence in failing to fence was a question of doubt.

But in *Ditcheff v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425, where the party was not injured by a train, and was not an infant, it was said that the stock fence law was not intended to protect against personal injury.

And in *Fitzgerald v. St. Paul, M. & M. R. Co.*, 20 Minn. 335, 43 Am. Rep. 212, where the statutory fence was a four-wire fence and the lowest one sixteen inches from the ground, and a child eighteen months old was injured, it was held there is no duty imposed on the railroad to fence against children.

And in *McCarty v. Fitchburg R. Co.*, 154 Mass. 17, it was held that the duty to fence the road as required by Mass. Pub. Stat. chap. 112, § 115, does not apply where the convenient use of the road would be obstructed, and a boy five years old crossed the street, passed on the track and was injured.

And in *Walkenbauer v. Chicago, B. & Q. R. Co.*, 17 Fed. Rep. 134, 3 McCrary, 553, it was held that the Iowa Code, section 1289, rendering a railroad liable to the owner of stock killed by reason of failure to fence, does not apply so as to render a railroad negligent for failure to fence against infant children.

### II. Duty to discover child on track.

On the question as to the degree of care required of railroad companies in discovering a child on the track in time to prevent injury, the cases are not all unanimous, the general rule being that ordinary care is required to discover the child and prevent the injury, and that on the failure to discover an infant in time to prevent injury that ought to have been discovered by the exercise of

plaintiff, the negligence of the defendant then becomes the proximate cause of the injury, if defendant fails to observe ordinary care.

*Davies v. Mann*, 10 Mees. & W. 545; *Butterfield v. Forrester*, 11 East, 60.

In neither of the above cases was the plaintiff a trespasser so the duty in both cases was the same. Yet in *Butterfield v. Forrester*, *supra*, a recovery is denied. In *Davies v. Mann*, *supra*, a recovery is had. Why? Because, in the case of *Butterfield v. Forrester* there is no recklessness, wantonness, or willfulness on the part of the defendant. In *Davies v. Mann* the failure to anticipate, as the defendant was bound to do, the lawful presence of the ass, coupled with the fact that the driver was "fifteen steps behind his team," makes his conduct wanton and reckless and the injury inflicted in law willful.

The doctrine in *Herring v. Wilmington & R. R. Co.*, 33 N. C. 402, 51 Am. Dec. 395, was that contributory negligence bars a recovery unless the defendant's negligence was wanton, willful, or reckless.

*Manly v. Wilmington & W. R. Co.*, 74 N. C. 658.

Yet in *Deans v. Wilmington & W. R. Co.*, 107 N. C. 690, Judge Avery uses this language: "In delivering the opinion in *Manly v. Wilmington & W. R. Co.*, 74 N. C. 655, Justice Bynum foreshadowed by an intimation the subsequent adoption by this court in *Gunter*

*v. Wicker*, 85 N. C. 810, of the principles stated in *Davies v. Mann*, 10 Mees. & W. 545, and, after it had been approved in so many well-considered opinions, it became apparent that it will be illogical and inconsistent to adhere to the rule laid down in *Herring v. Wilmington & R. R. Co.* 33 N. C. 402, 51 Am. Dec. 395.

The doctrine adhered to in *Manly v. Wilmington & W. R. Co.* 74 N. C. 658, and *Gunter v. Wicker*, 85 N. C. 810, is not a departure from but an affirmation of the doctrine in *Herring v. Wilmington & R. R. Co.* and *Davies v. Mann*, *supra*.

The departure first occurs in *Deans v. Wilmington & W. R. Co.* 107 N. C. 686.

Apply the rules in the *Deans Case* to the facts of the case at bar, and you charge the railroad company with the duty of anticipating the negligence of the plaintiff's father and mother, and of providing against it, and relieve them, the father and the mother, of even the exercise of ordinary care in protecting an infant twenty-two months old. This is a solecism of the law.

If the rule laid down in *Deans v. Wilmington & W. R. Co.*, 107 N. C. 686, is adhered to, the doctrine of contributory negligence no longer obtains in this state.

*Missouri Pac. R. Co. v. Brown*, 75 Tex. 267; *O'Keefe v. Chicago, R. I. & P. R. Co.* 32 Iowa, 487; *St. Louis, I. M. & S. R. Co. v. Monday*,

reasonable care, the question of negligence is one for the jury. *Little Rock & Ft. S. R. Co. v. Barker*, 39 Ark. 491; (age nineteen years) *Mauerman v. St. Louis, I. M. & S. R. Co.* 41 Mo. App. 348; (age sixteen months) *Reilly v. Hannibal & St. J. R. Co.* 94 Mo. 600; (age two years) *Frick v. St. Louis K. C. & N. R. Co.* 75 Mo. 542, 595; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; *Meredith v. Richmond & D. R. Co.* 108 N. C. 616; (age nineteen months) *San Antonio & A. P. R. Co. v. Vaughn*, 5 Tex. Civ. App. 195; (age eighteen months) *Texas & P. R. Co. v. O'Donnell*, 58 Tex. 37; (age five or six years) *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 235; (age four or five years) *Hyde v. Union Pac. R. Co.* 7 Utah, 366.

In *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 543, 58 Am. Rep. 594, it was held that the duty of an engineer when he sees children near the track in the country is the same as if he had been running through a populous city where more caution is to be observed in running a train than in the country. (Two and one half years old.)

In *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513, 36 Am. Rep. 67, it was held that a railroad company is negligent, where the whistle was not blown or bell rung, although a child six or seven years old lay on the track within a few feet of a public crossing, and the conductor saw him four or five hundred feet ahead but did not make out that it was a child until within one hundred and fifty feet, and the child should have been discovered some three hundred feet off. In *Meeks v. Southern Pac. R. Co.*, 56 Cal. 602, which was a former trial of the same case, the evidence was different.

But in *Lake Shore & M. S. R. Co. v. Clark*, 41 Ill. App. 343, it was held that a railroad company is not under greater obligation to anticipate the presence of children upon its tracks on its property, than of adults.

And in *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545, it was held that there is no willful negligence where a child five years old behind a standing car on a street near a wharf is not seen by trainmen

and is injured in moving the car, although no signals were given, but the fireman and engineer were on the lookout as the train was backed.

So in *Dooley v. Mobile & O. R. Co.*, 69 Miss. 648, it was held that a railroad company owed no duty to a youth of nineteen years wrongfully standing at the end of a switch track, and the speed of the car was about three miles an hour.

And in *Woodruff v. Northern Pac. R. Co.*, 47 Fed. Rep. 689, it was held that the railroad company is not bound to exercise ordinary care and vigilance as against a child twenty-two months old trespassing on right of way, where the child was not seen in time to stop the train.

And in *Ogden v. Pennsylvania R. Co.*, 28 W. N. C. 191, it was held that no negligence will be presumed because a boy ten years old was killed by some part of a train not at a crossing, at a place where the company was not bound to use unusual precautions.

So in *Morrissey v. Eastern R. Co.*, 126 Mass. 377, it was held that a railroad company owes no duty to a trespassing child four years old using the track on its right of way as a playground, except the negative one not maliciously or with gross and reckless carelessness to run over him.

And in *Meyer v. Midland Pac. R. Co.*, 3 Neb. 519, it was held that there was no negligence if the engineer of a train used the whistles at highways and crossings, fifty yards from each, rang the bell constantly, kept a proper lookout and did not see a child three and one-half years old in the city at a street crossing until within such distance that injury could not be prevented, where the child rose up out of a ditch in front of the train.

So in *Burnes v. Staten Island Rapid Transit R. Co.*, 44 N. Y. S. R. 371, it was held that the failure to see a small boy on the track at a place where he could not be seen is not negligence towards a larger boy attempting to save him, when every effort is made to stop the train as he runs on the track, as an engineer is not bound to expect helpless infants on the track.

49 Ark. 257; *Shearman & Redf. Neg.* § 488; *Pierce, American Railway Law*, p. 825.

The true rule in *Davies v. Mann*, 10 Mees. & W. 545, is where the defendant, after having become aware of the plaintiff's negligence, fails to exercise ordinary care in avoiding the injury, then there is liability.

*Smith, Negligence*, Whitaker's ed. pp. 374, 375; *Gunter v. Wicker*, 85 N. C. 810; 2 Thompson, Neg. 1157, and cases cited (by analogy *Walker v. Reidsville*, 96 N. C. 882); *Cooley, Torts*, p. 674.

The use of ordinary care is due to a party guilty of contributory negligence when one discovers that negligence, not when he might have discovered it.

*Shearman & Redf. Neg.* § 98, p. 159; *Philips v. Wilpers*, 2 Lans. 389; *State v. Manchester & L. Railroad*, 52 N. H. 528; *Needham v. San Francisco & S. J. R. Co.* 37 Cal. 420; *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67.

In the case at bar the plaintiff was a trespasser. The duty the defendant owed him was "a bare obligation to avoid inflicting a willful injury upon him."

*Emry v. Roanoke Nav. & Water-Power Co.* 17 L. R. A. 699, 111 N. C. 95; *Manly v. Wilmington & W. R. Co.* 74 N. C. 655; *McAdoo v. Richmond & D. R. Co.* 105 N. C. 147; *Pittsburgh, Ft. W. & O. R. Co. v. Vining*, 27 Ind. 513, 92 Am. Dec. 269; *Kean v. Baltimore &*

*O. R. Co.* 61 Md. 154; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 818; *Mangan v. Brooklyn R. Co.* 88 N. Y. 455, 98 Am. Dec. 66; 2 *American Corp. & R. Rep.* 199, note; *Roden v. Chicago & G. T. R. Co.* 30 Ill. App. 354; *Richmond & D. R. Co. v. Yeamans*, 86 Va. 860; *Dun v. Seaboard & R. R. Co.* 79 Va. 645; *Carrington v. Louisville & N. R. Co.* 88 Ala. 472; *Louisville & N. R. Co. v. Greene* (Ky.) 19 Am. & Eng. R. R. Cas. 96; *Kentucky Cent. R. Co. v. Dille*, 4 Bush, 593; *Paducah & M. R. Co. v. Hoshi*, 12 Bush, 46; *Card v. New York & H. R. Co.* 50 Barb. 39; *Tyler v. Siles*, 88 Va. 470; *Chicago West Div. R. Co. v. Ryan*, 131 Ill. 474; *Scoville v. Hannibal & St. J. R. Co.* 81 Mo. 434; *Denman v. St. Paul & D. R. Co.* 26 Minn. 357; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 25; *Spicer v. Cheapeake & O. R. Co.* 11 L. R. A. 835, 34 W. Va. 514; *Louisville & N. R. Co. v. Black*, 89 Ala. 213; *Carrington v. Louisville & N. R. Co.* 88 Ala. 472; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 482; *Weymire v. Wolfe*, 59 Iowa, 533; *Morris v. Chicago, B. & Q. R. Co.* 45 Iowa, 99; 2 *Thompson, Neg.* p. 1156; *Patterson, Railway Accident Law*, § 181, p. 174; 2 *Greenleaf, Ev.* § 222.

The doctrine I contend for is the construction put on *Davies v. Mann*, 10 Mees. & W. 545, by the English courts.

*Radley v. London & N. W. R. Co.* L. R. 10 Exch. 100. See also *Houston & T. C. R. Co. v. Symphkins*, 54 Tex. 615, 88 Am. Rep. 632;

And in *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631, it was held that an engineer is under no obligation to stop his train for a small child trespassing on the track until he had discovered that she was a human being. After discovery, willful or wanton injury will render the company liable.

So in *Chrystal v. Troy & B. R. Co.*, 105 N. Y. 164, and *Foley v. New York Cent. & H. R. R. Co.* 78 Hun, 248 (children seventeen months and four years), it was held that an engineer of a train is not bound to expect helpless infants upon the track near a street, without ability to escape, and he could run on without being negligent until he discovered that the child was heedless of danger. All that an engineer is required to do after the discovery of the peril is to use reasonable diligence to avert injury.

See also next subhead, *Lookout for children*.

### III. Lookout for children.

It is the duty of railroad employes in the operation of trains to keep reasonable lookout ahead for children, especially in a city, and failure to do so will be negligence. (Age six years) *Chicago, M. & St. P. R. Co. v. McArthur*, 10 U. S. App. 544, 53 Fed. Rep. 464; (age two years) *Philadelphia & R. R. Co. v. Long*, 75 Pa. 267.

Or where a train is backing in a city. (Tender years) *Chicago & A. R. Co. v. Murray*, 71 Ill. 601; (age three years) *Hamilton v. Morgan's L. & T. R. & S. S. Co.* 42 La. Ann. 824; (age three years) *Battishill v. Humphreys*, 64 Mich. 494; (age two years) *Frick v. St. Louis, K. C. & N. R. Co.* 5 Mo. App. 435; (age ten years) *Barry v. New York Cent. & H. R. R. Co.* 82 N. Y. 290, 44 Am. Rep. 377; (age six years) *Bellefontaine & L. R. Co. v. Snyder*, 13 Ohio St. 399; (age eight years) *Barley v. Chicago & A. R. Co.* 4 Biss. 490; (age thirteen years) *Whalen v. Chicago & N. W. R. Co.* 75 Wis. 654.

Or where a train is backing and no lookout is kept as required by city ordinance. (Age eighteen years) *Bergman v. St. Louis, L. M. & S. R. Co.* 88 Mo. 673; *Eckert v. St. Louis, L. M. & S. R. Co.* (Mo.) 25 L. R. A.

4 West. Rep. 596; *Menz v. Missouri Pac. R. Co.* 69 Mo. 672; (age twelve years) *Erwin v. St. Louis, L. M. & S. R. Co.* 96 Mo. 200.

Or where a train is backing at other crossings. (Little child) *Wiley v. Long Island R. Co.* 78 Hun. 29; (age six years) *Johnson v. Chicago & N. W. R. Co.* 49 Wis. 629, 56 Wis. 374; (age four years) *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. 187.

And a lookout must be kept on train making flying switch. (Less than three years) *Louisville, N. A. & C. R. Co. v. Schmidt*, 126 Ind. 290.

Or on a detached train. (Age nine years) *Ryan v. New York Cent. & H. R. R. Co.* 37 Hun. 123.

And under a Tennessee statute a vigilant lookout must be kept. (Age eight years) *East Tennessee & G. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 192.

And it is the duty of railroad employes to keep a proper lookout and exercise ordinary care to prevent injury to children at crossings or at such places as they may reasonably expect to find children, and after discovery to use such measures as are proper under the circumstances to avoid injury. (Age twelve years) *Houston & T. C. R. Co. v. Boozer*, 70 Tex. 530; (age two years) *Douglas v. Central Texas & N. W. R. Co.* (Tex.) May 2, 1894; (age twenty-two months) *Bottoms v. Seaboard & R. R. Co.* (N. C.) May 9, 1894; (age nine years) *Chicago, B. & Q. R. Co. v. Grabin* (Neb.) Oct. 13, 1893; (age eight years) *Rason v. East Tennessee, V. & G. R. Co.* 2 U. S. App. 272, 51 Fed. Rep. 938; (age nineteen months) *Kay v. Pennsylvania R. Co.* 65 Pa. 232, 3 Am. Rep. 628; (age between four and five years) *Gunn v. Ohio River R. Co.* 36 W. Va. 165; (age seven years three months) *Heddlies v. Chicago & N. W. R. Co.* 74 Wis. 239, 77 Wis. 223.

In *Georgia Pac. R. Co. v. Blanton*, 84 Ala. 154, it was held that under Ala. Act February 23, 1897, and sections 1099, 1070, Code, requiring the railroad company to prove all statutory duties were performed in cases of personal injury in towns and cities, the evidence on its part where a two-year-old child was killed, must show a compliance with all the requirements of the statute, as to whistle



*Houston & T. C. R. Co. v. Smith*, 52 Tex. 178; 1 Shearman & Redf. Neg. § 99.

It was not negligence for the employés of the defendant not to look constantly in front of the engine at a place where there was no crossing, and where they had no reason to expect persons on or along the track.

*Houston & T. O. R. Co. v. Smith*, 77 Tex. 179; *Jones v. North Carolina R. Co.* 67 N. C. 123; *Chicago, R. I. & P. R. Co. v. Eisinger*, 114 Ill. 79; *Rosenberger v. Grand Trunk R. Co.* 8 Ont. App. 481; *Bell v. Hannibal & St. J. R. Co.* 72 Mo. 50.

A trespasser, of whose presence the defendant was not aware can no more complain of the omission to give signals than an idler who strolls unnoticed into a foundry to gratify his curiosity can complain that there was nothing to warn him of the danger he was in.

*Toomey v. Southern Pac. R. Co.* 10 L. R. A. 189, 86 Cal. 874; *Louisville & N. R. Co. v. Howard*, 82 Ky. 213; *Spicer v. Chesapeake & O. R. Co.* 11 L. R. A. 885, 84 W. Va. 514; *Dietrich v. Baltimore & H. S. R. Co.* 58 Md. 848.

The fact that in the case at bar the plaintiff was an infant of twenty-two months does not vary the rule.

*Meredith v. Richmond & D. R. Co.* 108 N. C. 616.

There is no higher duty due to a negligent or trespassing child or other person *non sui juris* until such negligence or trespass is known

to the defendant, than is due to a negligent or trespassing adult in the possession of all his faculties.

*Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Pierce*, American Railway Law, 278-281.

The doctrine of imputing the negligence of the parent of the child is the doctrine in New York (*Ill. v. Forty-Second Street & G. Street Ferry R. Co.* 47 N. Y. 823, 7 Am. Rep. 450); in Massachusetts (*Lynch v. Smith*, 104 Mass. 53, 6 Am. Rep. 188); in Minnesota (*Fitzgerald v. St. Paul, M. & M. R. Co.* 29 Minn. 338, 43 Am. Rep. 213); in Maryland (*McMahon v. Northern Cent. R. Co.* 89 Md. 439; *Baltimore City Pass R. Co. v. McDonnell*, 43 Md. 551); in Maine (*Leslie v. Lewiston*, 62 Me. 468; *Brown v. European & N. A. R. Co.* 58 Me. 884); in Kansas (*Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan. 541); in Indiana (*Evansville & C. R. Co. v. Wolf*, 59 Ind. 89; *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545); in Illinois (*Gavin v. Chicago*, 97 Ill. 66, 87 Am. Rep. 99; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441); in California (*Schierhold v. North Beach & M. R. Co.* 40 Cal. 447; *Meeks v. Southern Pac. R. Co.* 53 Cal. 602).

Children have no right to be upon the track of a railway, and it is contrary to all the principles underlying this branch of the law to hold that the company is bound to respond in damages for an injury to them, when they are there

bell and lookout, and proper use of all means at hand to prevent injury.

But in *Ward v. Southern Pacific Co.* (Or.) 23 L. R. A. 715, it was held that a railroad company owes to a trespassing child six years old, no legal duty to keep a lookout or guard him against danger.

And in *Chicago, R. I. & P. R. Co. v. Eisinger*, 114 Ill. 79, it was held that the railroad company does not owe the duty in respect to a flagman as against a little boy injured traveling laterally along and upon the railroad right of way in the city, for convenience.

In *Burg v. Chicago, R. I. & P. R. Co.* (Iowa) Jan. 31, 1894, it was held that it is not negligence to fail to keep a vigilant lookout for a trespassing child three years old on the track. The court says that when the engineer knew such small children were on the track he had sufficient reason to know that they would remain and then he would be charged with the highest degree of care in their behalf.

In *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan. 541, it was held that if a two-year-old child is on the railroad right of way under or behind a standing car against which gravity cars are permitted to descend, if the employés did not look and see the child, this is not culpable negligence, rendering the railroad company liable.

In *Williams v. Kansas City, S. & M. R. Co.*, 96 Mo. 275, (age eight years), and *McDermott v. Kentucky Cent. R. Co.* 14 Ky. L. Rep. 437, it was held that there is no duty on the part of the railroad company to watch for a boy in their switch yards where he had no right to be.

And in *Houston & T. C. R. Co. v. Smith*, 77 Tex. 179, it was held that it is not negligence for the employés of a train not to look constantly in front of the engine at a place where there was no crossing and where they had no reasons to expect persons on the track, and the rules of the company required employés to look back along the train.

In *Cassida v. Oregon R. & Nav. Co.*, 14 Or. 551, it was held that although no lookout is required for persons who have no right on the track yet when 25 L. R. A.

the danger is discovered the railroad employés are required to use their best endeavor to avoid injury, and a greater duty is imposed if the employés have reasonable grounds to expect persons on the track, or known to be upon it. (Child seven years old killed on trestle near town.)

In *Givens v. Kentucky Cent. R. Co.*, 12 Ky. L. Rep. 950, it was held that lookout is not ordinarily required from a railroad company as against a trespassing child, nine years old, on right of way, but if discovered greater care is required of the company as to children than as to adults.

See as to general duty of railroad company to have "lookout," *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 297, *note*.

#### IV. Negligence after discovery.

After discovering the danger to an infant on the track the cases vary in regard to the expressions used defining the degree of care required of an engineer to prevent injury. As, if necessary, he should stop the train. (Age eleven years) *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602.

Do all in his power. *Ex parte Stell*, 4 Hughes, C. C. 157.

Use all means. (Age eighteen months) *Alabama G. S. R. Co. v. Dobbs* (Ala.) April 3, 1893; (age fifteen months) *Payne v. Humeston & S. R. Co.* 70 Iowa, 584.

Use all the care and caution he can command. (Age two years) *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71; (age two and one-half years) *Albertson v. Keokuk & D. M. R. Co.* 48 Iowa, 292.

Use all effort in his power. (Age seven years) *Shaw v. Missouri Pac. R. Co.* 104 Mo. 648; (age five years) *Ross v. Texas & P. R. Co.* 44 Fed. Rep. 44.

If he uses every effort there is no negligence. (Age twelve years) *Rudd v. Richmond & D. R. Co.* 80 Va. 548; *Chicago & N.W. R. Co. v. Schumilowsky*, 8 Ill. App. 613.

He should use reasonable care. (Age four years) *Foley v. New York Cent. & H. R. R. Co.* 20 N. Y. S. R. 516, 78 Hun. 248; (age fifteen years)

wrongfully, unless it could have prevented the injury by the exercise of such care as ought to be observed by them in view of the locality.

Wood, Railway Law, pp. 1278-1280 *et seq.*; *Cleveland, C. & O. R. Co. v. Elliott*, 4 Ohio St. 474; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *Macon & W. R. Co. v. Davis*, 18 Ga. 679; *Cooper v. Central Railroad of Iowa*, 44 Iowa, 184; *Cooley, Torts*, 674; *Trow v. Vermont Cent. R. Co.* 24 Vt. 487, 58 Am. Dec. 191; *Isbell v. New York & N. H. R. Co.* 27 Conn. 398, 71 Am. Dec. 78; *Hicks v. Pacific R. Co.* 64 Mo. 430; *Burnett v. Burlington & M. R. Co.* 16 Neb. 882.

If a child is permitted to go alone upon a highway, when of an age at which it is unable to comprehend and avoid the perils to which the road is naturally liable, it cannot recover compensation for an injury inflicted by neglect of a mere stranger, while the child itself is acting in a manner which, in a person of mature years, would be deemed so negligent as to deprive him of the right to sue.

*Shearman & Redf. Neg. § 80; Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188; *McGarry v. Loomis*, 68 N. Y. 104, 20 Am. Rep. 510; *O'Brien v. McGlinchey*, 68 Me. 552.

The rule seems to be that the negligence of parent and guardian is imputed to a child when the negligent act is of that character that an adult could not recover under the same cir-

cumstances. This is the true and sensible rule.

*Morrissey v. Eastern R. Co.* 126 Mass. 877, 30 Am. Rep. 686; *Fitzgerald v. St. Paul, M. & M. R. Co.* 29 Minn. 386, 48 Am. Rep. 212; *Meeks v. Southern Pac. R. Co.* 52 Cal. 604; *Holy v. Boston Gas Light Co.* 8 Gray, 123, 69 Am. Dec. 233; *Lynch v. Smith*, 104 Mass. 57, 6 Am. Rep. 188; *Wright v. Malden & M. R. Co.* 4 Allen, 289; *Flynn v. Hatton*, 4 Daly, 552; *Brown v. European & N. A. R. Co.* 58 Me. 884; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441; *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 25; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 518, 92 Am. Dec. 269; *Chicago v. Starr*, 42 Ill. 174, 89 Am. Dec. 422; *Mangan v. Brooklyn R. Co.* 88 N. Y. 455, 98 Am. Dec. 66; see note to *Kerr v. Forque* (Ill.) 5 Am. Rep. 148; note to *Freer v. Cameron*, 55 Am. Dec. 677; *McMahon v. Northern Cent. R. Co.* 39 Md. 438; *Ill. v. Forty-Second Street & G. Street Ferry R. Co.* 47 N. Y. 817, 7 Am. Rep. 450; *Hartfield v. Roper*, 21 Wend. 615, 84 Am. Dec. 273.

"Railroads have a right to presume those in vicinity of its track will not violate law, even children of tender years will not be there, for though irresponsible personally, they cannot be there without culpable violation of duty by parents or guardians."

*Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375.

*Mr. E. C. Smith* for appellee.

*Fiedler v. St. Louis, L. M. & S. R. Co.* 107 Mo. 645; (age eleven years) *Burnett v. Burlington & M. R. Co.* 16 Neb. 882.

Reasonable effort to prevent injury. (Age nine years) *Duffy v. Missouri Pac. R. Co.* 19 Mo. App. 380; (age four years) *Mobile & O. R. Co. v. Watley*, 69 Miss. 145; (age four years) *O'Connor v. Boston & L. R. Corp.* 135 Mass. 352.

Use reasonable precaution. (Age eighteen months) *St. Louis, L. M. & S. R. Co. v. Freeman*, 36 Ark. 41.

Use ordinary care. *Scoville v. Hannibal & St. J. R. Co.* 81 Mo. 424; *Kentucky Cent. R. Co. v. Gastineau*, 88 Ky. 119.

Use high degree of care. (Age fifteen years) *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645, Affirming 24 N. Y. S. 369.

Use greater degree of care than if the child was an adult. (Age two and one-half years) *Kenyon v. New York Cent. & H. R. R. Co.* 5 Hun. 479; (age five years) *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318; (age seven years) *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 191.

Some effort to stop the train is required. (Age seven years) *Jamison v. Illinois Cent. R. Co.* 68 Miss. 83.

And the best brakes in use. *Costello v. Syracuse, B. & N. Y. R. Co.* 65 Barb. 92.

And in *Cooran v. New York Elev. R. Co.*, 19 Hun. 368, it was held that it is negligence to start an engine on an elevated track after the engineer sees a boy on the track without looking to see if he had got out of the way and without giving warning, where the engine covered all but twelve inches of the trackway.

But in *McKenna v. New York Cent. & H. R. R. Co.*, 8 Daly, 304, it was held that where a boy in a city jumps or falls from a train onto another track, the engineer of a passing train is not guilty of wanton negligence in failing to stop the train in case they could pass the boy without injury. In this case all of the train but the last wheel of the last car passed him safely as he lay on the ground. 25 L. R. A.

And in *Singleton v. Eastern Counties R. Co.*, 7 C. B. N. S. 287, it was held that the fact that a child three and one-half years old was injured by a train coming up an incline, and the engineer saw the dangerous position of the children but made no attempt to stop the engine, contenting himself with whistling, does not constitute negligence, there being nothing to show how the children got on the railroad. The failure to protect by statutory fence is not discussed in this case.

In *Pratt Coal & Iron Co. v. Brawley*, 38 Ala. 371, it was said that a railroad company would be liable to a father for the injury to a seven-year-old child trespassing on its track, caused by wanton, reckless, or intentional negligence of the employees, after discovering the peril of the child, or when they ought to have discovered the peril.

And in *Richmond & D. R. Co. v. Didsmonst*, 1 App. D. C. 482, it was held that although it may be negligence on the part of an engineer not to know the danger to start a train forty yards from where a boy sixteen years old is seen sitting on the platform eighteen inches from the track, which might have been known by the exercise of due care, it will not be the same as recklessness, which is necessary to impose liability in the case.

#### V. Failure to give signal.

The question of negligence on the part of the employees of a railroad is generally one for the jury if no signals were given for the train at a crossing, and an infant was injured by reason of such failure. (Age seven years) *Philadelphia, B. & W. R. Co. v. Layer*, 112 Pa. 414; (age eight years) *Taylor v. Delaware & H. Canal Co.* 113 Pa. 162, 57 Am. Rep. 446; (age less than four years) *Schwieb v. New York Cent. & H. R. R. Co.* 90 N. Y. 558; (ages ten and eleven years) *Johanson v. Boston & M. R. Co.* 153 Mass. 57 (see 15 Hun. 572); (age twelve years) *Paducah & M. R. Co. v. Hoehl*, 13 Bush, 41.

And the same was held in regard to a crossing in the city. (Age eleven years) *Henderson v. St. Paul*

Shepherd, *Ch. J.*, delivered the opinion of the court:

It is unquestionably true, as argued by counsel, that in order to maintain an action for negligence, the plaintiff must not only show the existence of a duty on the part of the defendant, but he must also show that the duty is due to him. *Emry v. Roanoke Nav. & Water-Power Co.* 111 N. C. 94, 17 L. R. A. 699. It has been decided by this court that it is the duty of an engineer, in running a railroad train, to exercise ordinary care, by keeping a lookout on the track, in order to discover and avoid any obstructions that may be encountered thereon. This duty is due to passengers; and as a general rule the duty is likewise due to the owner of cattle running at large; to the owner of other property which, under certain circumstances, may be on the track; and also, as a general rule, to persons who may be on the same at places other than crossings. It has also been decided in many cases, and may be regarded as perfectly well settled, that the failure to exercise such ordinary care, in discovering persons or property in time to avoid a collision, cannot, except in case of cattle running at large, be made the subject of a recovery, where the plaintiff's negligence is the proximate cause of the injury. In the present case the jury have found, under proper instructions of the court, that the plaintiff was injured by reason of the negligence of defendant. The plaintiff is therefore entitled

to recover, unless he was guilty of negligence, as above stated. The real questions presented, therefore, are whether the plaintiff was of sufficient age and discretion to be capable of contributory negligence, and, if not so capable, whether the negligence of the parent can be imputed to him.

It is admitted by the pleadings that the plaintiff was at the time of the accident "an infant of tender years," who had been permitted by its mother "to stray and wander" on the track of the defendant. From the language of the admission, we would, if it were necessary for the purposes of this decision, be well warranted in holding that, *prima facie*, the plaintiff was of such a tender age as to be incapable of negligence. Apart from this, however, it is established by uncontradicted testimony, and also admitted by counsel for the defendant, that the plaintiff, at the time of the accident, was in fact but twenty-two months old. In several of the states, it has been held that an infant of that age is, as a matter of law, incapable of contributory negligence (2 *Thomp. Neg.* 1181), while in others it is held, in analogy to the rule of the common law as to criminal responsibility, that an infant under the age of seven years is also incapable, but that the presumption may be rebutted by testimony, and that the question may be determined by the jury. 1 *Shearman & Redf. Neg.* § 73, *note*. Applying either rule to the present case, it is clear that the plaintiff was incapable of

& D. R. Co. 52 Minn. 479; (age fifteen years) *Casey v. New York Cent. & H. R. Co.* 6 Abb. N. C. 104; (age ten years) *Burger v. Missouri Pac. R. Co.* 112 Mo. 238; (age thirteen years and seven months) *New Jersey R. & Transp. Co. v. West*, 38 N. J. L. 91, affirmed, 38 N. J. L. 91; (age eleven and one half years) *O'Mara v. Hudson River R. Co.* 38 N. Y. 445; 38 Am. Dec. 61; (age fourteen years) *Baltimore & O. R. Co. v. Shipley*, 31 Md. 368; (age eleven years) *Cleveland, C. C. & St. L. R. Co. v. Keely* (Ind.) May 11, 1894.

So in *Cumberland & P. R. Co. v. State*, 78 Md. 74, it was said that a railroad company is required to use reasonable effort to prevent injuring a boy seven years old if he was on the track, although trespassing, and that violation of a city ordinance as to speed or signals would be negligence, but there was no evidence where he was when hurt.

And in *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 243, reversing 2 *Thomp.* & C. 644, it was said the fact that a boy thirteen years old could be easily seen at a crossing and was caught by passing trains and no signals were given, was negligence; but that was not the question involved.

But in *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. 300, 36 Am. Dec. 544, it was held that the omission to whistle, by an engine close behind a train, is not an approximate cause of injury to a child five years old attempting to run across between the engine and the train at a point below the street crossing, for the engineer was under no duty to suppose any one would attempt to cross suddenly in front of the engine.

And in *Collis v. New York Cent. & H. R. R. Co.*, 71 Hun, 504, it was held that a railroad company is under no duty to give signal of approaching train to a school-boy about eight years of age, carrying water to circus employes in an advertising car stationed on a side track on railroad grounds, and the only duty was not to do him intentional injury.

So in *Malone v. Boston & A. R. Co.*, 51 Hun, 532, it was held that a

was held that it is not lack of ordinary care to "kick" a car upon switch tracks in a yard used for storage and making up of trains without first ringing the bell or giving a signal, or stationing a flagman or brakeman so as to give warning, where a child about four years old is run over by a freight car.

And in *Missouri Pac. R. Co. v. Porter*, 78 Tex. 304, it was held that the failure to signal a crossing by bell or whistle falls to show negligence on the part of the railroad contributing to the injury of a boy walking on the track on the railroad right of way, where it is not shown that he was killed at a crossing, nor the circumstances under which he was struck by the train.

In *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 34 Am. Dec. 457, it was held that the mere failure to give signal of starting of a car on the right of way is not negligence even if an infant seven years of age is injured, as ordinary care admits the presumption that they will not be on the company's land.

## VI. Speed.

The question of negligence is one for the jury where a railroad train passes through a city at excessive speed or at such speed as to be incapable of control, whereby an infant on the track is injured, especially where such speed is contrary to statute or city ordinance. (Age three years) *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; (age six years) *Tobin v. Missouri Pac. R. Co.* (Mo.) Nov. 23, 1891; (age sixteen months) *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357; (age ten years) *Haas v. Chicago & N. W. R. Co.* 41 Wis. 44; (age eight years) *Ewen v. Chicago & N. W. R. Co.* 38 Wis. 613; *Grethen v. Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609; (age six years) *Central Trust Co. of New York v. Wabash, St. L. & P. R. Co.* 31 Fed. Rep. 246; (age eight years) *Pennsylvania R. Co. v. Lewis*, 79 Pa. 38; *Dunseath v. Pittsburg, A. & M.*

contributory negligence, and it must follow that, unless the negligence of his mother can be imputed to him, there is nothing to bar his recovery. Conceding, only for the purposes of this discussion, that the mother was guilty of contributory negligence in going to the well, and leaving her infant child in the house, without closing the door, and also conceding, what is intimated in *Manly v. Wilmington & W. R. Co.*, 74 N. C. 655 (and indeed is well sustained by the authorities), that, if it be contributory negligence, it would defeat an action brought by the parent, we are not prepared to accept the doctrine which obtains in some few jurisdictions, that such negligence can be so imputed to the child as to defeat an action, when brought in its own behalf. As the question has never been passed upon in this state, it may not be inappropriate to quote at length from some of the leading authorities upon the subject:

The imputation of the negligence of parents and guardians to children of tender age is, says Shearman & Redfield on Negligence (volume 1, § 74), an invention of the supreme court of New York in the leading case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 278, and has been followed in many of the decisions of that state, although it is said by these authors to be founded upon a *dictum* which has only been assumed to be the law by the court of last resort, but never squarely presented to that tribunal for decision. And they further remark that it may well be doubted whether the question has ever been fully argued anywhere, and that the result of their examination of the cases is to satisfy them "that the last of the long series of so-called 'decisions' on this point is, like the first, a mere *dictum*, uttered without hearing argument and without consideration." Some of the decisions approving the doctrine are based upon the ground that the parent must,

*Traction Co. 161 Pa. 124; (age five years) Chicago & A. R. Co. v. Gregory*, 58 Ill. 226.

And the same was held where the speed is excessive at a crossing where children were accustomed to cross and infants were injured. (Age eight years) *McGovern v. New York Cent.*; & *H. R. R. Co. 67 N. Y. 418; (age nine years) Powell v. New York Cent. & H. R. R. Co. 22 Hun, 56; (age under fourteen years) Georgia Midland & G. R. Co. v. Evans*, 87 Ga. 678.

And in *Pittsburg, Ft. W. & O. R. Co. v. Bumstead*, 48 Ill. 221, 95 Am. Dec. 539, it was held that it is gross negligence for a fast train to run into a push car, wrongfully loaned to private parties by an agent, which car was plainly in sight for more than a mile, causing injury to a four-year-old boy on the road near by, where signals were given in time to stop the engine.

#### VII. *City.*

The question of care required of railroad employees to prevent injuries in cities is already mentioned under sub-heads, "*Lookout*," "*Speed*," etc., but it may be generally stated that greater care is required in running the train where children are expected to be met with than in other places, especially where crossings are blockaded; and the question of negligence is one for the jury if the crossing is unreasonably blockaded, or cars have been allowed to remain a longer time than permitted by ordinance or statute, and reasonable care is not used in moving the train. (Age seven years) *Rauch v. Lloyd*, 81 Pa. 363, 73 Am. Dec. 747; (age five years) *Cumming v. Brooklyn City R. Co.* 104 N. Y. 666; (age nine years) *Pennsylvania R. Co. v. Kelly*, 81 Pa. 372; (age nineteen years) *Cleveland, O. C. & St. L. R. Co. v. Keely (Ind.)*, May 11, 1894; (age nine years) *Schmits v. St. Louis, I. M. & S. R. Co.* 28 I. R. A. 250, 119 Mo. 262.

And in *Bannon v. Baltimore & O. R. Co.*, 24 Md. 106, it was held that a railroad company is required to use such diligence and care as prudent and discreet persons would use having due regard to the safety of the train where a child seven years old was injured on a Y in the city; but the infancy of the plaintiff does not change the degree of care or diligence to be used by the defendants in the management of their cars.

So in *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 455, it was held that a railroad company running its cars through a populous street on which many children live must omit nothing which can be done to prevent injury to children. A child two years

and ten months old was killed by the company running uncoupled cars.

In *Chicago, St. L. & P. R. Co. v. Welsh*, 118 Ill. 585, it was held that where a child seven years old was on the sidewalk and a switch engine violently pushed some cars so that they ran over the end of the track unprotected by a bumper and injured the child, the only question is, Was the defendant negligent in regard to the cause of the injury?

But in *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671, it was held that there is no negligence where a girl about nine years old was injured by attempting to cross between cars through a passage twenty inches wide not on a crossing, and the employees did not know that the child was attempting to cross.

And in *Moore v. Pennsylvania R. Co.*, 99 Pa. 201, 44 Am. Rep. 106, it was held that a railroad company owes no greater duty to a boy ten years old than to an adult, and is not subject to take precautions against any class of persons who walk along its tracks on the bed of a public street in a city.

In *New York Cent. & St. L. R. Co. v. Mushrush (Ind.)*, June 7, 1894, it was held that failure to keep a station platform reasonably safe is negligence, where a boy twelve years old went to meet his sister and stumbled on the platform and fell under the train and was killed.

So in *Louisville, N. O. & T. R. Co. v. Hirsch*, 69 Miss. 126, it was held that inviting passengers to approach its depot, across its tracks, imposes on a railroad company strong obligation to exercise the utmost care and caution in the movement of its trains, and the handling of its cars so as to prevent injuries to persons going to and from its offices, and this applies where two children aged respectively seven and fourteen years old were injured.

It was said in *Mobile & M. R. Co. v. Crenshaw*, 65 Ala. 566, that ordinary negligence as to a person of full capacity might be gross negligence as to a child, where a child between five and six years old at a depot ran up to the rear of a freight train and caught hold of the rear bumper and was injured.

But in *Baltimore & O. R. Co. v. Schwinding*, 181 Pa. 268, 47 Am. Rep. 706, it was held that a railroad company owes no duty to a boy five years old standing on depot platform for his own amusement and there can be no negligence without a breach of duty.

See also *Lookout*, *supra*.

#### VIII. *Foot caught.*

The question of negligence is one for the jury where a child caught his foot on the track on a

in law, be deemed the agent of the child, while others put it upon the ground that the child is identified with its parent or guardian,—“a legal fiction which led to the famous and now exploded decision of *Thorogood v. Bryan*, 8 C. B. 116,” recently overruled by the English appellate court in *The Bermina*, L. R. 12 Prob. Div. 58; 1 Shearman & Redf. Neg. §§ 66-75. In reviewing the case of *Hartfield v. Roper*, *supra*, Mr. Beach says that the doctrine, as applied to children too young to exercise discretion, is an anomaly, and in striking contrast with the case of a donkey which is carelessly exposed in the highway, and negligently run down and injured, and also with the case of oysters carelessly placed in the bed of a river, and injured by the negligent operation of a vessel, in both of which cases actions have been maintained. And he forcibly observes that, under the principle referred to, “the child, were he an ass or an oyster, would secure a

protection which is denied him as a human being of tender years.” This author, in his examination of the doctrine, remarks as follows: “It is not true that an infant is not *sui juris*. In the sense of being entitled to maintain an action for his own benefit, he is *sui juris*. As far as his right of action is concerned, he is in no respect the chattel of his father. . . . The judgment [when suing by guardian or next friend], if any is recovered, is the property of the minor. It is recovered to his sole use. It is an entirely false assumption, in *Hartfield v. Roper*, that the parent or guardian may recover heavy verdicts for their own misconduct. Again, it is assumed in that opinion that an infant injured by the joint negligence of his parent and a third person can have legal redress against the parent. It is much more fit, says the court, ‘that he should look for redress to that guardian.’ If this be so,—if the right of the infant be so distinct from the duty of

crossing and was injured by a train. (Age twelve years) *Friess v. New York Cent. & H. R. R. Co.* 97 Hun, 205; (age fourteen years) *Brown v. Pennsylvania R. Co.* 15 Phila. 321; (age under fourteen years) *Spooner v. Delaware, L. & W. R. Co.* 118 N. Y. 22.

Or in a switch. (Age eleven years) *Burnett v. Burlington & M. R. R. Co.* 16 Neb. 332; (age seven years) *Townley v. Chicago, M. & St. P. R. Co.* 53 Wm. 693.

Or in the track. *Pennsylvania R. Co. v. Morgan*, 63 Pa. 124.

In Louisville, N. A. & C. R. Co. v. Red, 47 Ill. App. 662, it was held that where a statute requires a railroad company to have public crossings safe, the company will be presumed to know their condition, and if the statute has been neglected and a boy falls in front of a train from stepping in a hole in the crossing, the company will be held bound to exercise such diligence as the safety of persons at unsafe crossings demands.

But in *Gresham v. Louisville & N. R. Co.*, 15 Ky. L. Rep. 599, it was held that the failure to stop the train at a crossing as required by statute, by reason of which failure a boy twelve years old trespassing, who had caught his foot and fallen in front of the train, was injured, when the train could not have been stopped in time to save him after he tried to cross the track will not render the company liable.

#### IX. Sudden appearance of child.

There is no negligence on the part of a railroad company if a child suddenly appears in front of the train and receives an injury which could not have been prevented by the company. (Age sixteen years) *Little Rock & Ft. S. R. Co. v. Cullen*, 54 Ark. 451; (age six years) *Renson v. Central Pac. R. Co.* 98 Cal. 45; (age twenty months) *Pennsylvania Co. v. Davis*, 4 Ind. App. 51; (age eleven years) *Baltimore & O. R. Co. v. State*, 71 Md. 590; (age nine years) *Galveston, H. & S. A. R. Co. v. Chambers*, 73 Tex. 286.

In *Chicago & A. R. Co. v. Becker*, 76 Ill. 25, it was held that there is no negligence where the whistle was blown and bell rung as required by law and a boy about seven years old ran across in front of the train and stumbled and fell on the rail in front of the engine and the injury could not have been avoided.

But in *Chicago & A. R. Co. v. Becker*, 54 Ill. 453, it was held that there was negligence if the speed was unlawful.

In *Barkley v. Missouri Pac. R. Co.*, 36 Mo. 367, it was held that a railroad company is not guilty of carelessness or want of ordinary care where a boy

six years old is between the tracks at a depot going straight forward in the same direction as the train and there is five feet ten inches between the tracks, and the boy turns, retraces his steps and stumbles, throwing an arm over the rail, and the train passes over it.

#### X. Projecting timber or car.

A railroad company must exercise reasonable care for the safety of persons on the track and prevent injury from projecting timbers. (Age between twelve and fourteen years) *Hicks v. Pacific R. Co.* 64 Mo. 430.

But in *Central Railroad v. Brinson*, 70 Ga. 207, where a fifteen-year-old boy in walking on a path was struck by a projecting timber, the case was reversed for error in the following charge: “If damage happen to such other person by a collision which the company by the use of ordinary care might have prevented, the company must make good the damage.”

And in *Philadelphia & R. R. Co. v. Heil*, 5 W. N. C. 91, it was held that there was no negligence shown from the fact that the car axles on a double track in a narrow street extended over the sidewalk and killed a five-year-old child who was walking on the pavement in a direction opposite the train, there being no excessive speed or failure to keep lookout.

#### XI. Gross negligence.

Whether the degree of care was used that exempted the railroad company from the charge of gross negligence, is a question for the jury. (Age four years) *Sabine & E. T. R. Co. v. Hanks*, 2 Tex. Civ. App. 303. See *Trinity & S. R. Co. v. Lane*, 79 Tex. 642.

Prior to 1887 a railroad company was only liable for gross negligence. *Sabine & E. T. R. Co. v. Hanks*, 73 Tex. 324.

And in *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531, it was held that a railroad company is liable if a boy nine years old is recklessly or wantonly run over, while wrongfully on the track.

The question of trespass of child affecting the company's duty towards such child will be fully treated in a note on contributory negligence of children and has only been referred to in the above note where made necessary.

In the preparation of this note cases turning upon the question of contributory or imputed negligence have been omitted.

The authorities upon the question of imputed negligence will be found in a note to *Chicago City R. Co. v. Wilcox* (Ill.) 31 L. R. A. 76. L. T.

the parent that the relation of parent and child is not an objection to the maintenance of such a suit,—then the whole theory upon which this class of cases rests falls to the ground. Again, it is falsely assumed that the parent is the agent of the child. . . . The relation of child and parent is not the relation of principal and agent. Neither is it analogous to it. The child does not appoint his father. He has no control over his acts. He cannot remove him from power, or appoint another in his stead. He has no right of action against him. Every element of agency is wanting. The want of any one of these elements is sufficient to prevent the acts or omissions of the parent from being viewed as the acts or omissions of the child, upon any analogy to be drawn from the law of agency. By the common law a child cannot appoint an agent. The authority by which the parent exercises control over the child is therefore an authority derived from the law. It is a principle of law laid down before 'the spacious days of great Elizabeth' that the abuse of an authority derived from the law shall not work harm to, or prejudice the rights of, the person subjected to it. The parent's authority is given for the protection of the child, but the principle of *Hartfield v. Roper* turns the shield into a sword, and uses it to deprive the child of the very protection arising from the parental relation." Beach, *Contrib. Neg.* 2d ed. § 123. In *Wood on Railroads* (section 822) it is said: "The doctrine announced in this case [*Hartfield v. Roper*] has been followed in some jurisdictions; but the modern tendency is to reject it, and to hold the negligent injurer liable for the consequences of his own wrongful act, regardless of the contributory negligence of the child's parent or guardian." Bishop, in his work on *Noncontract Law* (section 552), emphatically rejects the doctrine, and observes that it is "as flatly in conflict with the established system of the common law as anything possible to be suggested." And an examination of the leading text-books which treat of negligence will disclose that it is also disapproved, as being contrary to principle and reason, as well as the rapidly accumulating weight of authority. *Whart. Neg.* 312-314; *Pollock, Torts*, 299; *Cooley, Torts*, 681; 2 *Thomp. Neg.* 1184; *Shearm. & Redf. Neg. supra*; *Beach, Contrib. Neg. supra*.

In Tennessee the doctrine is denounced as being opposed "to every principle of reason and justice" (*Whirley v. Whiteman*, 1 Head, 610); and in Pennsylvania it is declared to be "repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil." *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 8 Am. Rep. 628.

In *Newman v. Phillipsburg Horse Car R. Co.*, 52 N. J. L. 446, 8 L. R. A. 842, *Chief Justice* Beasley, after exposing the fallacy of basing the doctrine on the ground of agency, demonstrates its untenableness by conducting us to the rather absurd conclusion of making an infant in its nurse's arms answerable for all the negligence of such nurse while thus employed in its service. "Every person so 25 L. R. A.

damaged by the careless custodian would be entitled to his action against the infant. If the neglect of the guardian is to be regarded as the neglect of the infant, as was asserted in the New York decision, it would, from logical necessity, follow that the infant must indemnify those who should be harmed by such neglect."

In Vermont the subject was examined with much care in the leading case of *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, in which the court denied the doctrine of imputed negligence, as laid down in *Hartfield's Case*, and held that, although a child of tender years may be in the highway through the fault or negligence of his parents, and so improperly there, yet, if he be injured through the negligence of the defendant, he is not precluded from redress. "All," says *Judge* Redfield, in delivering the opinion, "that is required of an infant plaintiff, in such a case, being that he exercise care and prudence equal to his capacity." This rule is also laid down in *Washington & G. R. Co. v. Gladmon*, 83 U. S. 15 Wall. 401, 21 L. ed. 114, which is cited with approval in *Murray v. Richmond & D. R. Co.* 93 N. C. 92. "The 'Vermont rule,' as it is called," remark *Shearman & Redfield*, "commends itself to our judgment and is abundantly justified by the reasoning of the courts which have adopted it. . . .

It should be fully applied to such cases, giving to defendants who suffer from its hardships the same consolation which courts administer to plaintiffs when consulting them,—that their case is very hard, and deserves sympathy, but that the law must not be relaxed to meet hard cases." "If, where one of two innocent persons must suffer, the law puts the loss, as it justly does, upon the one who has, by some negligence, enabled the wrong to be done, surely, when there are two guilty persons in the transaction, the law should not leave the only innocent one to suffer, as it practically does, by referring him to his parent or guardian for an injury of which a stranger has been the principal cause." Sections 77, 78. "No injustice can be done to the defendant by this limitation of the defense of contributory negligence, since the rule itself is not established primarily for his benefit, and he can never be made liable, if he has not been himself in fault." Section 78.

The doctrine of *Hartfield v. Roper* has also been denied in Pennsylvania, Ohio, Connecticut, Missouri, Nebraska, Alabama, Tennessee, Texas, Georgia, Louisiana, Illinois, Iowa, Maryland, Michigan, Mississippi, New Hampshire, Virginia, and perhaps in other states, while some of the courts which have heretofore adopted the rule are subjecting it to so many qualifications, in order to escape its harshness and injustice, that but little of its original similitude remains. *Pratt Coal & I. Co. v. Brawley*, 88 Ala. 371; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 418; *Ferguson v. Columbus & R. Co.* 77 Ga. 102; *Chicago City R. Co. v. Wilcox*, 88 Ill. App. 450; *Wymore v. Mahaaka County*, 78 Iowa, 396, 6 L. R. A. 545; *Westorfield v. Lewis*, 43 La. Ann. 63; *Baltimore City Pass. R. Co. v. McDonnell*, 43

Md. 534; *Shippy v. Au Sable*, 85 Mich. 280; *Westbrook v. Mobile & O. R. Co.* 66 Miss. 560; *Winters v. Kansas City Cable R. Co.* 99 Mo. 509, 6 L. R. A. 586; *Huff v. Ames*, 16 Neb. 189, 49 Am. Rep. 716; *Bisailon v. Blood*, 64 N. H. 565; *Cleveland, C. C. & I. R. Co. v. Manson*, 30 Ohio St. 451; *Smith v. O'Connor*, 48 Pa. 218, 86 Am. Dec. 582; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 265; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 455. These numerous authorities, which we have thought proper to cite, very abundantly sustain the position enunciated by the Supreme Court of the United States, and adopted by this court in *Murray v. Richmond & D. R. Co. supra*,—that, in the law of negligence, the degree of care and discretion required of an infant of tender years “depends upon his age and knowledge;” and they also sustain the position that where the child is too young, as in this case, to exercise any discretion whatever, the negligence of his parent or other custodian, in permitting him to escape, and place himself in a perilous position, will not be imputed to him, so as to defeat his action for damages sustained by reason of the negligence of another. There is nothing in *Murray’s Case, supra*, which at all conflicts with this view. The plaintiff was nearly eight years of age, and of sufficient discretion to understand the danger to which he had exposed himself; and, under the circumstances, the court held that he could not recover. The authorities quoted in the opinion, so far as they have any bearing upon this case, are in support of the view we have taken. Our attention, however, was called to a part of the opinion, purporting to be founded upon a paragraph in a former edition of *Shearman & Redfield*, to the effect that while an infant should be held to a degree of care only as is usual among children of his age, yet, “if his own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of injury,” he cannot recover. In the fourth and later edition (section 78) of the same work this passage is reproduced with the following comments: “It was held in some English cases that if a child’s own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of danger, the latter cannot recover damages. But these decisions have been condemned in England, and are directly opposed to the current of American cases. The law has been settled to the contrary in America by the famous series of *Turntable Cases*, in which railroad companies have been held liable by the federal supreme court, as well as by several state courts of last resort.” While the passage is really inapplicable to cases like the present, but only, it seems, to those in which, like the *Turntable Cases*, the child meddles with something which is perfectly harmless if let alone, and he thus “directly” brings the injury upon himself, we have nevertheless thought it best to show that, in the opinion of the learned authors, the proposition stated in the former edition of their valuable work is not sustained by the weight

of authority. Neither is there anything in *Meredith v. Richmond & D. R. Co.* 106 N. C. 616, cited by counsel, which approves of the principle of imputable negligence. The question was not before us, but what was said *arguendo*, assimilating a child apparently too small to appreciate its danger to persons who are apparently helpless on the track, in respect to the duty of the engineer to use all available means to avert a collision, is really in support, rather than in contradiction, of the views we have expressed in this opinion.

We commend the charge of his honor upon the first issue as a correct exposition of the duty of railroad companies in moving their trains, and especially the limitations with which it is accompanied. The use of the words “ordinary care,” unattended with explanation, would have been obnoxious to the authorities in this state. *Emry v. Raleigh & G. R. Co.* 109 N. C. 589, 15 L. R. A. 832. But as it is apparent, from the instructions, that they were used to indicate a vigilant lookout, and also the exercise of all efforts within the power of the engineer to stop the train, we do not see how they could have prejudiced the defendant. Indeed, no objection to the charge, in this particular, was made on the argument; and this, we suppose, for the reasons we have given. Under these instructions, it has been found that the defendant has been guilty of negligence, and as we are of the opinion, upon the admitted facts, that the plaintiff was incapable of contributory negligence, the judgment of the court below must be sustained; and it therefore becomes unnecessary to consider the learned argument of defendant’s counsel upon the subject of contributory negligence, in its relation to what is commonly known as the “rule of *Davis v. Mann*,” 10 Mea. & W. 545.

#### *Affirmed.*

**Clark, J.**, filed the following opinion:

I concur in the conclusion reached, but dissent from some of the reasons given. The judge charged the jury—I think, correctly—that: “If the defendant, by the exercise of reasonable care and prudence, could have discovered the child on the track in time to have stopped the train, it was its duty to have done so; or if the defendant, in the exercise of reasonable or ordinary care and prudence, could have discovered that a child of the age of 22 months, or very small, was going towards the track, or running along very near it, so as to render it probable that it would go on the track, and discovery could have been made in time to have stopped the train, it was defendant’s duty to stop, and defendant would be guilty of negligence in failing to stop. The engineer has a right to suppose that an adult will leave the track, and continue the speed; but when a child, without discretion or intelligence, is seen, or could have been seen, its presence must be regarded. If the child came on the track suddenly or unexpectedly, so near ahead of the train that it could not be discovered in time to stop the train, in the exercise of ordinary care, then there is no negligence; or if it came on the

track when the engineer and fireman were engaged in their necessary duties in the cab, and they were engaged long enough to prevent them from observing the child, then there was no negligence. The engineer's first duty to passengers is to keep his engine in proper condition, and also to keep a proper lookout on the track, and for objects so near it as to make their presence a probable obstruction or interruption. If the sight of the child was prevented by the necessary attendance by the engineer and fireman to matters inside the cab, and this continued until the time they reached the child, or came so near it that the engine could not be stopped, in the exercise of ordinary care, the defendant would not be guilty of negligence." And upon that instruction the jury found against the defendant. While the general underlying principles of the law do not change, their application, in the changing conditions of life, and the progress and development of the age, must change. Originally, when air brakes were unknown, and even after they were first introduced, a railroad company would not have been held liable for an injury caused by not stopping within the distance air brakes would have made possible. The law is otherwise now. So, recently, congress, by an enactment, has followed some courts, and anticipated others, by making railroad companies liable, after a given date, for all injuries caused by failure to use automatic couplers on freight as well as on passenger cars. And there are many similar instances of the progress of the law hand in hand with the progress and development of the times. So, when the speed of railway trains was a fraction of what it is now, and the population sparse, it was not recklessness to fail to keep such a lookout as is now necessary to prevent accidents. But now that the number and speed of railway trains are vastly in-

creased, and the population of the country also, a better lookout is required. A failure to keep a lookout, which, in a given case, the jury find would have prevented an accident, notwithstanding the negligence of the plaintiff in being helpless on the track, is recklessness in a high degree. It has always been held, and by all courts, *semper et ubique*, that though the plaintiff has been negligent, if, notwithstanding that fact, injury by the defendant could have been avoided, but the defendant, through recklessness or wantonness, committed the injury, the defendant is liable. There is no disposition in the courts to throw restrictions around railroads in the free use of their tracks. They are becoming more and more important. Over their tracks roll daily the commerce of a people,—the transportation of a continent. But with development comes the duty of increased care to avoid injury. Air brakes, automatic couplers, Miller platforms, electric headlights, heavier rails, and other improvements, permit accelerated speed, and the public demands it. But with the increased speed comes the duty of a better lookout. It is recklessness not to have it. The company should be held liable for every injury which could be avoided by a proper lookout, whether as to passengers, children, livestock, or people temporarily disabled, and lying on the track. As to whatever it strikes, a railroad engine is as deadly as a cannon ball. When there is target firing, though due notice is given, if a drunken man wanders across the field of fire, and is lying asleep at foot of the target, but by proper lookout could be seen, yet, for want of it, he is struck and killed, I apprehend this would be deemed recklessness. The same holds true as to a drunken man down and helpless on the track, when, by keeping a proper lookout, he would be seen, and his death or injury avoided.

## NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *Resp't.*,  
v.

Charlotte EWER, *App't.*

RE Petition of Charlotte EWER for  
Writs of Habeas Corpus and Certiorari.

(141 N. Y. 129.)

### 1. A statute prohibiting the employment or exhibition of girls under four-

teen years of age as dancers or in theatrical exhibitions is not invalid as taking away from parents the right to employ their children in any lawful occupation but is an exercise of the power of the state as *parens patrie* to protect the physical, mental, and moral welfare of children-

### 2. A prohibition by the New York Penal Code, § 292, of the exhibition as a dancer or in theatrical performances of a girl under fourteen applies to all public exhibitions or shows and not merely to exhibitions which of-

NOTE.—The protection of the rights and interests of children is so fully recognized to be the duty of the state, that courts have adopted very generally the rule that a child's welfare is the controlling consideration in determining a disputed right to its custody. See *Sheers v. Stein* (Wis.) 5 L. R. A. 781, and note; *Weir v. Marley* (Mo.) 6 L. R. A. 672; *Re Lally* (Iowa) 16 L. R. A. 681; *Nugent v. Powell* (Wyo.) 20 L. R. A. 199.

In addition to this the right of the state itself to assume the guardianship of neglected or abused children is established. See *Whalen v. Olmstead* 25 L. R. A.

(Conn.) 15 L. R. A. 503, and note; also *Van Walters v. Board of Children's Guardians of Marion County* (Ind.) 18 L. R. A. 481.

The statutes which prohibit the employment of children for excessive hours, or in improper employments, as well as those which prohibit the sale to them of intoxicating liquors, all of which are closely akin to that upheld in the above case, seem to be fully acquiesced in without any challenge of their constitutionality.

As to statute prohibiting minors to enter bars-rooms, see *State v. Austin, ante*, 283.



feed against morals or decency or endanger life or limb.

(January 30, 1894.)

**A** PPEAL by petitioner from an order of the General Term of the Supreme Court, First Department, affirming an order of the Special Term for New York County overruling demurrers to returns of writs of habeas corpus and certiorari to obtain the release of petitioner from the custody of the warden of the city prison in the city of New York, to which she had been committed for violating the statute against permitting her child to perform in a theatre. *Affirmed.*

Statement by Gray, J.:

Charlotte Ewer was arrested, upon a police magistrate's warrant, charged with a misdemeanor in violating section 292 of the Penal Code, by exhibiting her child, Mildred Ewer, as a dancer at the Broadway Theatre, in New York City. The examination before the magistrate sustained the charge, and showed that she was of the age of seven years and went by the stage name of "La Regal-oncita;" that she was clad in the usual style of the ballet dancer, in a low-necked, sleeveless and short dress, and wore purple tights; that she danced upon the stage to the music of an orchestra, elevating her legs, moving upon her toes and posturing with her figure. Her mother, being held upon the charge, sued out writs of habeas corpus and certiorari, to which the magistrate made return of his proceedings, etc. The prisoner demurred to the return, alleging that there were no sufficient grounds for holding her and that the statute under which she was arrested was unconstitutional. The provisions of the code under which this arrest was made read that "a person who . . . exhibits . . . a female child, apparently or actually under the age of sixteen years, . . . or who, having the care, etc., of such a child, as parent, etc., . . . in any way consents to the employment or exhibition of such a child, either as . . . a dancer . . . or in a theatrical exhibition . . . or in any . . . exhibition dangerous or injurious to the life, limb, health, or morals of the child, . . . is guilty of a misdemeanor." At the special term the writs were dismissed and the prisoner was remanded. The order of that court was affirmed at the general term, and the defendant has appealed to this court.

**Messrs. A. J. Dittenhoefer and David Gerber**, for appellant:

The portions of section 292 of the Penal Code under which the appellant was held are void for the reason that they deprive a person of his natural and inalienable rights.

The parent is entitled by the law of nature to the custody of his child.

The father's duty to maintain and educate the child carries with it the right to its custody and services.

*Ramsey v. Ramsey*, 6 L. R. A. 683, 121 Ind. 215.

The duty of the parent extends to providing the child with a profession or trade, and it is a legitimate exercise of parental authority to compel the child to labor for his subsistence. 25 L. R. A.

*Fraser, Parent & Child*, 2d ed. pp. 72, 73.

This right of the parent is founded in nature and the care which it is presumed they will take of their children. If the confidence on which this presumption rests is misplaced, or if the parent is unable or unwilling to execute his duty, the state may of necessity interfere.

*Fraser, Parent & Child*, 2d ed. pp. 77-79; *De Manneville v. De Manneville*, 10 Ves. Jr. 52.

In *Ex parte Skinner*, 9 Moore, C. P. 278, it was held that the jurisdiction of the king as *parens patriæ*, vested absolutely in the court of chancery, that that court decided (*Re Curtis*, 28 L. J. Ch. 458) that it could not interfere with the rights of a father unless he so conducted himself as to render it essential to the safety and welfare of the child, either physically, intellectually, or morally, that it should be removed from his custody.

*Re Fynn*, 2 DeG. & S. 457, 12 Jur. 718.

In this country the state surely cannot have greater rights over infants than were vested in the king.

*People v. Turner*, 55 Ill. 280, 8 Am. Rep. 643.

This act cannot be upheld on the ground that there may perchance once in a while occur a case where acting or dancing would prove injurious to a child's health or morals.

The act is not a valid exercise of the police power of the state.

When an act does not purport to be a regulation aimed at the public health it cannot be sustained as a police law.

The provision that forbids a child from engaging in a lawful and harmless theatrical exhibition or dance clearly has no relation to the public health, comfort, or safety. The rights of persons and property cannot be invaded under the guise of a police regulation for the protection of health when it is manifest that such is not the object of the regulation.

*People v. Rosenberg*, 188 N. Y. 410; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 899; *People v. Marx*, 90 N. Y. 877, 52 Am. Rep. 84.

This statute is a violation of the right to liberty secured by the constitution to all persons—including children.

*Mill, Liberty*, pp. 27, 28; *Smith, Wealth of Nations*, B. 1, chap. 10, pt. 2; *Kent, Com.* pp. 1-8; 2 *Story, Const.* 5th ed. pp. 697, 698; *People v. Gillson*, 109 N. Y. 400; *Re Jacobs*, 98 N. Y. 106, 50 Am. Rep. 636; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 823; *Wynhamer v. People*, 18 N. Y. 420; *Live Stock D. & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. U. S. 398; *Slaughter-House Cases*, 83 U. S. 16 Wall. 116, 21 L. ed. 421.

In *Re Maguire*, 57 Cal. 604, 40 Am. Rep. 125, the supreme court of California held it to be unconstitutional to prevent females from pursuing a certain business, in the pursuit of which males were not disqualified.

In *Ex parte Kuback*, 9 L. R. A. 482, 85 Cal. 274, the act which prohibited the employment of Chinese in certain trades was held unconstitutional as an unlawful discrimination.

**Messrs. Delancey Nicoll, Dist. Atty., and Elbridge T. Gerry**, for the People:

The power of the legislature to regulate the

relations between parent and child has never before been questioned.

The state as *parens patrie* has the absolute control and regulation of its children.

5 Rollin, Ancient History, art. 7; Maine, Ancient Law, 160; Pritchard and Nasmi's Ortolan, 602; *Cary v. Bertie*, 2 Vern. 842; Stanford's Exposition of the King's Prerogative, (1548); Fraser, Parent & Child, 2d ed. p. 77.

The state delegates to parents as the natural guardians of the child its primary care and education, and with a view of preserving the rights of the latter compels the parent to so educate and train the child that its health and morals will be preserved.

Browne, Dom. Rel. 78; Laws 1874, chap. 421; *Cowley v. People*, 21 Hun, 415, affirmed, 88 N. Y. 464, 88 Am. Rep. 464.

The laws governing theatrical exhibitions of children forbid such exhibitions under the age of sixteen as the limit of such protection, and as the legislative result of an elaborate and careful investigation into the relative physical strength of children, which established the following facts: 1. The exhibitions prohibited are physically injurious to the children.

*People v. Meade*, 24 Abb. N. C. 357.

Case after case has occurred where these so-called gifted children were driven to an early grave.

In the next place, when such children are exhibited in the day time, they lose their education.

Again the associations are bad for the children.

It was to protect children from being used in these theatrical exhibitions in order to make money for their parents or guardians that the law now assailed was passed, just as it forbids their use in begging, peddling, or in factories.

The power of a father at this age is conferred, not as a right of dominion, or even as a privilege for the father's own benefit or pleasure; but merely for the benefit and guidance, and comfort of the child.

Fraser, Parent & Child, 2d ed. p. 67.

There is no legal obligation resting upon a child to support a parent; while the parent is bound to supply the necessities to an infant child, an adult child, in the absence of positive statute, or a legal contract on his own part, is not bound to supply necessities to his aged parent.

Schouler, Dom. Rel. 8d ed. § 265; Field, Infants, § 48; *Edwards v. Davis*, 16 Johns. 281.

This court has uniformly upheld the police power of the legislature when enacting laws for the protection of the public health or morals.

Skim-milk Act (*People v. West*, 106 N. Y. 293, 60 Am. Rep. 452; *People v. Kibler*, 106 N. Y. 823); The Lottery Advertising Act (*Hart v. People*, 26 Hun, 396); The Clean Sidewalks Act (*Carthage v. Frederick*, 10 L. R. A. 178, 122 N. Y. 268); The Act Regulating the Height of Buildings (*People v. D'Oench*, 111 N. Y. 359).

The police power was also expressly sustained in *Bertholf v. O'Reilly* (Civil Damage Act), 74 N. Y. 509, 30 Am. Rep. 328; *Phelps v. Racey* (Game Law), 60 N. Y. 10, 19 Am. Rep. 140; *People v. Gallagher* (Colored Schools), 98 N. Y. 438, 45 Am. Rep. 232; *People v. King* (Civil Rights), 1 L. R. A. 293, 110 N. Y. 418; 25 L. R. A.

*People v. Budd* (Grain Elevator Charges), 5 L. R. A. 559, 117 N. Y. 1; *Lawton v. Steele* (Fishing Law), 7 L. R. A. 184, 119 N. Y. 226; *People v. Arensburg* (Oleomargarine), 105 N. Y. 123, 59 Am. Rep. 483; *People v. Rosenberg* (Fat Rendering), 188 N. Y. 410.

Even in the cases where enactments were held unconstitutional, this court has been uniformly consistent in disclaiming any right to question the discretion of the legislature as to the methods and expedients adopted to protect the public health or morals, when legislating upon those subjects.

*Re Jacobs*, 98 N. Y. 96, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 839; *People v. Marz*, 99 N. Y. 877, 52 Am. Rep. 84; *People v. Rosenberg*, 188 N. Y. 410.

The law whose validity is here assailed is fairly, clearly, and wholly within the subject of the public health and morals, and so within the power of the legislature to enact.

*People v. King*, 1 L. R. A. 293, 110 N. Y. 427.

The courts of this state have uniformly held all acts intended for the prevention and punishment of wrongs to children to be constitutional. They are in the nature of public regulations to prevent as well as to punish crime.

*People v. Forbes*, 4 Park. Crim. Rep. 611; *Duffy v. People*, 1 Hill, 355, 6 Hill, 75; *Re Donohue*, 1 Abb. N. C. 1.

Gray, J., delivered the opinion of the court:

The question we shall determine upon this appeal is, whether the statute under which the appellant was arrested violates any just and personal rights secured to her by the constitution of the state. If it is such an interference with the legal relation of parent and child as exceeds the limits within which the legislature, exercising the sovereign power of the state, may regulate and control that relation, then it is the duty of the courts to declare its unconstitutionality. But if it is within a proper and legitimate exercise of legislative functions the courts may not interfere.

This question falls within those which are classified under the head of the police power of the state. The extent of the exercise of that power with which the legislature is invested, and which it has so freely exerted in many directions within constitutional limits, is a matter resting in discretion; to be guided by the wisdom of the people's representatives. It is difficult, if not impossible, to define the police power of a state; or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed. It is a power essential to be conceded to the state in the interest and for the welfare of its citizens. We may say of it that when its operation is in the direction of so regulating a use of private property, or of so restraining personal action as manifestly to secure or to tend to the comfort, prosperity or protection of the community, no constitutional guaranty is violated, and the legislative authority is not transcended. But the legislation must have some relation to these ends; for, to quote the expressions of Mr. Justice Field in the *Slaughter-House Cases*, 89

U. S. 16 Wall. 36, 21 L. ed. 394, "under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded." In *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, it was well observed by Judge Andrews: "By means of this power the legislature exercises a supervision over matters affecting the common weal. . . . It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community, and the propriety of its exercise, within constitutional limits, is purely a matter of legislative direction, with which courts cannot interfere." The assumption of the exercise of this extraordinary and very necessary power has been the subject of severe criticism in the opinions of judges when it has been sought thereby to regulate and control, in the interest of the public, the conduct of corporate or individual business transactions. *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 97, may be referred to as starting a current of authority in this country. But no such criticism can find just grounds for cavilling at legislation whose ends clearly tend to promote the health or moral well being of the members of society. To that class of legislation this statute belongs. By preventing the exhibition of children of tender and immature age upon the theatrical or other public stage, the legislature is exercising that right of supervision and control over the child, which, in every civilized state, inheres in the government, and which nothing in the legal relations of parent and child should be deemed to forbid. The proposition is indisputable that the custody of the child by the parent is within legislative regulation. The parent, by natural law, is entitled to the custody and care of the child, and, as its natural guardian, is held to the performance of certain duties. To society, organized as a state, it is a matter of paramount interest that the child shall be cared for, and that the duties of support and education be performed by the parent or guardian, in order that the child shall become a healthful and useful member of the community. It has been well remarked that the better organized and trained the race the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment; and which limit and regulate the employment of children in the factory and the workshop to prevent injury from excessive labor. It is not, and cannot be disputed, that the interest which the state has in the physical, moral, and intellectual well-being of its members warrants the implication and the exercise of every just power which will result in preparing the child in future life to support itself, to serve the state, and in all the relations and duties of adult life to perform well and capably its part.

In the brief of the able counsel who appears for the people, and whose earnest efforts in behalf of the cause of humanity and of mercy have so distinguished him, the discussion of the subject upon these lines is quite full and interesting. Indeed, the learned counsel for the appellant does not, in

the main, contest the right and the duty of the state to protect and to promote by adequate legislation the health and morals of its citizens, but bases his arguments here upon the proposition, substantially, that the legislature cannot take from parents the right to employ their children in any lawful occupation, not indecent or immoral, or dangerous to life, limb, health and morals. That proposition may be readily conceded. It is true enough that if the court could say that this legislation was an arbitrary exercise of the legislative power, depriving the parent of a right to a legitimate use of his child's services; that, while ostensibly for the promotion of the well-being of children, in reality, it strikes at an inalienable right, or at the personal liberty of the citizen and but remotely concerned the interests of the community, it would be its duty to so pronounce and to declare its invalidity. But this legislation has no such destructive effect or tendency. It does not deprive the parent of the child's custody, nor does it abridge any just rights. It interferes to prevent the public exhibition of children, under a certain age, in spectacles or performances which, by reason of the place or hour, of the nature of the acts demanded of the child performer and of the surroundings and circumstances of the exhibition, are deemed by the legislature prejudicial to the physical, mental, or moral well-being of the child, and, hence, to the interests of the state itself. Take the facts of this case and they seem sufficiently to warrant the interference of the law. It is not necessary to reason upon them. The scanty dress of the ballet dancer, the pirouetting and the various other described movements with the limbs and the vocal efforts cannot be said to be without possible prejudice to the physical condition of the child; while, in the glare of the footlights, the tinsel surroundings and the incense of popular applause, it is not impossible that the immature mind should contract such unreal views of existence as to unfit it for the stern realities and exactions of later life. The statute is not to be construed as applying only when the exhibition offends against morals or decency, or endangers life or limb by what is required of the child actor. Its application is to all public exhibitions or shows. That any and all such shall be deemed prejudicial to the interests of the child, and contrary to the policy of the state to permit, was for the legislature to consider and say.

The right to personal liberty is not infringed upon, because the law imposes limitations or restraints upon the exercise of the faculties with which the child may be more or less exceptionally endowed. The inalienable right of the child, or adult, to pursue a trade is indisputable; but it must be not only one which is lawful, but which, as to the child of immature years, the state or sovereign, as *parens patriæ*, recognizes as proper and safe. It is not the strict moralist's view, dictated by prejudice, but the view from the standpoint of a member of the body politic, which ranges the judgment in support of legislative interference to restrain the parent from permitting an employment of the

child under circumstances deemed unsuited to its proper mental, moral, or physical development. In the judgment of the legislature it was deemed as unsuitable for the youth of the community, under a certain age, to dance or to perform in public exhibitions in the ways mentioned, as it was deemed unsuitable for them to work in the factory, except under certain limitations as to age, hours, etc.

We have not overlooked certain cases, referred to by the appellant's counsel, to show the invalidity of this legislation as an exercise of the police power of the state, or to show a violation of constitutional rights. They establish that the legislature has no right, under the guise of protecting health or morals, to enact laws, which bearing but remotely, if at all, upon these matters of

public concern, deprive the citizen of the right to pursue a lawful occupation. Such were the cases of *Re Jacobs*, 98 N. Y. 98, 59 Am. Rep. 636; *People v. Marr*, 99 N. Y. 577, 53 Am. Rep. 84; *People v. Gillson*, 109 N. Y. 889; *People v. Rosenberg*, 188 N. Y. 410.

We are referred to some cases in Illinois, but they are neither applicable nor authoritative upon the question before us.

Further discussion is unnecessary. We might have remained satisfied with the able and clear exposition of his views by the learned justice at the special term, had not the range taken by the arguments of counsel seemed to call for a brief expression by us of our view of the principle of state interference.

*The order should be affirmed.*

All concur.

### LOUISIANA SUPREME COURT.

#### RE Succession of Louise Marie REISS.

(.....La.....)

**\*Plaintiff, the mother-in-law, appeals from a judgment ordering her son-in-law to send his children, aged respectively six and eight years, issue of the marriage with her late daughter, to visit her, and directing, further that she shall visit the grandchildren at their father's home in alternate weeks, on such days as the parties may agree. She complains of the judgment in so far as she is to visit the children, and asks that it be limited to the imperative duty of the children to visit her. There is very little difference in principle between the parties as disclosed by the evidence. The husband does not deny the filial piety that is due by the children. Differences and incompatibilities have arisen shaking to the grandparent and that may prove painful, in course of time, to the children. The question is of first impression in the courts of this state. In France, under similar laws, the courts and commentators greatly differ upon the subject. There are well-considered decisions holding that the precept, "Honor thy father and thy mother," as embodied in the civil code, includes the grandmother or grandfather as a legal obligation. Other courts and certain writers lay down the principle that under a law of nature the child is under the authority of the father or mother alone, and that the law has conformed to natural law and that the judge has no authority to intervene. The court of the first instance has pronounced judgment based upon the principles that the parties in their testimony admit are correct, but which they have not followed. On appeal to this court it does not appear that there is cause for judicial intervention.**

(February 12, 1894.)

\*Headnote by BREAU, J.

**NOTE.**—The duty of parents to permit their children to visit grandparents, which is held in the above case "to be moral and not legal," is a question which seems to be here presented for adjudication for the first time in this country.

That the custody of children will be awarded with reference to the interests of the children, rather

**A PPEAL** by plaintiff from a decree of the District Court for the Parish of Orleans providing conditions upon which plaintiff, grandmother of the children of Louise Marie Reiss, should have the privilege of visiting with such children, the exercise of which privilege had been obstructed by Henry J. Rolling, Jr., the father of the children. *Judgment annulled for want of jurisdiction in the court.*

The facts are stated in the opinion.

*Mr. Aristee L. Tissot* for appellant.

*Mr. Bernard McCloskey* for appellee.

**Breaux, J.**, delivered the opinion of the court:

The father and tutor of two minor children, one eight and the other six years of age, is defendant in a rule issued at the instance of their maternal grandmother to compel him to send his children to visit her at her residence and domicile on such days and at such hours as the court may deem proper to determine. She alleges that he arbitrarily, wantonly, maliciously, and cruelly denies her the privilege of seeing her grandchildren, thus abusing parental authority, controllable by the courts. The defendant denies that he has refused to move in rule the privilege of visiting his children, and averred that he is willing that she shall visit his children. The judgment of the court *a quo* makes the rule absolute, and orders the father to send the children to visit their grandmother, and further orders that the grandmother shall visit the children at their father's home, in alternate weeks, on such days as the parties may agree, provided the visits do not in any manner interfere with the schooling of the children. Before this court the appellant asks that her rule be made absolute, commanding the defendant to send the children to visit her, without reference to any visit by her.

than to any absolute right of parents, is shown by *Sheers v. Stein* (Wis.) 5 L. R. A. 731, and note; *Weir v. Marley* (Mo.) 6 L. R. A. 672; *Whalen v. Olmstead* (Conn.) 15 L. R. A. 598 (with note as to state guardianship); *Re Lally* (Iowa) 16 L. R. A. 651; *Van Walters v. Marion County Children's Guardians* (Ind.) 18 L. R. A. 431; *Nugent v. Powell* (Wyo.) 20 L. R. A. 199.

The appellee, in his answer to the appeal, prays for a dismissal of the rule. The mother of these children has been dead about six years. They live with the father. The relations between the son-in-law and mother-in-law are not only strained, but acrimonious. More than three years have elapsed since he has sent his children to visit their grandmother. She has requested him she testifies, to send them, but he failed to comply with the request. The defendant's household consists of his father and other members of his family. They and the children live at the same residence. The relations of plaintiff with the members of the son-in-law's family are not, it seems, of the most pleasant character. The plaintiff by her testimony, creates the impression that the coolness and feeling existing would render the visit anything but pleasant. Moments with her grandchildren while on such visits, which, under other circumstances, would be highly enjoyed, at this time would possibly only cause irritation and bad blood. The differences are, we are led to believe, of an entirely personal character, and have no reference to the standing of the parties, in regard to which there is not the most remote suggestion. The plaintiff states as a witness that she does not entertain any objection on that score. The witness testifies: "Q. Have you visited those children at the house of their father? A. No, sir. Q. Why not? A. Why not? Because I thought they should be sent to see me, and not to go there to see them. Q. Why not call upon these children at the home of their father, to see them? A. Because I thought it was proper to send them to me. Q. Is that the only reason? A. That is my reason that I wish to give. Q. Do I understand you, then, as refusing to visit those children at the house of the father? A. No, sir, I don't refuse; but I have other reasons. I may be wrong, but at the same time I have never visited the Rolling family; and I did not think it was my place to go and see those children there, as I think their place was to come and see me." When examined as a witness, the son-in-law, in answer to the question: "Don't you think that there is a law of nature that children should visit their grandparents? A. I think that's right." Manifestly the difference between these parties is considerable, and would not be sufficient to arrest attention, were it not that it affects the good relation and intimacy that should prevail between these little children and their grandmother. While we appreciate the affection that moves her to seek the occasional company of the offspring of her daughter, this court's jurisdiction does not include the cause pleaded. The issue is not incidental to any other cause. However disinclined we are to discountenance causes of action such as the one under consideration,—for they are inspired by a true and commendable impulse,—we find no authority in law to entertain jurisdiction of the issue presented. The question involved is *res nova* in this state.

In interpreting articles of the civil code in France similar to ours on the subject, the courts and commentators greatly differ. There is respectable authority listed in favor of the precept of Deuteronomy, "*Honora patrem tuum et matrem*" embodied in the civil code as including also the grandfather and grand-

mother. They construe under the articles of this code that the obligation involved in the case at bar, legal in so far as relates to the father and mother, is legal also in so far as relates to the grandfather, and the grandmother, and that the court can intervene for its enforcement without regard to the will of the father or mother. Other courts hold, and other commentators state, that under the law of nature the child is under the authority of the father or mother after the death of either. We translate from 4 Laurent, p. 862, who propounds the question, can the ascendant demand that the authority of the father and mother be limited? In truth, the ascendants have certain rights that the law in accord with nature gives them; but only when the father and mother are dead, or are incapable of manifesting their will. During the existence of the father and mother, the law properly accords them no authority over the children. To permit them to intervene would occasion embarrassment and annoyance; even more, it would injuriously hinder proper paternal authority by dividing it. The authority sought is said to be in the interest of the children. Are the children interested in anything in the nature of a conflict of authority? Without doubt it is desirable that the ties of affection that nature creates between the ascendants and their grandchildren be strengthened and unceasing, but, if there is a conflict, the father alone or the mother should be the judge. The law gives no right of action to the grandparents. The father may have good reason to avoid all contact between his children and their grandparents,—either that he fears that they may inculcate bad principles, or that they will unsettle the respect and affection due him. He owes no account to any one for his motives. They may be so intimate that the honor of the family requires that they shall remain a secret. Shall we say that the judge shall be the arbitrator between the grandparent and the father? The court of Bordeaux replies that the intervention of the tribunals would, as a consequence, render the dissensions of the family more pronounced by delivering them to the public. Other views than these above expressed, says the commentator, would be proper on the part of the legislator. We do not understand them when emanating from interpreters of the present laws. We refer approvingly to the French authorities only so far as they lay down the principles that there is not a *vinculum juris*; that the obligation ordinarily to visit grandparents is moral, and not legal. There may be cases of downright wrong and inhumanity demanding judicial intervention, even to the extent of dismissing the father and tutor from his trust. The case at bar does not disclose so grave an issue. Ill feeling and bad blood separate the father and grandmother. The former admits the respect due to the latter by his children. The ties of nature will prove more efficacious in restoring kindly family relations than the coercive measures which must follow judicial intervention.

*It is therefore ordered, adjudged, and decreed that the judgment of the court a qua be annulled and avoided, and that the rule be dismissed, at plaintiff's costs in both courts.*

Rehearing denied March 12, 1894.

## MARYLAND COURT OF APPEALS.

Frank I. RIDGELY, *Appt.*,

v.

Charlotte RIDGELY *et al.*

(.....Md.....)

1. A court of equity has no inherent jurisdiction to annul a marriage in the absence of fraud or duress.

2. The annulment of an invalid marriage cannot be decreed upon the application of a third party on the ground that he is the lawful husband of the woman by a prior marriage, which is still in force.

(June 19, 1894.)

**A** PPEAL by plaintiff from a decree of the Circuit Court No. 2, for Baltimore City in favor of defendants in an action brought to nullify a certain marriage contract. *Affirmed.*

The facts are stated in the opinion.

*Mr. Joseph P. Merryman*, for appellant:

The determination that the marriage relation was a contract by the civil tribunals, resulted in their obtaining concurrent jurisdiction with the ecclesiastical courts over this relation—the civil courts maintaining and controlling finally jurisdiction of marriages absolutely void, restraining the spiritual courts whenever they attempted to extend their au-

thority over marriages which did not fall within the law of canonical disabilities, and from the time of 33 Henry VIII. the civil tribunals have had jurisdiction over void marriages, and asserting the civil character of this relation. The chancery court is the proper forum for relief from illegal and fraudulent contracts.

The jurisdiction of this tribunal became a part of our inheritance after the separation of the colonies and it has jurisdiction over these causes (*Fornhill v. Murray*, 1 Bland, Ch. 433, 18 Am. Dec. 348; *LeBrun v. LeBrun*, 55 Md. 496; *Helms v. Francisca*, 2 Bland, Ch. 544, 20 Am. Dec. 402; *Stewart, Mar. & Div.* § 419, and accepted and recognized in other states.

*Carris v. Carris*, 24 N. J. Eq. 516; *Wightman v. Wightman*, 4 Johns. Ch. 343, 1 L. ed. 861; *Ferlat v. Gofon*, Hopk. Ch. 479, 2 L. ed. 493, 14 Am. Dec. 554; *Orump v. Morgan*, 38 N. C. 91, 40 Am. Dec. 447; *Clark v. Field*, 13 Vt. 460; *Ravdon v. Ravdon*, 28 Ala. 565; *Cook v. Cook*, 56 Wis. 195, 43 Am. Rep. 706; *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247.

By Code, vol. 2, art. 62, § 12, jurisdiction in nullity suits is conferred upon the superior court of Baltimore city, and the circuit courts of the county. This statute does not interfere with the jurisdiction of the equity court. The original common-law jurisdiction of the equity court is not disturbed by it.

*Barnes v. Orain*, 8 Gill, 398; *Bridges v. Mc-*

**NOTE.—Jurisdiction of chancery to decree nullity or dissolution of marriage.**

Inasmuch as the dissolution of marriages was in England within the exclusive jurisdiction of ecclesiastical courts while they existed, the jurisdiction of chancery in such cases if it could be upheld at all in this country must be based on its expansive character and the necessities of the case. The result of the examination of the question is to find that there is a substantial agreement of the courts in the doctrine which is declared in *Griffin v. Griffin*, 47 N. Y. 124 (which was a case as to an allowance), that some recognized ground of equitable jurisdiction in case of other contracts must exist to create a case for equity in respect to a marriage contract. This, it will be observed, is recognized as the true doctrine in *RIDGELY v. RIDGELY*, and not inconsistent with the decision in *KELLEY v. KELLEY*, *post*, 800.

An apparent exception in Georgia is not really in conflict with the other cases.

Under a statute making mental incapacity a ground of divorce, the claim was made in a Georgia case that the marriage was void and not merely voidable, and that therefore the decree should not make provision for the wife and offspring. But the court refused to approve this theory and held that under such a statute no power existed in a court of equity to give a sentence of nullity but that the divorce laws furnished the only remedy. *Brown v. Westbrook*, 27 Ga. 102. This merely construes the statutory remedy to be exclusive and does not conclude a case where no statute exists.

But following a statement in *Rhame v. Rhame*, 1 McCord, Eq. 208, 16 Am. Dec. 597, that jurisdiction of chancery in such case could extend only to alimony, the same court in *Mattison v. Mattison*, 1 Strobb. Eq. 387, 47 Am. Dec. 541, denied the jurisdiction of equity to decree the nullity of a marriage, denying any difference between the authority to 25 L. R. A.

grant a divorce and to pass sentence of nullity. This case is contrary to some which follow.

In *Wright v. Wright*, 6 Tex. 3, the court says "Whatever diversity of opinion may be entertained as to the authority of a district court to annul a marriage for causes antecedent to its celebration other than that of incurable impotency, it will be conceded that for cause subsequently arising the power of the court is restricted to the grounds prescribed in the statute."

In *Le Brun v. Le Brun*, 55 Md. 496, the court says "The power of a court of equity to declare a marriage null and void when a proper case is made out cannot be questioned. The authority of the court, however, to act in such cases is not derived by the powers conferred by the divorce laws, although a divorce *a vinculo* may be decreed upon some of the same grounds upon which a marriage may be declared a nullity."

In this case a prior existing marriage was alleged, but not established, and the language quoted is clearly too broad under the decision of the same court in *RIDGELY v. RIDGELY*, while the Massachusetts court decided a precisely similar case against the alleged jurisdiction in *KELLEY v. KELLEY*, *post*, 800.

That jurisdiction to decree the nullity of a marriage is merely statutory, is affirmed in *Peugnet v. Phelps*, 48 Barb. 668, where the marriage was attacked on the ground that it was entered into in another state in evasion of a decree of divorce from a former marriage of the wife, prohibiting her to remarry, and the case was dismissed for lack of jurisdiction.

But in Kansas in the case of *Fuller v. Fuller*, 33 Kan. 532, a suit for nullity was sustained because of the wife's incapacity to contract a legal marriage as she was already married, and her claim to alimony or an allowance of property was denied.

In *Fornhill v. Murray*, 1 Bland, Ch. 433, 18 Am.

*Kenna*, 14 Md. 270; *Schroeder v. Loeber*, 75 Md. 195.

A marriage void for fraud, mistake, etc., is within the inherent jurisdiction of equity.

2 Bishop, Mar. & Div. § 291; *Stewart*, Mar. & Div. § 122; *Pingree v. Goodrich*, 41 Vt. 49; *Raudon v. Raudon*, 28 Ala. 565; *Crump v. Morgan*, 88 N. C. 91, 40 Am. Dec. 447; *Tefft v. Tefft*, 85 Ind. 50; *Carris v. Carris*, 24 N. J. Eq. 516.

Marriage procured by fraud is within the jurisdiction of the equity court.

*Fornhill v. Murray*, 1 Bland, Ch. 488, 18 Am. Dec. 848.

Any one who can exhibit his libel for divorce can institute a nullity suit.

*Pingree v. Goodrich*, *supra*.

The appellant unable to have his status determined, is in conflict with every equitable principle. Equity courts are the forum for relief in such cases. It has paramount jurisdiction.

*Schroeder v. Loeber*, *supra*.

Every state has the undisputed right to determine the status and the domestic and social condition of its own citizens.

*Strader v. Graham*, 51 U. S. 10 How. 92, 18 L. ed. 841.

This status is fixed in the state where domicil exists.

*Garner v. Garner*, 56 Md. 127.

And is therefore, the country which has control over the status of husband and wife.

*Keerl v. Keerl*, 84 Md. 21.

There being no domicil or residence of the appellee Charlotte in the state of South Da-

kota, a condition precedent of jurisdiction by the courts of South Dakota in a divorce suit, the decree of the court of South Dakota is absolutely void for want of jurisdiction of the parties and their status.

*Barber v. Barber*, 62 U. S. 21 How. 582, 16 L. ed. 226; *Stewart*, Mar. & Div. § 221.

The decree of the court of South Dakota being void for want of jurisdiction of the parties and their status, it is not within the provision of art. 4, § 1, Constitution of the United States. Full force and credit is given only to those judgments rendered where the state has jurisdiction over both person and thing.

*Strader v. Graham*, 51 U. S. 10 How. 92, 18 L. ed. 837; *Cheever v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604.

This decree being void for want of jurisdiction is not recognized by this state under the comity existing between nations. Nor has it any force under the provisions of the Constitution of the United States, art. 4, § 1.

*Strader v. Graham*, *Cheever v. Wilson*, and *Barber v. Barber*, *supra*; *Barrett v. Failing*, 111 U. S. 528, 28 L. ed. 505; *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225.

The validity of a decree absolutely void for want of jurisdiction can be impeached, in any court, at any time directly or collaterally.

*Windsor v. McVeigh*, 93 U. S. 274, 28 L. ed. 914; *United States v. Walker*, 109 U. S. 258, 27 L. ed. 927; *Seawall v. Seawall*, 122 Mass. 156, 23 Am. Rep. 299; *Williamson v. Berry*, 49 U. S. 8 How. 495, 12 L. ed. 1170; *Glenn v. Williams*, 60 Md. 121; *Ex parte Sawyer*, 124 U. S.

Dec. 348, the court says it would seem that chancery could declare a marriage void as a mere civil contract for abduction, terror, and fraud, and to this nearly all authorities have agreed.

The jurisdiction of the court of chancery to relieve against a marriage contract, or annul a contract solemnized before a magistrate or minister of the gospel, if obtained by force, fraud, or imposition, or under a mistake as to the legal effect of such solemnization by one of the parties, if the other party knew the legal effect and also knew that the party was under such mistake, at least when such ceremony has not been followed by consummation or cohabitation, is upheld in *Clark v. Field*, 13 Vt. 460.

In upholding the power of a court of equity to declare a marriage null for fraud, the court says in *Ferlat v. Gojon*, Hopk. Ch. 478, 2 L. ed. 493, 14 Am. Dec. 554: "If this court has not the same jurisdiction where the contract has been procured by fraud, it is the only case of a fraudulent contract to which its jurisdiction does not extend." In that case statutory power to grant divorce for certain specified causes was held not to exclude this power by implication.

In holding the marriage of an insane person void and granting sentence of annulment, the court in *Wightman v. Wightman*, 4 Johns. Ch. 343, 1 L. ed. 661, said: "There must be a tribunal existing that was competent to investigate such a charge and to afford the requisite relief, and the power, I apprehend, must reside in this court which has not only an exclusive jurisdiction over cases of lunacy but over matrimonial cases." This is further defined as a sole jurisdiction over the marriage contract in certain specified cases. The doctrine here broadly stated is limited by the later decisions of the same court especially by *Burtis v. Burtis*, Hopk. Ch. 557, 2 L. ed. 522, 14 Am. Dec. 568, *infra*.

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In *True v. Ranney*, 21 N. H. 52, 58 Am. Dec. 164, a suit for nullity on account of the imbecility of the wife, which renders her incapable of contracting marriage, was sustained by the superior court of judicature. The court said no mode is prescribed either in the constitution or the statutes, in which proceedings shall be instituted and carried on for the purpose of procuring a decree of nullity of marriage, but that the power to make the decree and regulate the mode of procedure existed beyond doubt, as the revised statutes made allusion to such a decree.

Again the same court decided that chancery jurisdiction in cases of fraud includes a suit to annul a marriage for insanity of one of the parties fraudulently concealed from the other. *Keyes v. Keyes*, 22 N. H. 568.

In a suit for nullity of marriage on the ground of insanity, the jurisdiction is sustained in *Rawdon v. Rawdon*, 28 Ala. 565, although relief is denied on the merits; but no discussion of the question of jurisdiction is made and no statement as to the existence of any statute on the subject.

So independently of the provisions relating to divorce, it is held in *Powell v. Powell*, 18 Kan. 371, 28 Am. Rep. 774, that the district court of that state has full jurisdiction of a suit to annul a void marriage on the ground of the insanity of one of the parties.

And in Ohio it was held that jurisdiction at the suit of an imbecil's guardian to declare his marriage a nullity belongs to the court of equity like that to order the surrender and cancellation of a forged or otherwise void instrument. *Waymire v. Jetmore*, 22 Ohio St. 271.

A suit to annul a marriage for lack of mental capacity of one of the parties is held to be within a statutory provision giving jurisdiction in all cases of applications for divorce, both to superior

200, 81 L. ed. 402; *Leith v. Leith*, 89 N. H. 20; *Hoffman v. Hoffman*, 46 N. Y. 80, 7 Am. Rep. 299; *Hickey v. Stewart*, 44 U. S. 3 How. 761, 11 L. ed. 818.

*Mr. Thomas C. Weeks* also for appellant.

*Messrs. William A. Fisher and Charles W. Field*, for appellees:

How can a court of one state directly set aside a decree of a court of another state.

The power to annul such decree directly exists alone in the court that passed it.

2 Bishop, Mar. & Div. § 1556; 1 Black, Judgments, § 297; 2 Wait, Act. & Def. p. 616; *Parish v. Parish*, 9 Ohio St. 534, 75 Am. Dec. 482; *DeGraw v. DeGraw*, 7 Mo. App. 121; *Allen v. Maclellan*, 12 Pa. 323; *Edson v. Edson*, 108 Mass. 596, 11 Am. Rep. 898; *Holmes v. Holmes*, 68 Me. 420.

The Code, art. 62, § 12, says the superior court of Baltimore city "may, upon petition of either of the parties, inquire into, hear, and determine the validity of any marriage."

The "parties" here referred to are the parties to the alleged void marriage.

Independently of the statute, a proceeding for nullity of a marriage could only be taken by a party to it.

2 Bishop, Mar. & Div. §§ 206, 804.

A court of equity will not undertake an unnecessary or fruitless inquiry. If the facts alleged in the bill are true, the marriage would be void without the action of the court.

18 Law Library, 156; *Gathings v. Williams*, 27 N. C. 498, 44 Am. Dec. 49; *Harrison v. State*, 22 Md. 484, 85 Am. Dec. 653.

*McSherry, J.*, delivered the opinion of the court:

In October, 1881, Frank I. Ridgely married the appellee, Charlotte, and they resided in Maryland continuously until October, 1892, when the said Charlotte left the state without the consent of her husband, and went to South Dakota, where in January following, she instituted proceedings against her husband for divorce, which culminated in a decree of divorce *a vinculo* on April 18th, 1893. A few days thereafter she returned to Baltimore, and in May following she married the appellee, Hyatt. It is alleged in the bill of complaint filed by Frank I. Ridgely against his former wife, Charlotte, and her present husband, Hyatt, that she went to South Dakota for the purpose of procuring a divorce; that he was ignorant of her whereabouts dur-

courts of law and to courts of equity. *Johnson v. Kincaid*, 37 N. C. 470.

The power of equity to decree a marriage null when performed in jest is upheld in New Jersey by a liberal construction of a statute authorizing chancery to grant divorces and annul marriages in other specified cases. The court says that the constitution by taking away from the legislature this power may be inferred to intend to leave the power with chancery, upon which jurisdiction over most cases of divorce is directly conferred. *McClurg v. Terry*, 21 N. J. Eq. 226.

Intoxication of a person at the time of marriage, which was not followed by cohabitation, is held to give a court of equity power to declare the marriage void, although the case is not one enumerated in the statute conferring jurisdiction to grant divorce for certain specified causes. *Selah v. Selah*, 23 N. J. Eq. 185.

In this case the court says of *McClurg v. Terry*, *supra*: "Nor does the decision in that case hold that the court has power to dissolve a marriage actually entered into, but only that it has power to declare that such contract was never legally made."

A marriage under a license procured by the husband's fraud and false swearing as to the age of the wife was declared void on her petition in *Robertson v. Cole*, 12 Tex. 356, although it appears that the statute made no provision for such a case but only provided for divorce for causes arising after marriage. It was regarded as a fraud upon her in procuring her consent illegally, and the jurisdiction of the district court to grant divorce was extended to this case.

In case of a marriage of a girl of twelve years, on a bill by her next friend she was placed under the protection of the court of chancery as a ward thereof, and the husband prohibited to correspond with her so long as the order was in force, but without any discussion of jurisdiction. *Aymar v. Roff*, 3 Johns. Ch. 49, 1 L. ed. 538. This case evidently belongs to a different class than nullity of marriage cases, and is merely an exercise of the jurisdiction of chancery over infants.

The equitable jurisdiction over infants does not extend to the granting of a divorce to a wife who is a minor in any case where it would not be

granted if she were of full age,—especially if the marriage had been consummated before the chancellor acquired jurisdiction over the person of the infant. *Maguire v. Maguire*, 7 Dana, 181.

Fraud in inducing a marriage with a pregnant woman was held ground for its annulment in equity, under the general power of the court to annul fraudulent contracts. *Carris v. Carris*, 24 N. J. Eq. 518. The court says: "It is a case of fraud in the consent and is akin to that in a case of lunacy, idioecy, or infancy, which all have to do with the consent."

A similar case in New York was similarly decided on the ground of fraud. *Scott v. Shufeldt*, 5 Paige, 43, 3 L. ed. 620.

In *Tefft v. Tefft*, 35 Ind. 51, the court says the circuit court having jurisdiction in all civil actions, except when otherwise provided, has jurisdiction to declare a contract void in a direct proceeding in a proper cause independent of any provisions in the divorce law. This was a case in which a former existing marriage was alleged and a fraudulent concealment of the fact.

Under a statute authorizing divorce but designating no tribunal, it was held in *Cast v. Cast*, 1 Utah, 112, that a suit for divorce was virtually a suit in chancery, to be brought on the equity side of the district court, and that the territorial legislature could not confer such jurisdiction on the probate courts. The court in this case recognized the ecclesiastical law as part of the common law and declared that ecclesiastical jurisdiction was derived from the common law.

But the annulment of a marriage for impotence was refused by the New Jersey court of equity in *Anonymous*, 24 N. J. Eq. 12, there being no statutory provision therefor.

To the same effect it had been decided in *Burtis v. Burtis*, Hopk. Ch. 557, 3 L. ed. 522, 14 Am. Dec. 563, and the court said the case was different from one of fraud, as the power of the court to vacate a contract obtained by fraud was an unquestioned branch of its jurisdiction.

So it was held that chancery had no jurisdiction to give a divorce for cruelty, in the absence of a statute provision. *Perry v. Perry*, 3 Paige, 501, 3 L. ed. 1006.

In holding that consent to a divorce cannot dis-



ing her absence; that she was without means of her own to defray her expenses, and that her conduct in this matter resulted from the influence of Hyatt, who fraudulently and illegally aided her in attempting to destroy the plaintiff's marital rights. The bill charges that the divorce procured in South Dakota is void, and prays that the "so-called ceremony of marriage between Hyatt and the said Charlotte Ridgely may be declared null and void." To this bill a demurrer was filed, and upon a hearing thereof circuit court No. 3 sustained the demurrer and dismissed the bill. From that decree this appeal was taken.

The jurisdiction of a court of equity to pass a decree of the character prayed for, upon the application of a person not a party to the marriage alleged to be null and void, is directly presented. Treating, for the purposes of this discussion, the concessions of the demurrer as admitting the invalidity of the South Dakota divorce, how can a Maryland court of equity, at the instance of Mr. Ridgely, annul a subsequent marriage of his wife to another person, upon a bill filed exclusively for that purpose and asking no other

relief? That is the distinct question which this record brings before us for decision.

If such a power be possessed by a court of equity it must have been acquired either as a part of its original, inherent jurisdiction or by statute. But upon tracing the history of the English court of chancery prior to the American Revolution no such power will be found to have been asserted or exercised by that tribunal. In point of fact as early as the reign of Edward, the Confessor, the clergy assumed to decide all matters relating to marriage; but somewhat later the ecclesiastical courts took jurisdiction both in respect of annulments for canonical disabilities and dissolutions by limited divorces for superadventitious causes; and acting on the ground that marriage was a sacrament held to be indissoluble. But inasmuch as adultery was a flagrant breach of the marriage vow, it was soon found necessary to devise some means to punish the offending party and to relieve the innocent one from the ties of a contract so incontestably violated. Accordingly the ecclesiastical courts, but not the court of chancery, began to decree separations on the ground of adultery—such separations giving

pense with proof of the facts required by statute, it is said in *Palmer v. Palmer*, 1 Paige, 276, 3 L. ed. 645, that a court of chancery cannot, even with consent of the parties, decree an absolute or partial dissolution of the marriage contract, except in cases provided for by statute.

That chancery jurisdiction to grant a divorce is purely statutory is declared also in *Jarvis v. Jarvis*, 3 Edw. Ch. 422, 6 L. ed. 728, where the question was as to jurisdiction as affected by residence of the parties.

The jurisdiction of equity to grant a limited divorce is also declared to be statutory in *Klein v. Klein*, 43 How. Pr. 122.

#### *Ditto.*

In respect to a question as to the title to property, the court said in *Weber v. Weber*, 16 Or. 163, that it was conceded that the power to grant a divorce and such other relief as is truly incident thereto, is purely statutory.

Likewise in discussing the rights of children on divorce, it is said in *Hopkins v. Hopkins*, 39 Wis. 165, that courts, either of law or of equity, possess no powers except such as are conferred by statute.

In *Rose v. Rose*, 9 Ark. 507, the court said: "It is altogether safe to assume that the chancery courts of this state have rightfully, as to divorce and alimony, all the powers of the English ecclesiastical courts, as well as additional powers conferred by statutes," but the case involved merely the construction of the statute of the state.

In *Stebbens v. Anthony*, 5 Colo. 343, the court says the weight of authority is in favor of the jurisdiction of equity over divorce suits in the absence of statutes as well as under them, and that where the grounds of a separation are fixed by statute the litigation is necessarily one of equitable cognizance, but the case did not involve the necessity of deciding that an equity court could entertain such a suit in the absence of statute.

#### *Character of proceeding.*

That divorce is the special creature of statute and not a proceeding in equity, although the proceeding is commenced by petition, is declared by the Connecticut court in *Steele v. Steele*, 35 Conn. 48, 25 L. R. A.

A statute giving concurrent jurisdiction of "civil cases" to circuit courts and courts of common pleas was held to include actions for divorce. *Herron v. Herron*, 16 Ind. 122; *Ellis v. Hatfield*, 20 Ind. 101; *Ewing v. Ewing*, 24 Ind. 463.

The provision in the Georgia constitution of 1835, authorizing divorce "upon legal principles" is held to permit a divorce only for the causes recognized at common law. *Head v. Head*, 3 Ga. 191.

The superior court in Georgia, having exclusive jurisdiction under the constitution and code of divorce cases and also in equity, it is held to have power in a divorce case to exercise all its powers, whether those of a court of law or equity, so far as is necessary to maintain and carry out its jurisdiction over the subject-matter, so a prayer for an injunction as to property may be joined in a petition for divorce. *Schooler v. Schooler*, 77 Ga. 601.

In holding that a decree for alimony payable in installments does not constitute a lien on real estate, unless made so by the decree, in *Olin v. Hungerford*, 10 Ohio, 288, the court declared that it was a statutory proceeding and not within a statutory provision that decrees in chancery should operate as judgments at law.

A statute regulating appeals from decrees in chancery is held applicable to a bill for divorce, where the statute has given the court of chancery jurisdiction of such cases. *Fulton v. Fulton*, 38 Miss. 517.

In Montana, divorce proceedings being of chancery jurisdiction, under Rev. Stat., § 508, verdicts or special findings of the jury are merely advisory. *Beck v. Beck*, 6 Mont. 313.

In deciding that reasonable legal precision is necessary in the pleadings on a petition for divorce, it was declared in *Stokes v. Stokes*, 1 Mo. 220, that the proceedings under the Missouri statute were *not generis* neither chancery nor ecclesiastical, but that the rules of the ecclesiastical courts should govern so far as applicable where the statute made use of terms used in the ecclesiastical courts.

Cases on the jurisdiction of chancery to decree alimony, or separate maintenance are not here included, but a very extensive discussion of that question appears in the case of *Edgerton v. Edgerton*, 16 L. R. A. 94, 12 Mont. 122. B. A. R.

to the parties all the rights of celibacy, except that of contracting a new marriage. Gradually the grounds of such separations were extended, and cruelty and some other causes were allowed as just and proper reasons to support them. Thus much having been conceded, men began to look forward to these separations with a view to the formation of other and more desirable ties. Apparently to meet this growing desire, but at all events contemporaneously with it, the ecclesiastical law expanded far beyond their original limits the degrees of consanguinity and affinity within which it was declared unlawful to contract marriage.

"And not only was it held that relations of the blood of the sixth and seventh degree were incapable of contracting matrimony, but that if either party to the marriage had been pre-contracted to another the marriage was voidable; and eventually it was declared that if it happened to any man to have carnal connection with a woman, the same relations in regard to affinity were thereby created between them as if an actual marriage had taken place. Upon these grounds of pre-contract, affinity and carnal knowledge, the ecclesiastical law, still upholding the doctrine of the sacramental indissolubility of marriage, . . . and declaring such marriages to have been null and void *ab initio*, separated the parties '*pro salute animarum*,' lest they should endanger their souls by living in a state of known sin." 2 Broom & Hadley's Com. \*394. Thus matters stood until the reformation, when the views of the reformers, including Cramer, was that a more extended system of divorce should be allowed, and that a second marriage should be permitted after a divorce for adultery. A digest of ecclesiastical law, compiled under 8 & 4 Edward VI., chap. 11, having failed to receive the *imprimatur* of the law by reason of the death of the king, there was no judicial authority in the realm which had jurisdiction to make such a decree as would enable a man or woman to marry again, and recourse was then had to the supreme power of the state—the king, lords and commons in parliament assembled—to legislate upon the particular circumstances of each case. 2 Broom & Hadley's Com. \*395. These applications to parliament became precedents and after 1701 became more numerous. No steps, however, were taken to reduce the practice there to any form 'till 1798, when Lord Loughborough's orders were adopted. These, with some modifications, continued to control the method of procedure until, in 1857, the court of divorce and matrimonial causes was created by 20 & 21 Vict. chap. 95.

It will thus be seen from this rapid and imperfect sketch that from the very earliest times the jurisdiction to annul a marriage in England when void, or voidable, on account of pre-existing impediments or to dissolve it for supervenient causes, was vested in other tribunals than the court of chancery (Shelford, Mar. & Div. \*459); and consequently when Maryland was separated from the mother country the Maryland court of chancery did not acquire from the English chancery any power over such cases, though in

this state the courts of equity independently of any statute, but in virtue of their general jurisdiction to vacate contracts procured by fraud, have exercised the power to annul a contract of marriage when the marriage induced or procured by fraud or coercion, but of this later on. The sole jurisdiction in divorce and matrimonial causes being at the time of the revolution vested in the ecclesiastical courts and in parliament, and no ecclesiastical court having been established in Maryland, the legislature in 1777, passed an Act, chap. 12, by the 15th section of which it was provided: "That the general court may inquire into, hear, and determine, either on indictment or application of either of the parties, the validity of any marriage, and may declare any marriage contrary to the table in this act, or any second marriage the first subsisting, null and void."

The legislature in thus providing for judgments of nullity in certain instances including both canonical and civil disabilities, did not confer jurisdiction upon the court of chancery in the premises but upon the general court and when the latter court was abolished this power was transferred said *Chancellor Bland in Fornhill v. Murray*, 1 Bland, Ch. 488, 18 Am. Dec. 844, to the county courts. Under the Constitution of 1851, art. 4, § 11, the superior court of Baltimore city was given equity jurisdiction in that city. When therefore, the Code of 1860, was adopted and the Act of 1777, chap. 12, § 15, was codified therein it gave to the courts exercising equity jurisdiction at that time, viz.: the superior court of Baltimore city and the circuit courts for the counties, the authority to decree the nullity of marriages for the causes set forth in the old Act of 1777.

The Constitution of 1867 deprived the superior court of all equity jurisdiction and conferred that jurisdiction exclusively upon the circuit court of Baltimore city. The organic and the statute law stood thus in February, 1881, when the case of *LeBrun v. LeBrun*, 55 Md. 496, was decided by this court. In that case it was said: "Suits for nullity of marriage have been very rare in this state, but the power of a court of equity to declare a marriage null and void when a proper case is made out, cannot be questioned. The authority of the court, however, to act in such cases, is not derived from the powers conferred by the divorce laws. . . . If the marriage be procured by abduction, terror, fraud, or duress, the court, in declaring it a nullity, acts in virtue of its general jurisdiction in matters of fraud affecting contracts, and by the marriage act (Code, art. 60, § 8) the Act of 1777, chap. 12, § 15, express authority is given to the courts to inquire into, hear, and determine the validity of any marriage, and may declare any marriage within the prohibited degrees of kindred or affinity, or any second marriage, the first subsisting, null and void. These are the two sources of jurisdiction. This court was strictly right when in the case just cited it referred to the Act of 1777, as codified in section 8 of article 60 of the Code of 1860 as one of the two sources of an equity court's authority to nullify a marriage as contradistinguished from granting a divorce. But in

1886, by chapter 497, the legislature repealed section 8 of article 60 of the Code of 1860, and then re-enacted it, and as re-enacted, it, in express terms, conferred upon the superior court, which then was and still is, under the Constitution of 1867, a court of law, and not a court of equity, the authority to annul a marriage contract within the prohibited degrees, and a second marriage contracted whilst a first one is still subsisting. This Act of 1886 was re-enacted in 1888, when the code of that year was adopted.

The legislature had the undoubted right to confer this power upon either a court of law, or a court of equity, or on both, as it had in fact done by including the criminal court. By virtue of this recent legislation the authority to annul a marriage for any of the causes set forth in the Act of 1777 is, so far as the courts of Baltimore city are concerned, confined to the superior and criminal courts. This must be so unless we hold that when the legislature said in 1886, superior court, they did not mean that court, but a court of equity. It would scarcely be permissible to do this when we are dealing with a statute conferring a special jurisdiction not inherently belonging to either a court of law or a court of equity, but created solely by the statute now being considered. Nor could we treat the Act of 1886 as giving the superior court concurrent jurisdiction with the circuit court in this particular—but conceding to the latter the possession of this special power outside of and apart from any statute at all.

But besides the difficulty which the Act of 1886 presents as to the right of a court of equity in Baltimore city to pass a decree of nullity for any of the causes set forth in the Act of 1777, which, as amended by the Act of 1886, is now section 12 of article 62 of the Code of 1888, the language of that section specifically limits the right to make the application to one of the parties to the marriage whose validity is assailed, and gives to no third person the authority to invoke its provisions. In construing the Act of 1777, this court, in *Harrison v. State*, 22 Md. 486, 85 Am. Dec. 658, said: "No ecclesiastical court existed here; and instead of destroying it the Act of 1777 erected a jurisdiction with power, upon petition of either of the parties, or on indictment, to inquire into, hear, and determine the validity of any marriage," etc. With the exception of cases falling within the Act of 1777, as now codified, and marriages procured by fraud, no marriage was or could be declared null in Maryland, save by the general assembly until 1841, when, for certain specified causes, now set forth in art. 16, §§ 85, 86, 87, of the Code, the courts of equity were empowered to decree divorces upon the application of one of the parties to the marriage. Speaking with strict technical precision, a decree of nullity is widely different from a decree of divorce, for the one is founded on the theory that there never was a marriage at all, whilst the other concedes that a valid marriage did exist, but dissolves it, though a decree for a divorce may, under our code, be passed for causes which would sustain a decree of nullity. See notes to *Lewis v. Lewis* (Minn.) 9 L. R. A. 505.

25 L. R. A.

But the case before us does not fall either within the Act of 1777 or the above cited sections of the code. It is not within the Act of 1777, as amended by the Act of 1886 and codified in article 62, section 12, because, first, that act, as now codified, confers power upon the superior court, a court of law, and not upon a court of equity, in Baltimore city, to act in cases covered by it and instituted under it; and secondly because the act can only be invoked by one of the parties to the alleged null marriage, and not by some one else. The proceeding before us is not by Mr. or Mrs. Hyatt to annul their marriage, but by Mr. Ridgely to annul it for them and against their wishes. Nor is the pending case within either of the above cited sections of the code, because the bill sets forth no one of the causes for which the injured party to a contract of marriage may seek to have it set aside; and furthermore, it is not filed by such a party, but by a person not a party to the alleged invalid marriage at all.

Just here we may observe that there is some conflict in the authorities as to the right of a third party to inaugurate proceedings in the ecclesiastical courts to procure a sentence of nullity. In the flexible forms of the ecclesiastical courts, whenever during the lives of both of the parties any inquiry into the validity of a marriage arose, it took at once the character of a suit for nullity, since this suit need neither be instituted nor carried on by one of the parties to the marriage, it being equally maintainable by any other person having an interest therein. 1 Bishop, Mar. & Div. sec. 265; *Sherwood v. Ray*, 1 Moore, P. C. 358. There are some instances given in Shelford, Mar. & Div. 8 Law Lib. \*179. But the complaining party must have some interest in the marriage, and generally the interest must be of a pecuniary character. Except in criminal cases, this right of third parties seems to be very doubtful. Stewart, Mar. & Div. § 328; *Cropey v. McKinney*, 80 Barb. 47. Whatever may have been the practice in the ecclesiastical courts we have not succeeded to it nor imported it into our courts of equity and nullity decrees except for fraud or coercion, are pronounced solely under the Act of 1777 as now codified, which in terms, as we have said, is confined to an application by one of the parties.

But it is insisted that the general jurisdiction of a court of equity is broad enough to embrace this case. Whilst Chancellor Bland in 1828, did not regard the Act of 1777, as clothing the court of chancery with authority to determine the validity of a contract of marriage; yet he held in *Furnhill v. Murray*, *supra*, that "by virtue of its general jurisdiction in matters of fraud affecting contracts, it would seem, that considering marriage as a mere civil contract it (a court of chancery) may at the instance of either party, declare a marriage to be null and void which has been procured by abduction, terror, and fraud." He cited *Portsmouth v. Portsmouth*, 1 Hagg. Eccl. Rep. 355; *Re Fust*, 1 Cox, Ch. 418; *Ex parte Turing*, 1 Ves. & B. 140; *Ferlat v. Gojon*, Hopk. Ch. 478, 2 L. ed. 498, 14 Am. Dec. 554. And we may add *LeBrun v. LeBrun*, *supra*;

*Clark v. Field*, 18 Vt. 460; *Keyes v. Keyes*, 22 N. H. 553; *Wightman v. Wightman*, 4 Johns. Ch. 343, 1 L. ed. 861.

Undoubtedly in the eye of the law marriage is a civil contract, differing from other contracts in the circumstance that it cannot be rescinded by the mere consent of the parties. Being then a contract, it seems to follow, that where it has been procured by fraud or duress it may be set aside by a court whose inherent jurisdiction gives it authority to annul any ordinary contract procured in the same way; provided the application be promptly made and before a consummation of the marriage by voluntary cohabitation, *Clark v. Field*, *supra*; *Robertson v. Cole*, 12 Tex. 856. In general either party may complain, but obviously in this as in other instances the party guilty of the fraud cannot allege and rely on his own misconduct to avoid a contract procured by that means. *Stewart, Mar. & Div. §§ 46, 150, 151; Browne, Div. & Al. 360.*

The case made by the pleadings does not come within these principles, for the bill of complaint does not allege the marriage between Mrs. Ridgely and Mr. Hyatt to be fraudulent at all, or to have been procured by fraud or coercion. It does allege, though, that the South Dakota divorce is fraudulent and void, and inferentially, by no direct charge, that the subsequent marriage was illegal and null. But the marriage might well be illegal and null to the extent of subjecting one of the parties to indictment for

bigamy, without having been procured by fraud; and as this relief, if granted at all, must depend upon some fraud or force practiced by one party to the impeached marriage upon the other party to the same marriage, there must be appropriate averments to that effect in the complaint as well as proper parties to the proceeding. It is upon the bald allegation of the invalidity of the Dakota divorce that the annulment of the Maryland marriage is asked. There is no charge that any rights of property are involved, and there is no injury complained of for which the law, either through the criminal courts or through the civil tribunals by actions for damages, does not give the appellant ample remedy and redress.

The bill before us asks us to declare the marriage of Mrs. Ridgely and Mr. Hyatt void, not because it was procured by fraud, but because a valid prior marriage between her and the plaintiff is still in force. But the application is not made by either of the parties to the second marriage, and under the Act of 1777, as now codified, which is the only source from which any court in Maryland derives the power to pass such a sentence or judgment for that cause, no third person can institute such a proceeding. It follows, therefore, as the court below had no jurisdiction to pass the decree prayed for, that its decree dismissing the bill must be affirmed.

*Decree affirmed with costs above and below.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Ellen KELLEY

v.

John B. KELLEY.

(.....Mass.....)

1. There is no presumption that the statutes or local laws or usages of another state are like those of the forum.
2. Statutes and decisions of another state not put in evidence at the trial cannot be used for the first time at the argument of a case on report to the supreme judicial court of Massachusetts.
3. A court of chancery has no authority to annul a marriage independently of statutory authority on the ground merely that one of the parties was incapable to marry because of a prior existing marriage.
4. The assumption by a court of general jurisdiction in another state of the exercise of jurisdiction to annul a marriage on the ground of a prior existing marriage of one of the parties, and a dismissal of the complaint for failure to prosecute the suit, with a judgment for alimony and costs in favor of the defendant, which jurisdiction must depend on statute, is not sufficient to create a presumption that such jurisdiction existed.

(March 27, 1894.)

NOTE.—For chancery jurisdiction to decree nullity or dissolution of marriage, see note to *Ridgely v. Ridgely*, *ante*, 800.  
26 L. R. A.

REPORT by the Superior Court for Essex County for the opinion of the Supreme Judicial Court of an application for an execution to enforce a judgment rendered by the Supreme Court of the State of New York in favor of plaintiff and against defendant annulling their marriage and awarding her alimony. *Decree for defendant.*

The facts sufficiently appear in the opinion. Mr. Clifford Brigham for plaintiff.

Messrs. Henry F. Hurlburt, Eugene T. McCarty, and Daniel N. Crowley for defendant.

Allen, J., delivered the opinion of the court:

In this commonwealth, no power exists in any court to pass an order for the payment of alimony *pendente lite*, or of permanent alimony, in a matrimonial cause of any description, except under provisions of statute conferring such power. By the Constitution of Massachusetts (part 2, chap. 8, art. 5) it was provided that "all causes of marriage, divorce, and alimony . . . shall be heard and determined by the governor and council until the legislature shall by law make other provision." By Stat. 1785, chap. 69, § 2, it was enacted that "all marriages where either of the parties shall have a former wife or husband living at the time of such marriage shall be absolutely void;" and, by section 8, "divorces from the bond of matrimony shall be decreed in case . . . either of

them [the parties] had a former wife or husband alive at the time of solemnizing such second marriage." In section 5, certain provisions for alimony are made but none in case of such void marriage. In section 7, "all questions of divorce and alimony shall be heard and tried by the supreme judicial court." It is not necessary to make special reference to later statutes, which have always, since 1785, contained such provisions upon these subjects as seemed expedient to the legislature; and the authority of the court to decree alimony and counsel fees has always been considered to rest exclusively upon the statutes. *Shannon v. Shannon*, 2 Gray, 235; *Baldwin v. Baldwin*, 6 Gray, 341; *Coffin v. Dunham*, 3 Cush. 404, 54 Am. Dec. 769; *Davol v. Davol*, 13 Mass. 264; *West v. West*, 2 Mass. 233, 227; *Orrok v. Orrok*, 1 Mass. 341.

In the absence of anything to show the contrary, there is a presumption that the common law of another state is like that prevailing here; but this presumption does not extend to the statutes of another state. *Harris v. White*, 81 N. Y. 532; 544; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17. In the case now before us, it appears that, in 1877, a husband brought, in the supreme court of the state of New York, a complaint against his wife, seeking to have his marriage annulled and declared void on the ground that at the time of the marriage she had a former husband living. She answered to the complaint, admitting her former marriage, but averring that it was invalid and void, because her former husband was then married to another woman, and that these facts were known to the present husband at the time of his marriage to her. The complaint contained no charge of fraud, force, mistake, or lunacy. In 1888 an order was passed, reciting the pleadings, and reciting that it appeared satisfactorily to the court that subsequently thereto an order was made, among other things, that the husband pay to the wife \$10 a week alimony, commencing October 22, 1877; that it also appeared that he had wholly failed to do so from November 5, 1877, though due demand had been made; and that he had failed to prosecute his action, and had departed from the state,—and an order was made that the complaint be dismissed with costs, that her attorney have an extra allowance of \$100, and that the wife recover of and have judgment against her husband for \$6,114, being the amount of alimony due and owing to her under said order, and also for costs and the above allowance; and judgment was entered accordingly on April 17, 1888. It is also recited that counsel appeared for the husband at the time of this order in 1888. Judgment was entered accordingly, and, the husband having removed to this commonwealth, the wife now brings a suit in equity here, praying the superior court to order execution to issue upon said judgment. In defense, no direct charge is made that the entry of the judgment was procured by fraud or imposition upon the court, but it is set up, and the court has found as a fact that on April 27, 1887,—about a year before the entry of the judgment in New York,—the

husband obtained in this commonwealth a decree annulling his marriage, his wife having been served with process, and defaulted for nonappearance. There is nothing to show that this decree of nullity made here was known to the supreme court of New York at the time when the judgment there was entered. The order for the payment of alimony *pendente lite* is not set forth in the record, and does not appear otherwise than by the recital in the final order.

The principal question which we have to consider is whether it appears that the supreme court of New York had jurisdiction, in the suit for nullity, to pass an order for the payment of alimony *pendente lite*, and, at the time of dismissing the suit, to pass an order for the payment of the arrears of alimony down to the date of the order, and of an allowance for counsel fees and for costs, and to enter judgment thereon. Jurisdiction may always be inquired into, and a judgment entered without jurisdiction will not be enforced. *Simmons v. Saul*, 188 U. S. 439, 34 L. ed. 1054; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 468, 21 L. ed. 897, 901; *Cumming v. Belchertown*, 149 Mass. 223, 4 L. R. A. 181; *Cross v. Cross*, 106 N. Y. 628.

Ordinarily, and where the proceedings of a court of general jurisdiction are according to the course of the common law, there is a presumption in favor of the regularity of its proceedings, and it will be presumed to have had such jurisdiction as it has assumed to exercise, unless the contrary is shown. *Galpin v. Page*, 85 U. S. 18 Wall. 850, 865, 21 L. ed. 959, 962. In the present case, the justice of the superior court reports that the defendant among other defenses, contended that the judgment alleged had not been proved; and he declined to enforce the judgment rendered in New York, but the special ground of his refusal is not stated. So far as appears, no evidence was introduced, on the one side or on the other, to show the jurisdiction and authority of the court in the matter. No evidence of the law of New York, by statutes or decisions of courts, or otherwise, appears to have been presented; and there was nothing to sustain the jurisdiction except the fact that the supreme court, which was a court of general jurisdiction, assumed to exercise it. The question is whether this is enough in a proceeding of this kind. In the argument before us, certain statutes and decisions have been referred to which are supposed to bear upon the authority and jurisdiction of the court, and the fact is thus brought to our attention that there are statutes and decisions which relate to the subject. As already mentioned, the common law of another state is presumed to be the same as that which is established here, unless shown to be otherwise; but there is no such presumption in relation to statutes or to local laws or usages. These must be proved as facts at the trial, and, where a question of the law of another state is in controversy, the party upon whom the burden lies will fail unless evidence is produced to sustain his view; and statutes and decisions which were not put in evidence at the trial cannot be used for the first time at

the argument of the case before us for the purpose of proving the law of such state. *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631; *Hull v. Mitcheson*, 64 N. Y. 639; *Hackett v. Potter*, 135 Mass. 849, 850; *Murphy v. Collins*, 121 Mass. 6; *Ufford v. Spaulding*, 156 Mass. 65, 69. We, therefore, are not at liberty to place our decision upon the result of such examination as we might now be able to make, even with the aid of the citations by counsel of the statutes and decisions in New York in respect to marriage and divorce, nullity of marriage, and alimony, except so far as such decisions may throw light upon the rules of common law existing independently of the statutes.

We have then to consider, in the first place, whether it falls within the general jurisdiction of a court of chancery, without statutory authority, to entertain a suit for nullity of marriage in a case where no fraud, duress, mistake, or lunacy is explicitly charged, and where, accordingly, no such ground is alleged as would enable such a court to annul an ordinary contract. The complaint of the husband in the present case, as presented to the supreme court of New York, only charged, as a ground for avoiding his marriage, that, at the time when it was entered into, his wife had a former husband living, and that her marriage to such former husband was in full force and validity. It did not charge that he was led to marry her through deception, or even through ignorance of the facts. No doubt instances sometimes occur where a man and a woman who wish to live together go through a form of marriage, for social or other purposes, taking the chance of subsequent disturbance or trouble, though well knowing that the marriage is void for the reason that one of them has a former husband or wife living, or that they are within prohibited degrees of kin. Both real life and fiction furnish illustrations of this. Such marriages are of course void, and may be declared so under the authority of statutes like those which have long existed in this commonwealth. Stat. 1785, chap. 69, § 3; Rev. Stat. chap. 76, § 3. But, in our opinion, a court of chancery would decline to act in such a case by virtue of its own inherent jurisdiction, and without the authority of a statute enabling it to do so. The chief aid which we have derived in determining this question comes from the carefully considered decisions in New York, where the court has assumed jurisdiction to declare a marriage void for lunacy (*Wightman v. Wightman*, 4 Johns. Ch. 848, 1 L. ed. 861), and fraud (*Ferlat v. Gojon*, Hopk. Ch. 478, 2 L. ed. 498, 14 Am. Dec. 554), but has declined, for want of jurisdiction, to do so for impotence, *Burtis v. Burtis*, Hopk. Ch. 557, 2 L. ed. 522, 14 Am. Dec. 563. In the last case the chancellor said: "The cases in which this court can annul marriages in virtue of its powers as a court of equity must be few and very peculiar, and they must appertain to the jurisdiction of equity." In *Griffin v. Griffin*, 47 N. Y. 135, the same question was incidentally discussed as follows, in a learned and elaborate opinion delivered by Rapallo, J.: "The court of

chancery of this state has in some instances entertained bills to declare the nullity of marriages, independently of any statute conferring jurisdiction; but these were cases in which the marriage was sought to be declared void for some cause for which chancery had power to cancel or avoid all contracts, such as lunacy or fraud; and it was held that the marriage contract was not excepted from the operation of this general jurisdiction. . . . In all other cases it must be conceded that the jurisdiction of the court of chancery of this state in actions for divorce, either on the ground of nullity or for any cause arising subsequent to the marriage, is founded wholly upon the statutes." Page 188. The court expressed no definite opinion on the question whether the particular case then before it, which was an action brought by a husband to have the marriage declared void by reason of her former marriage, would be cognizable by the court, independently of the statutes (page 140); and it does not appear in the report of the case whether or not there was any fraud or mistake. The same doctrine above stated was reiterated in the recent case of *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, where the court, by Ruger, Ch. J., says: "The courts in this state have no common-law jurisdiction over the subject of divorces, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute. Previous to the revision of the statutes, it was, however, held that the court of chancery had authority, by virtue of its general equity jurisdiction, to entertain suits to annul marriage contracts upon the same grounds which authorized them to annul contracts generally. . . . Beyond this, however, the court of chancery refused to go." Page 468. Then, after quoting a portion of the passage above cited from the judgment in *Griffin v. Griffin*, the court adds: "The provisions of the revised statutes constitute a comprehensive and detailed scheme for the treatment of matrimonial and domestic differences, framed with great care to define the rights and liabilities of the respective parties and the power and duties of the court." Pages 465, 466. This leaves the impression that, at the time of rendering the decision in 1884, the whole subject was deemed to be covered by legislation, to which the courts must look for their powers and authority; and, so far as we know, the same is the case since the adoption of the present code of that state. See also, 2 Bishop, Mar. Div. & Sep. 801-809, where the question is treated of, but no definite opinion expressed. We have come to the conclusion that it does not fall within the general jurisdiction of a court of chancery, independently of authority by statute, to annul a marriage for the reasons set forth in the complaint made by the present defendant against the present plaintiff in the court of New York, and also that no such jurisdiction existed in that court at the time of entering the judgment now under consideration, or was asserted by it; and that whatever the court did it assumed to do under the express or incidental powers conferred upon it by statutes of that state.

We are brought, then, to consider more directly the question whether, in a case of this kind, where the court acted under statutory authority, jurisdiction should be presumed merely from the fact that the court assumed to exercise it. In *Galpin v. Page*, 85 U. S. 18 Wall. 850, 21 L. ed. 959, the court says: "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits,—persons who can be reached by their process,—and also over proceedings which are in accordance with the course of the common law." Page 867. A passage is quoted with approval from *Morse v. Presby*, 25 N. H. 299, 302, as follows: "The jurisdiction in such cases, both as to the subject-matter of the judgment and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it." And a little further on the court adds: "Where the special powers conferred [by statute] are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." *Galpin v. Page*, 85 U. S. 18 Wall. 871, 21 L. ed. 964. It is also said, in *Sabariego v. Maverick*, 124 U. S. 261, 81 L. ed. 430, that the presumption in favor of regularity of proceedings does not apply to give jurisdiction in proceedings not according to the common course of justice. In *Holmes v. Broughton*, 10 Wend. 75, 25 Am. Dec. 536, it was held that where a claim was founded upon a proceeding in Vermont, unknown to the common law, but authorized by a statute of that state, the statute must be set forth, so that the court might see that the proceedings were conformable thereto; and that a general averment that the proceedings were according to the laws of Vermont, and fully authorized thereby, was not enough; and that the court could not take judicial cognizance of laws of sister states at variance with the common law. This decision was cited with apparent approval in *Harris v. White*, 81 N. Y. 532, 544. In *Embury v. Conner*, 3 N. Y. 511, 523, 53 Am. Dec. 325, and in *Striker v. Kelly*, 7 Hill, 9, it was held that the supreme court of New York exercised its powers under the New York street law as a court, but that, as its powers in such matters were wholly derived from the statutes, and did not belong to it as a court of general jurisdiction, its decisions must be treated like those of a court of special and limited jurisdiction. A similar rule was applied in the surrogate's court to a decree of divorce, granted by the proper court, but not shown to be within the conditions and limitations prescribed by the statutes. *Lawrence's Case*, 18 Abb. Pr. 847. See also, *Cullen v. Cullen*, 18 N. Y. S. R. 881. For an application of similar doctrine to differ-

ent subjects, see *Morse v. Presby*, *supra*, which is cited and approved in *Galpin v. Page*, *supra*; *Bradley v. Jamison*, 46 Iowa, 68; *Louisville, N. A. & O. R. Co. v. Parish*, 6 Ind. App. 89; *Ferguson v. Jones*, 17 Or. 204, 3 L. R. A. 620; *Northcut v. Lemery*, 3 Or. 816; *Heatherly v. Hadley*, 4 Or. 1, 14; *Gray v. Larrimore*, 2 Abb. U. S. 542, Fed. Cas. No. 5,721; *Belcher v. Chambers*, 53 Cal. 635; *Neff v. Pennoyer*, 3 Sawy. 274, 299, 800, Fed. Cas. No. 10,083; *Denning v. Corwin*, 11 Wend. 647.

The rule is uniform, in the case of inferior courts, that their jurisdiction, when brought into question, must be clearly shown. *Thomas v. Robinson*, 8 Wend. 267; *Sheldon v. Hopkins*, 7 Wend. 425; *McLaughlin v. Nichols*, 13 Abb. Pr. 244. The same rule prevails in Massachusetts. The decision in *Com. v. Blood*, 97 Mass. 538, was placed solely upon this ground, the document produced being treated as if it were a record, though, strictly speaking, it was not entitled to be so treated; and it was held that the jurisdiction of a court of record in California over the subject of divorce is a special authority not recognized by the common law, and its powers must be shown, and must appear to have been strictly pursued. A similar decision was made in respect to the jurisdiction of a court of record of another state to decree an absolute and final dissolution of a corporation at the suit of an individual in *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 274, 96 Am. Dec. 747, and in respect to a question of the adoption of a child in *Foster v. Waterman*, 124 Mass. 592. The rule on which these decisions rest is not peculiar to Massachusetts, but, as has been seen, it has a wide recognition elsewhere. The proceedings which resulted in the judgment in the supreme court of New York in the case now before us were not in accordance with the course of the common law. 1 Bishop, Mar. Div. & Sep. §§ 71, 128. Jurisdiction to entertain them has not been shown. If the court had jurisdiction over the general subject, and if it should be assumed from the final order that an interlocutory order was actually passed for the payment of alimony *pendente lite*, it has not been shown that the court had authority to pass such order, or, at the conclusion of the suit, to order payment of arrears of such alimony, or to enter a judgment for such arrears, which should stand as a valid judgment, enforceable in other courts. We do not know whether it would possess such authority in respect to alimony, even if it had jurisdiction over the general subject of the suit, or whether such a judgment for arrears of alimony could be enforced in New York by issue of an execution thereon without further proceedings in court. *Knapp v. Knapp*, 134 Mass. 353. And see *Hoffman v. Hoffman*, 55 Barb. 269; *Galinger v. Galinger*, 4 Lans. 478. The jurisdiction in such cases is usually special, and the remedies special; and we are satisfied that this judgment depends for its validity upon statutes which are not before us, or usages or a course of practice which we are not familiar with, and we have not the means of knowing what faith and credit would be given to such a judgment in the

courts of the state of New York. 1 Bishop, Mar. Div. & Sep. § 128; *Allen v. Allen*, 100 Mass. 878. The justice of the superior court rightly refused to issue an execution upon the judgment for the amount of the alimony and counsel fees.

The judgment for costs of suit must rest on the same basis. The proceedings being special, the right to costs must depend upon the statutes or upon the inferences to be drawn from them. In *Stevens v. Stevens*, 1 Met. 279, it was held, under our statutes then in force, that, where a husband voluntarily discontinued a libel against his wife for a divorce, she was entitled to a judgment and execution against him for costs. There was, however, an express statute providing that the court might hear and determine all mat-

ters relating to divorce according to the course of proceedings in ecclesiastical courts and in courts of chancery. Rev. Stat. chap. 76, § 38. The court was therefore authorized to allow costs, unless there was something in the relation of husband and wife to prevent; and the court held that there was not, and costs were allowed. The authority of the court in New York in respect to costs in a proceeding like that before us for nullity of marriage is not shown. We suppose it depends directly or indirectly upon the statutes, which have not been put in evidence. 2 Barb. Ch. Pr. 250; 2 Bishop, Mar. & Div. 5th ed. § 866.

For these reasons, without considering other objections, the entry must be, *decree for the defendant*.

### NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *Appt.*,

v.

W. C. GORHAM.

(.....N. C.....)

1. A license tax on the business of putting up lightning rods is not a tax on interstate commerce, in case of a person who puts up no rods except those which he sells and which are brought from another state, although he puts them up without extra charge.
2. The sale of lightning rods, constituting only a part of the original package in which they were brought from another state, is not interstate commerce.

(October 16, 1894.)

**A**PPEAL by the State from a judgment of the Superior Court for Wilson County in favor of defendant in an action brought to recover the statutory penalty for putting up lightning rods without paying the required license tax. *Reversed*.

The jury returned a special verdict as follows:

"Cole Brothers were, on and prior to October 1, 1891, and up to the 4th day of June, 1894, and still are, citizens and residents of the town of Greencastle, in the state of Indiana. They were on said 1st day of October, 1891, and now are manufacturers of and dealers in lightning rods, fixtures, ornaments, etc., and prosecuted said business in the several states through their agents, selling and delivering rods and fixtures, by attaching the same to dwellings and other houses and buildings of their customers. In the department of selling and delivering they employ soliciting agents in the several states, who travel

on railroads and in buggies from place to place, and house to house, for the purpose of soliciting and taking orders for lightning rods by samples thereof, and catalogues illustrating the same. That when orders are received from persons desiring to purchase rods the same are delivered or forwarded by such soliciting agent to the said Cole Brothers, and the same are filled by the shipment of rods so ordered to some convenient and accessible point, from which they are delivered to the person ordering the same. The said Cole Brothers have no place of business in North Carolina. The said Cole Brothers, on the 1st day of October, 1891, for the purpose of introducing their goods into the state of North Carolina, entered into a contract with the defendant, W. C. Gorham, whereby they appointed him their agent and manager to conduct for them in said state the business of selling by sample and delivering lightning rods so manufactured by them. That such sale and delivery included the putting up of said rods whenever the purchaser so requested, for which no extra charge was to be made. That the said defendant, W. C. Gorham, was authorized to and did employ salesmen and others to assist him in the prosecution of said business. That all orders taken by the defendant, W. C. Gorham, for lightning rods and fixtures were in the form of Exhibit A, hereto attached. That on the — day of —, 1893, the said W. C. Gorham, acting as the agent of Cole Brothers, at and in the town of Wilson, county aforesaid, took from Jas. E. Rountree an order in accordance with a sample for rods to be attached to his dwelling house in said town, in the form and language of Exhibit A, hereto attached. That said order, together with other orders of like character, taken from

**NOTE.**—The invalidity of a license tax imposed on a traveling salesman for nonresident dealers, although without any discrimination against non-residents, is established by *Brennan v. Titusville*, 158 U. S. 280, 38 L. ed. 719, reversing the opinion of the supreme court of Pennsylvania in *Titusville v. Brennan* (Pa.) 14 L. R. A. 100.

35 L. R. A.

For other decisions as to the rights of such salesmen, depending on the interstate character of their business, see *note to Re Spain* (Fed. Rep.) 14 L. R. A. 97.

The present case makes an interesting distinction between the license tax on the business of putting up lightning rods and that of selling them.



other persons, was forwarded by the said defendant to said Cole Brothers at their said place of business in the state of Indiana, and he same was filled by shipment of the rods so ordered. That said rods were received by he said W. G. Gorham, and by him, through his servants and employés, attached to the dwelling house of the said Jas. E. Rountree in accordance with the terms of said order. That the shipment of said rods was made at the same time, and as a part of a shipment of other rods to fill other orders so taken by the said defendant and forwarded to the said Cole Brothers. That the defendant had not, at the time of taking said order and delivering said rods, paid the tax in Wilson county imposed by section 27, chap. 294, Acts 1898, and had not, at the time of the issuing of the warrant herein, paid said tax.

"Exhibit A. Order for Lightning Rods: Mess. Cole Bros.—Sirs: Erect or deliver at your earliest convenience your improved lockscREW lightning rods, manufactured by your Franklin Lightning Rod Co., at or on my —, in the county of —, state of —, viz., — points, — ground rods, in accordance with the scientific rules as printed on the back of this order, and I agree to settle for the same by cash, or note due —, at 47½ cents per foot for the rod, and the price of five feet of rod for each brace, \$3.50 for each point, \$2.50 for each ball, and \$4.00 for each arrow; no extra charge for putting up rods. If this order is revoked by me, or if through any fault or refusal on my part the rods are not erected, I agree to pay as liquidated damages therefor a sum equal to one half of the costs of material necessary for the work, at prices quoted in the order. It is expressly understood by the signer of this order that he signs the same on his own judgment, after due deliberation by him, without any undue influence having been used, or relying on any representation made by any agent or person other than what is written or printed on this blank. Given this — day of —, 189—."

Messrs. Frank J. Osborne, Atty-Gen., and W. J. Peele, for the State.

Mr. H. G. Connor, for appellee:

The facts found by the jury in the special verdict come directly within the principle announced by the Supreme Court of the United States in *Brennan v. Titusville*, 153 U. S. 289, 88 L. ed. 719.

No tax can be imposed by the state upon the lightning rods manufactured by Cole Brothers, in the state of Indiana, and sold in this state until they have become attached to the dwelling of the purchaser, or in some other way mingled with the common mass of property within the state.

*Leisy v. Hardin*, 135 U. S. 100, 84 L. ed. 128, 8 Inters. Com. Rep. 36.

Until delivery in the manner agreed upon, the rods continue to be articles of interstate commerce, and beyond the taxing power of the state.

*Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Leisy v. Hardin*, 135 U. S. 100, 84 L. ed. 128, 8 Inters. Com. Rep. 36.

Cole Bros. could send agents, drummers, 25 L. R. A.

or itinerants into the state to solicit orders for their rods, and to deliver them when sent upon such orders, and such agent, etc., could not be required to pay a license tax before engaging in the business for which they were employed.

*Robbins v. Shelby County Taxing Dist.* 120 U. S. 497, 80 L. ed. 697, 1 Inters. Com. Rep. 45; *Leoup v. Port of Mobile*, 127 U. S. 640, 82 L. ed. 811, 2 Inters. Com. Rep. 134; *McCull v. California*, 186 U. S. 104, 84 L. ed. 892; *Orutcher v. Kentucky*, 141 U. S. 47, 85 L. ed. 649; *Brennan v. Titusville*, 153 U. S. 289, 8 L. ed. 719.

Mr. Perrin Busbee also for appellee.

McRae, J., delivered the opinion of the court:

Section 27 of chapter 294 of the Acts of 1898, being a part of Schedule B, the taxes in which are imposed as license taxes for the privilege of carrying on business or doing the act named, is as follows: "On every itinerant who puts up lightning rods, \$50 annually for each county in which he carries on business." There is nothing in the words of the statute to indicate a purpose to levy a tax in any form upon, or to impose a restriction in any manner upon, citizens or inhabitants of other states from engaging in business connected with the commerce between the states, which is protected from state legislation by the Constitution of the United States. The right of a state legislature to tax trades, professions, and avocations within the borders of the state has never been disputed. It is earnestly contended, however, by the learned counsel that the defendant was not an itinerant engaged in the business of putting up lightning rods, but that his business was that of selling, in which, of course, is included the delivery, an article manufactured in another state; that it appears by the special verdict that such sale and delivery included the putting up of said rods whenever the purchaser so requested, and for which service no extra charge was to be made; and therefore that the imposition of a license tax upon defendant for putting up the rods so sold by him "is an attempt to impose a tax on the business of carrying on interstate commerce." We are not disposed to question the principle so often laid down by the Supreme Court of the United States from *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678, to *Brennan v. Titusville*, 153 U. S. 289, 88 L. ed. 719, that no state has a right to lay a tax on interstate commerce in any form; neither have we any disposition to extend the application of this doctrine any further than we find it. Unless, then, there is something in this special verdict which so connects the act of defendant in putting up the lightning rods sold by him with the business of interstate commerce, it will be our duty to uphold the law of this state, and apply it to the case before us. The whole matter is in a nutshell. After finding the fact that Cole Bros. were manufacturers in another state, and defendant was their agent in this state for the sale of their wares, it further finds "that such sale and delivery included the putting up of said rods whenever

the purchaser so requested, for which no extra charge was to be made." Under these circumstances, is the defendant liable for the license tax? It will be seen that quantities of said goods were shipped to the agent, at some convenient point in this state, in original packages, and were, after bulk broken, distributed and delivered by him to the different purchasers; that the sale was not completed by delivery until after such breaking of bulk in this state: and that the quantity of the article was not determined in the order, as will appear by reference to Exhibit A, and was to be determined after the importation of the original package. The consideration of these facts leads us to the conclusion that the present case may easily be distinguished from any of the numerous adjudications on the subject. In *Brennan's Case*, *supra*, the pictures were delivered, framed, direct to the purchaser. Of necessity, the goods, if many of them had been shipped to the agent for delivery, were separate and distinct from all other goods of the same character. It was not obnoxious to the interstate commerce clause of the constitution when a license tax was laid "on all peddlers of sewing machines, without regard to the place of growth or produce of material or of manufacture," because the test is "whether there is any discrimination in favor of the state which enacted the law." *Hove Machine Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754. "When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are." *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, citing *Hove Machine Co. v. Gage*, *supra*, and *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257.

If this license tax upon itinerants putting up lightning rods could in the slightest degree affect the sale and delivery of the article, its effect upon interstate commerce would be so incidental and remote as not to amount to a regulation of such commerce, as in *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79. Again, as said in *McCall v. California*, 136 U. S. 104, 34 L. ed. 892, where an agent of a railroad running from another state was soliciting business, but not selling tickets, in California: "The test is, Was the business a part of the commerce of the road? Did it assist or was it carried on with the purpose to assist in increasing the amount of passenger traffic on the road?" In our case the business which could not be taxed was the sale of, or the solicitation of persons to purchase, the lightning rods manufactured in another state. The avocation requiring a license is that of an itinerant putting up lightning rods. The sale and delivery of the article is not inseparable from the erection of it, any more than the shoeing of horses is from their importation into the state, or the shipping here of wheat is from its sowing in the

fields. Indeed, it appears by the contract that the agent was only to put up the rods when requested so to do by the purchaser. The inference is that the purchaser might choose to employ some one else to put them up, and that a sufficient margin is allowed upon the price to fully pay the expenses of erection, and make it to the interest of the purchaser to require the seller to put it up. One who goes through the country putting up rods is none the less liable to be taxed for the privilege of exercising his avocation because he adds to this business that of soliciting the purchase of the articles to be so put up by him. If such is the law, it will not be difficult for persons whose avocations are taxed to ingraft upon their business a branch for the sale of some article of foreign manufacture, which is a necessary part of the business in which they are engaged. We may distinguish the manner of delivery of the articles named in *Spain's Case*, 47 Fed. Rep. 208, 14 L. R. A. 97, if we were bound by the opinion delivered in that case. Certain specified articles, lamps, lamp shades, etc., manufactured in West Virginia, were sold by the agent traveling in North Carolina for his principal. Many of the articles ordered were shipped in the same box to the agent, who took out the separate articles, and completed the sale by delivery of the same to the purchasers. But here a sufficient quantity of the lightning rod material is shipped to the agent from which to fill orders theretofore taken. He selects from the bulk enough to fill the order of his customer, and delivers it. The bulk was broken, and the same became a part of the general property in the state before delivery, when the package was opened, and a part thereof, until then undistinguishable from the balance, was set apart to be delivered to a particular purchaser. The latest, as far as we have been able to ascertain, of the very numerous deliverances of the highest court of this country upon the subject we have under consideration is that of *Brennan v. Titusville*, *supra*. The defendant was the agent of a manufacturer of picture frames and maker of portraits, residing in Illinois. The defendant's business was to travel in Pennsylvania, and to solicit orders for said pictures and frames. The orders were forwarded by the defendant to his principal in Chicago, who shipped the goods direct by freight or express to the purchaser. The price of the goods was sometimes paid to the express company and sometimes to the agent. An ordinance of the city of Titusville had attempted to lay a license tax upon "all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited." This was so clearly within the rulings of the cases of *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, and *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 868, 2 Inters. Com. Rep. 241, that it scarcely requires an elaborate opinion. Its simple statement will show the particulars in which it differs from ours. We conclude then that his honor was in error in

holding that the defendant was not guilty upon the special verdict, because: (1) The defendant was an itinerant putting up lightning rods. (2) The connection between the pursuit of this avocation and the sale of articles manufactured in another state was so remote in its effect as to impose no burden upon the business of interstate commerce. (3) The manner of sale and delivery of the lightning rods was such as to divest it of any feature of interstate commerce, the original packages being necessarily broken before the sale was completed by delivery.

*There is error, and the judgment is reversed.*

Patsy Ann GASKINS, *App't.*,

v.

Henry C. DAVIS.

(.....N. C.....)

1. In trespass for cutting timber against one who acted in the honest but mistaken belief that the trees were his, the measure of damages is their value in the woods from which they were taken, together with the injury incident to their removal.
2. The true owner is entitled to regain possession of a log cut and removed from his land by a good faith trespasser either by recapture or by any other remedy provided by law and whatever additional value may have been imparted to it by transporting it to a better market or by any improvement in its conditions short of actual alteration of species.
3. The enhanced value given to logs cut wrongfully but in good faith by their removal to a place where the true owner recaptures them belongs to him and cannot be recouped against the damages assessed against the trespasser in an action for other logs cut with them but not recaptured.

(October 16, 1894.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for Craven County in favor of defendant in an action of trespass brought to recover damages for the alleged wrongful cutting and carrying away of certain timber trees. *Reversed.*

The facts are stated in the opinion.

*Mr. W. W. Clark* for appellant.

*Messrs. F. M. Simmons and P. M. Pearsell* for appellee.

**Avery, J.**, delivered the opinion of the court:

The plaintiff's complaint is in the nature of a declaration for trespass in the entry by the defendant upon her land, after being forbidden, and cutting, carrying away, and converting to his own use valuable timber that was growing thereon, to her damage \$500. The logs, after being severed, were

**NOTE**—One of the counsel in the above case states that the case makes clear a principle that he has failed to find clearly decided in any court. The authorities on the subject, some of which are in harmony with the present case, are presented in a note to *Bailey v. Chicago, M. & St. P. R. Co.* (S. Dak.) 19 L. R. A. 632.  
25 L. R. A.

transported to Newbern in two lots, one of which lots was seized by plaintiff after reaching that city, where it was much more valuable than at the stump, and was sold by her for the sum of \$112. The other lot was converted into boards and sold by the defendant. The defendant, for a second defense, sets up by way of counterclaim the seizure of the logs by the plaintiff; and though the counterclaim may be a defective statement of the defendant's cause of action, in that it fails to aver an unlawful taking, the defect is cured, if the counterclaim can be maintained at all, by the reply, which, by way of aid, raises the question of the rightfulness of the seizure. The well-established rule is that in such cases the injured party is entitled to recover of the trespasser the value of the timber where it was first severed from the land and became a chattel, *Bennett v. Thompson*, 85 N. C. 146, together with adequate damage for any injury done to the land in removing it therefrom. As long as the timber taken was not changed into a different species, as by sawing into boards, the owner of the land retained her right of property in the specific logs as fully as when by severance it became her chattel, instead of a part of the realty belonging to her. *Potter v. Mardre*, 74 N. C. 40. The value of the material taken indicates the extent of the loss, where there are no circumstances of aggravation or willfulness shown, and is the usual measure of damages. Where the trespasser has converted the property taken into a different species, under the rule of the civil law which we have adopted, the article, in its altered state, cannot be recovered, but only damages for the wrongful taking and conversion, when the change in its form is "made by one who is acting in good faith, and under an honest belief that the title was in him." In *Potter v. Mardre*, *supra*, *Rodman, J.*, delivering the opinion of the court, says: "The principle of equity [applied in that case] is supported by the analogy of the rule established in this state by the decisions which hold that a vendee of land by a parol contract of sale, who takes possession and makes improvements, and is afterwards ejected by the vendor, may recover the value of his improvements. *Albee v. Griffin*, 23 N. C. 9. So if one who has purchased land from another, not having title, enters and improves, believing his title good, and is ejected by the rightful owner, he is entitled to compensation. In both cases one who is morally innocent has confused his property with that of another, and he is held entitled to separate it in the only way it can be done, viz., by being allowed the value of his improvements in the raw material." The judge laid down correctly the rule as to the damage that the plaintiff was entitled to recover of the defendant for the original trespass,—the value of the logs when severed at the stump, and adequate damage for injury done to the land in removing them. *Potter v. Mardre*, *supra*; 5 Am. & Eng. Encyclop. Law, p. 86; *Ross v. Scott*, 15 Lea, 479.

The character of the logs had not been changed by cutting and transporting to Newbern, but the value had probably been greatly enhanced. The approved rule, where the

plaintiff is asking damage for the trespass, seems to be that the owner is entitled to recover the value of the logs when and where they were severed, and without abatement for the costs of severance. *Franklin Coal Co. v. McMillan*, 49 Md. 549, 83 Am. Rep. 280. But, if he prefers to follow and claim the timber removed, he is entitled to do so, as long as the species remains unchanged. The plaintiff was entitled to recover in a claim and delivery proceeding the logs that she seems to have acquired peaceful possession of without action. Was the defendant entitled, by way of recoupment, to the benefit of the enhanced value imparted to the property by transporting it to market? Had they been sawed up in planks, and used to construct a boat, the plaintiff would not have been entitled to recover the boat, or the material used in its construction. But if the plaintiff had then unlawfully seized and lost or destroyed the boat, and the defendant had been thereby driven to an action to recover compensation for his loss, he might have recovered the value of the boat, together with the damage, if any, done to his land in removing it therefrom; but the present plaintiff would have been entitled "to deduct or recoup, by way of counterclaim, the value of the timber which was manufactured into the canoe, just after it was felled and converted into a chattel." *Potter v. Mardre*, *supra*. It seems to have been conceded that the defendant cut and carried away the logs under the honest but mistaken belief that the land upon which they were growing was his own. Where a trespasser acts in good faith under a claim of right in removing timber, though he may not be allowed compensation for the cost of converting the tree into a chattel, may he not recoup, in analogy to the equitable doctrine of betterments, for additional value imparted to the property after its conversion into a chattel, and before it is changed into a different species? The judge below, in allowing the defendant, by way of recoupment, the benefit of the enhanced value imparted to the logs by removal from the stump to the Newbern market, seems to have acted upon the idea that the defendant, by reason of his good faith, was entitled to the benefit of the improvement in value imparted by his labor and expense. In *Ross v. Scott*, *supra*, where it appeared that the defendant had entered upon land to mine for coal, and, under the honest but erroneous belief that he was the owner, had built houses thereon, it was held that the plaintiff might recover the cost of the coal *in situ*, subject to reduction by an allowance for permanent improvements put upon the land. See also *Re United Merthyr Collieries Co. L. R. 15 Eq. 46*; *Hilton v. Woods*, L. R. 4 Eq. 482; *Forryth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617.

The weight of authority, it must be conceded, sustains the rule that, where the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. *Widen* 25 L. R. A.

*v. Johnson*, 52 Vt. 628, 36 Am. Rep. 769, and *note*, 770; *Herdie v. Young*, 55 Pa. 176, 93 Am. Dec. 739; *Hill v. Canfield*, 56 Pa. 454, *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239; *Cushing v. Longfellow*, 26 Me. 306; *Geller v. Pett*, 80 Cal. 482; *Foot v. Merrill*, 54 N. H. 494, 20 Am. Rep. 151; *Lake Shore & M. S. R. Co. v. Hutchins*, 82 Ohio St. 571.

In the absence of any evidence that would justify the assessment of vindictive damages, there is only one exception to the rule, as we have stated it, and that is where the trees destroyed are not the ordinary timber of the forest, but are peculiarly valuable for ornament, or as shade trees.

It being settled in this state that the right to the specific chattel, which vests on severance from the land in the owner of the soil, remains in him till the species is changed, we are constrained to go further, though it may sometimes subject a mistaken trespasser to hardship, and hold that the true owner is entitled to regain possession of a log cut and removed from his land, either by recapture or by any other remedy provided by law, whatever additional value may have been imparted to it by transporting it to a better market, or by any improvements in its condition short of an actual alteration of species. In *Weymouth v. Chicago & N. W. R. Co.*, 17 Wis. 550, 84 Am. Dec. 763, the court says: "In determining the question of recaption the law must either allow the owner to retake the property, or it must hold that he has lost his right by the wrongful act of another. If retaken at all, it must be taken as it is found, though enhanced in value by the trespasser. It cannot be returned to its original condition. The law, therefore, being obliged to say either that the wrongdoer shall lose his labor, or the owner shall lose the right to take the property wherever he may find it, very properly decides in favor of the latter. But where the owner voluntarily waives the right to reclaim the property itself, and sues for damages, the difficulty of separating the enhanced value from the original value no longer exists. It is then entirely practicable to give the owner the entire value that was taken from him, which it seems that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defendant. In the case of recaption the law does not allow it, because it is absolute justice that the original owner should have the additional value. But where the wrongdoer has by his own act created a state of facts, when either he or the owner must lose, then the law says the wrongdoer shall lose." *Id.* 26 Am. Rep. 529, *note*. When, therefore, the plaintiff recaptured the one lot of logs that had been enhanced in value by transportation from the stump to the city market, she but exercised the right given her by law to peacefully regain possession of her own chattels wherever found. She was guilty of no infringement of the rights of the defendant, for which an action would lie. It is familiar learning that a defendant can only maintain successfully a counterclaim when it is of such a nature that he could recover upon it in a separate suit brought against the plaintiff.

The defendant could not recover, therefore, either in a distinct action for the taking of the logs, or by way of counterclaim. When the plaintiff recaptured the logs she was guilty of no wrong, and the question of title to the property so rightfully taken was eliminated from all possible future controversy. Her remedy by act of the law remained as to so many of the logs as she had not regained possession of by her own act. After she had recaptured one lot the property in them in their altered state, and at the new *situs*, re-vested in her, with the absolute *jus dis-*

*ponendi*, as in the case of her other personal property. Nothing remained to be adjusted in the courts, except her claim for damages for the taking of the other lot and the injury to the land, if any, incident to the removal of both lots. It was error, therefore, to instruct the jury that the enhanced value imparted by removal to the one lot of logs might be allowed the defendant as a counterclaim, so as to set off the damages assessed for injury to the land and for the value at the stump of the other lot, and the *plaintiff is entitled to a new trial*.

## MICHIGAN SUPREME COURT.

GRAND RAPIDS ICE & COAL CO., *Plff.*  
in *Err.*,  
v.  
SOUTH GRAND RAPIDS ICE & COAL  
CO.

(.....Mich.....)

**The relative rights of shore owners on a small inland lake** navigable for small steamers, which is so large that the lines of the subsections or subdivisions of the tracts held by such owners will, if extended, not include the whole of the lake, are to be determined without reference to the extension of such lines but by the principles governing the rights of riparian proprietors, depending upon their frontage and the form, length, and breadth of the lake.

(September 27, 1894.)

**ERROR** to the Circuit Court for Kent County to review a judgment in favor of defendant in an action brought to recover damages for the alleged trespass of defendant in entering upon plaintiff's premises and cutting and carrying away a quantity of ice. *Affirmed*.

The facts are stated in the opinion.

*Messa. Taggart, Wolcott & Ganson*, for plaintiff in error:

If the rule laid down in *Clute v. Fisher*, 65 Mich. 48, is adhered to by this court, there is no doubt about the right of plaintiff to recover.

*Clute v. Fisher*, *supra*, followed the former decisions of this court, and particularly that of *Palmer v. Dodd*, 64 Mich. 474.

The rights of riparian owners are settled according to state not United States law.

*Webber v. Pere Marquette Boom Co.* 62 Mich. 627; *Burroughs v. Whitwam*, 59 Mich. 279.

The riparian rights to inland lakes having been settled by the decisions of this court, they should not be unsettled, even though the United States Supreme Court in one instance has changed its former rulings.

*Palmer v. Dodd*, *supra*, while citing *Wilson v. Hoffman*, 54 Mich. 246; *Keyser v. Sutherland*, 59 Mich. 455, and also *Brown v. Clements*, 44 U. S. 8 How. 650, 11 L. ed. 767,—establishes another principle than that necessarily

involved in the cases cited, and the same, which is recognized in *Clute v. Fisher*, *supra*, that sales of fractional subdivisions of land upon the small inland lakes, included all land within the section or subdivision lines extended. Nor has this rule been overruled by *Wilson v. Hoffman*, or the Supreme Court of the United States in *Gazzam v. Phillips*, 61 U. S. 20 How. 372, 15 L. ed. 958.

*Clute v. Fisher* was expressly recognized approvingly in *Jones v. Lee*, 77 Mich. 40.

See also *Blodgett & D. Lumber Co. v. Peters*, 87 Mich. 498; *Stoner v. Rice*, 6 L. R. A. 367, 121 Ind. 51, and *State v. Portsmouth Sav. Bank*, 106 Ind. 436; *Edwards v. Ogle*, 76 Ind. 302.

The general rule, that as to inland lakes, private, not public ownership prevails and extends to the beds of the lakes, and ordinary use of their waters, will not be controverted. The rule is the same, even if they are navigable for certain purposes.

*Gouverneur v. National Ice Co.* 18 L. R. A. 695, 184 N. Y. 855. See also *Cobb v. Davenport*, 82 N. J. L. 369; *Hardin v. Jordan*, 140 U. S. 871, 35 L. ed. 428; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 398; *Ledyard v. Ten Eyck*, 86 Barb. 102.

Ice forming over the bed of a lake or stream belonging to private parties belongs to and becomes the property of such parties.

*Peoples' Ice Co. v. Steamer Excelsior*, 48 Mich. 386, 44 Mich. 229, 38 Am. Rep. 246; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 425; *Clute v. Fisher*, 65 Mich. 48; *Bigelow v. Shaw*, Id. 341; *Higgins v. Kusterer*, 41 Mich. 818, 32 Am. Rep. 160; *Washington Ice Co. v. Shortall*, 101 Ill. 54, 40 Am. Rep. 196; *Mill River Woolen Co. v. Smith*, 84 Conn. 462; *State v. Pottmeyer*, 88 Ind. 402, 5 Am. Rep. 224; *Edgerton v. Huff*, 26 Ind. 85; *Bates v. State*, 81 Ind. 72; *Brown v. Cunningham* (Iowa) 12 L. R. A. 588, and *note*.

*Mr. J. W. Champlin*, for defendant in error:

*Clute v. Fisher*, 65 Mich. 48, does not sustain the plaintiff's contention.

At the time *Clute v. Fisher* was decided I was a member of the court, and I concurred in the opinion filed. It is, therefore, with the greatest diffidence, that I am compelled to assert that the reasons given as the basis of the conclusion reached were based upon errors of my own.

I take my full share of the blame in putting the court in a wrong position in the case of

**NOTE**—The above decision does much to promote unity in the doctrine of the courts as to riparian rights on small inland lakes. The whole array of authorities on the subject is found in a note to *Gouverneur v. National Ice Co.* (N. Y.) 18 L. R. A. 695.

25 L. R. A.

See also 26 L. R. A. 609; 33 L. R. A. 146.

*Wilson v. Hoffman*, 54 Mich. 246, and freely admit that I followed the decision in *Brown v. Clements*, 44 U. S. 8 How. 665, 11 L. ed. 774, and that I was unaware that it had been expressly overruled in *Gazzam v. Phillips*, 61 U. S. 20 How. 372, 15 L. ed. 958. The court followed *Wilson v. Hoffman*, *supra*; in *Keyser v. Sutherland*, 59 Mich. 455, and in *Palmer v. Dodd*, 64 Mich. 474, and *Clute v. Fisher*. Before the question came before the court again, the case of *Gazzam v. Phillips*, *supra*, was brought to the attention of the court, and in *Wilson v. Hoffman*, 77 Mich. 552, these cases were overruled, and *Gazzam v. Phillips*, *supra*, followed.

See also *Hartford Iron Min. Co. v. Cambria Min. Co.* 80 Mich. 491; *Jones v. Pashby*, 62 Mich. 614; *Heyer v. Lee*, 40 Mich. 853, 29 Am. Rep. 587; *Dart v. Barbour*, 82 Mich. 271.

But if *Clute v. Fisher* were sound law, and is to be adhered to, then this case is plainly distinguishable from that.

This is a much larger body of water. The lake is of such dimensions and consequence that its waters are navigated by iron steamers, and other steamers and sail boats, conveying passengers for pleasure.

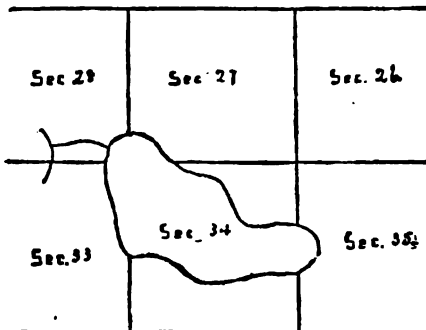
As well could the section corner have been located in Teal lake, in *Hartford Iron Min. Co. v. Cambria Min. Co.* *supra*, and the sections called full and equal divisions made, as to do so in this.

*Clute v. Fisher* was never intended to apply to any but those small lakes where there would be no difficulty in extending the line, so as to do substantial justice between all parties.

*Jones v. Lee*, 77 Mich. 40.

McGrath, Ch. J., delivered the opinion of the court:

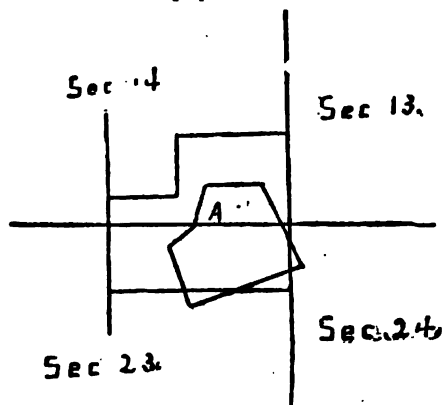
This is a controversy over the right to cut ice in Reed's lake, plaintiff insisting upon ownership of the bed of the lake within the lines of the fractional subdivisions extended, and defendant insisting upon a division of the center line proportionate to the shore line, so as to give to each riparian owner an equitable share. The accompanying diagram will best explain the situation:



By the meanders, the south shore line is 177.65 chains, and the north shore line is 117 chains. The center line of the lake is about 488 rods. The circuit judge finds that the plaintiff's lessors took all the upland on the N.  $\frac{1}{4}$  of section 34, under a government conveyance, which described the land taken as "the north-east fraction of section 34, . . . containing one 25 L. R. A.

hundred and nine acres and ninety-hundredths of an acre; . . . that what is now known and called 'Reed's Lake' is a body of water lying in five different sections, and by the United States government survey was meandered, and the lands adjoining platted by the United States, and sold as fractions; that the lake has an outlet which extends to grand river, and is called 'Cold Brook;' that its greatest length of clear water, according to the United States plat, is 440 rods. On the east and west quarter line, if extended through the lake, it is 380 rods. If the quarter line north and south were extended through, the distance across the lake would be 192 rods. The distance across the water on the west section line of section 34 is 226 rods. The greatest width across the lake is 220 rods, and the least width is 96 rods. The waters of the lake cover over 870 acres of land. It is a pleasure resort, having four steamboats, drawing from two to four feet of water, and for carrying passengers during the summer months, and numerous smaller craft. The defendants are riparian owners of a piece of land situated on the south fraction of section 34, commencing at the section line between sections 33 and 34, extending eastwardly, and having a frontage on the margin of the lake of 813 feet, being a part of the southwest fractional quarter of section 34, town 7, north, of range 11 west, as described in the original purchase from the government in the same chain of title. They also had a verbal lease from the owners of the land, at the time of the cutting of the ice, lying next westerly from said section line, having a margin on the lake of 23 rods, and of the right to take ice in front thereof, so far as the same belonged to said riparian owners. The defendant, during the early part of the year 1893, entered upon the ice in front of the lands so leased and so owned by it, and cut and removed the ice in front of said lands, and between the shore and the middle of the lake, between lines which would be formed by running them at right angles from the center line of said lake to the shore line, so that defendant would have the same proportionate share of the center line of the waters of the lake as they have of the whole shore line on the south side of said lake."

Plaintiff relies upon *Clute v. Fisher*, 65 Mich. 48. The following diagram will illustrate the situation in that case:



Clute owned the southern portion of the S. E.  $\frac{1}{4}$  of 14, and the northern part of the N. E.  $\frac{1}{4}$  of 23. The meander lines were almost wholly, and the water lines were wholly, within the subdivisions owned by Clute. The ice was cut at the point A. Defendant was not the owner of the N. W.  $\frac{1}{4}$  of 24 nor of that portion of 23 adjoining Clute's land. No claim was made that an apportionment would give the right to cut the ice to some one other than Clute, but the sole contention was that the title to the bed of all the lands within the meandered lines was in the state. It was that question that the court was dealing with. *Mr. Justice* Morse in that case says: "It has been held in this state that the soil under the water of the inland lakes in this state does not belong to the general government or to the state. . . . It has also been repeatedly decided in this state that private ownership of lands bounded on navigable fresh water is not restricted to the meander line. . . . We have also held, in accordance with the decisions of the Supreme Court of the United States, that the land described as the fraction of any subdivision—as for instance, the southeast fractional quarter—cannot be extended beyond the lines of said southeast quarter as they would run if extended."—citing, *Wilson v. Hoffman*, 54 Mich. 246; *Keyser v. Sutherland*, 59 Mich. 455; *Brown v. Clements*, 44 U. S. 8 How. 665, 11 L. ed. 774; *Palmer v. Dodd*, 64 Mich. 474.

In *Wilson v. Hoffman*, *supra*, 117 acres of the S.  $\frac{1}{4}$  of section 28 lay south of Black river. Plaintiff brought ejectment to recover seven acres lying on the extreme west point, and within the lines of the S. W.  $\frac{1}{4}$  if the lines had been extended. The description in the patent to plaintiff's grantor was: "The southeast fractional quarter of fractional section 28, . . . containing 117 acres, according to the official plat of the survey of the said lands returned to the general land office by the surveyor general." The map was not introduced. The court held that all subdivisional lines of a section must be straight lines running from the proper corner in one exterior line to its corresponding corner in the opposite boundary of the section, and that the patent and deed thereunder, through which plaintiff claimed, did not embrace within their description the lands in controversy, since no part thereof was within the S. E.  $\frac{1}{4}$  of the section. The case came up again, and is reported in 70 Mich. 552, and the court there says: "In granting patents for lands, it is usual for the government to add, immediately after the statement of the number of acres which the tract contains, if it be fractional, these words: 'According to the official plat of the survey of said lands returned to the general land office by the surveyor general.' Such language, when used, constitutes a part of the description of the premises conveyed, and limits the purchaser to the tract as marked upon the plat of the surveyor general. This was so held in *Gazzam v. Phillips*, 61 U. S. 20 How. 872, 15 L. ed. 958, which overruled the same case in 44 U. S. 8 How. 650, 11 L. ed. 767, under the title of *Brown v. Clements*. This was the language used in the patent to Tingley." The record then showed that the premises described in the declaration were embraced in what the government denominated

the S. E.  $\frac{1}{4}$  of 28. "It might, perhaps, have been more accurate," says the court, "to describe it as that portion of section 28 lying south of Black river; but as the fraction contained less than 160 acres, and the law required it to be sold entire, the description contained in the patent, in connection with the official plat, was sufficient, and is quite a customary method of description in the general land office."

In *Keyser v. Sutherland*, 59 Mich. 455, a dispute arose respecting a strip of land on the west line of section 29, in the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of that section, which extended around the west and south sides of the S. W.  $\frac{1}{4}$  of the section. Defendant claimed title under a conveyance from the government describing this his land as the south fraction of section 29. Plaintiff's deed called for a full subdivision, to wit, the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of 29. *Brown v. Clements*, *supra*, and *Wilson v. Hoffman*, 54 Mich. 246, are cited.

In *Palmer v. Dodd*, 64 Mich. 474, defendant was the owner in fee of the E.  $\frac{1}{4}$  of the N. W. fractional  $\frac{1}{4}$  of section 28, described in the United States patent as containing 57 acres. Plaintiff was the owner in fee of the S. W. fractional  $\frac{1}{4}$  of section 28. The section was made fractional by a lake and marsh which was meandered by the United States survey. The trespass was committed within the boundaries of the S. W.  $\frac{1}{4}$ , if the quarter lines should be extended. The lake, which is surrounded by the marsh, was mostly located upon the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of the section. Defendant claimed to own to the center of the lake. The court says: "But no grantee by such patent, granting a legal subdivision of land, can derive title to land upon another legal subdivision. This we have decided in the cases of *Wilson v. Hoffman*, 54 Mich. 246, and *Keyser v. Sutherland*, *supra*, which were based upon the decisions of the Supreme Court of the United States in *Brown v. Clements*, *supra*. The principles which govern the rights of riparian proprietors do not apply to defendant's grant. No part of the land granted to him in the description contained in his patent was bounded by a lake or other water. His grant extended no further south than the east and west quarter line of the section, and this line did not touch or intersect the shore of any lake. Indeed, the lake is nearly 40 rods south of this line." In the *Palmer Case* the court recognized the principles which govern the rights of riparian owners, but held that they did not apply.

The question before the court in the other cases was the significance of meander lines. In none of them did the question arise as to the rights of shore owners as between themselves. It was held in *Clute v. Fisher*, *supra*, that the rule that private ownership of lands bounded on navigable fresh water is not restricted to the meander line must also apply to the small inland lakes by analogy, whether they can strictly be termed "navigable" or not; and it was also conceded that in case of a body of water so large that the lines of the sections or subdivisions of sections held by the shore owners, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the center line of said

lake. It would seem to follow that the extent of the qualified ownership in the bed of the river or lake must depend upon the shore ownership, rather than upon the distance from the shore to the parallel subdivision line. The rule laid down in *Olute v. Fisher*, that the owner of a fractional subdivision owns the soil which is included within the extended subdivision lines, is inconsistent with the rule repeatedly laid down in this state, that the shore proprietor owns to the thread or center of the stream. It is also inconsistent with the rule laid down in *Clark v. Campau*, 19 Mich. 828, and *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182, that side lines are to be governed by the course of the stream and the submerged land bounded by lines drawn at right angles with the central thread, rather than at right angles with the shore at the point of departure. The application of the rule of the *Olute Case* to the one before us would leave the  $N. \frac{1}{4}$  of the  $N. W. \frac{1}{4}$  of section 84 without the lines of any subdivision, and would apportion that area upon the basis of imaginary subdivision lines, without reference to shore proprietorship. Again, the rule that a conveyance of a fractional subdivision actually conveys the entire subdivision is inconsistent with the rule laid down in *Au Gres Boom Co. v. Whitney*, 28 Mich. 42; *Dart v. Barbour*, 32 Mich. 271; *Jones v. Pashby*, 62 Mich. 614; *Hartford Iron Min. Co. v. Cambria Min. Co.* 80 Mich. 491. In each of these cases part of a parcel of land having a water frontage was conveyed, describing it as half of the lot or parcel; and it was insisted that the conveyance was of half of the water frontage, but the court held that the words "half of the lot" meant half in quantity of the upland. A correct result was reached in the *Olute Case*, but the reasons given are without support. That case and those upon which it relies were based upon *Brown v. Clements*, 44 U. S. 8 How. 665, 11 L. ed. 774, which was expressly overruled in *Gazam v. Phillips*, 61 U. S. 20 How. 372, 15 L. ed. 958. See also, *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428. In any event, we think that this case is governed by the rule laid down in *Jones v. Lee*, 77 Mich. 85.

Unless the contrary appears, a grant of land bounded by a watercourse conveys riparian rights (*Richardson v. Prentiss*, 48 Mich. 88); and the title of the riparian owner extends to the middle line of the lake or stream of the inland waters (*Webber v. Pere Marquette Boom Co.* 62 Mich. 626, and cases cited at page 636). A boundary line may be so described as to preclude the extension of the grant, by construction, to the center of the stream. When it is said that meanders have no significance as boundaries, what is meant is that meanders do not preclude such extension of the grant. In *Luce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637, among the courses in the description of the premises were those to a hemlock stake "standing on the east bank of the river; from thence down the river, as it winds and turns, 24 chains and 94 links, to a hard maple tree." The court says: "It is never thought that monuments mentioned in such deed as occupying the bank of the river are meant by the parties to stand on the precise water line. They are used to fix the termini of the line which is de-

scribed as following the sinuosities of the stream. . . . When the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, one half of the bed of the stream is included by construction of law." *Child v. Starr*, 4 Hill, 375; *Seneca Nation of Indians v. Knight*, 23 N. Y. 498; *Riz v. Johnson*, 5 N. H. 520, 23 Am. Dec. 472; *Gouverneur v. National Ice Co.* 134 N. Y. 355, 18 L. R. A. 695.

The shore proprietor takes by virtue of shore ownership. His interest in the bed of the stream he acquires as appurtenant to the grant, and the extent of that interest depends upon his frontage, and the form, length, and breadth of the body of water upon which he abuts. That a lake may be of such form as to render the designation in it of the boundaries of the several riparian owners somewhat difficult is not an objection to the application of the rule. *Mr. Justice Campbell* says in *Lincoln v. Doss*, 53 Mich. 390, 51 Am. Rep. 116: "In carrying out lines of ownership in narrow streams, it is easy to find the general course of the stream, and to draw lines perpendicular to that course from the terminal shore lines. But on lakes all lines from the shore tend to converge in some central part of the lake; and, while irregularity of shape prevents drawing them to a common center, they must all, if protracted, cross each other in a perplexing way. The rule adopted in such waters, where the whole surface could be appropriated, has always been to divide the water area in proportion to the shore frontage, and never to attempt any division by lines run from the shore, except over such parts of the lakes as are substantially adjacent to the shore. In some cases, by a fair partition, a shore owner would, by his extent of shore line, obtain a share beyond the center. But it seems impossible, if the whole water is to be regarded as divided up, to reach a division without some proceeding, in the nature of a partition, which will fix the various possessions." Again, in *Jones v. Lee*, *supra*, *Mr. Justice Campbell* says: "It appears clearly enough in the present case that while there is a considerable frontage facing northwest or southeast, the lake being longest in that direction, there must also be large end frontages, which look up or down the lake perpendicularly, or nearly so, to any line across from bank to bank, at most places along the shores. If this body of water were not navigable, and if all its waters could in any way be apportioned among the riparian proprietors for any lawful purpose, it is evident that it could not be done by reference to any *flum aqua* or middle thread, but must be done by some rule of proportion, which probably could only be got at by some partition proceeding, inasmuch as such waters are common for all ordinary uses." In *Blodgett & Davis Lumber Co. v. Peters*, 87 Mich. 498, the question arose as to the proper apportionment between several shore owners in a cove on Green bay. In *Hardin v. Jordan*, *supra*, the court says: "If there should arise any question between the plaintiff and other riparian owners of lands situated on the margin of the lake as to the conveyance of the side lines of the plaintiff's land in the lake, it can be disposed of by the parties themselves, by a resort to equity or to



such other form of procedure as may be proper." See also *Gouverneur v. National Ice Co. supra*.

In the present case it is practically conceded by plaintiff that, unless the rule contended for by it is applicable, the judgment below was correct.

*The judgment is therefore affirmed.*

The other Justices concurred.

## COIT & CO.

v.

EH R. SUTTON, *Plff. in Err.*

(.....Mich.....)

**Foreign corporations selling through itinerant agents** and delivering goods manufactured outside of the state are not, in view of the commerce clause of the United States Constitution affected by state statutes requiring foreign corporations to file their articles of association with the secretary of state and pay a franchise fee as a condition of doing business within the state.

(October 16, 1894.)

**ERROR** to the Circuit Court for Wayne County to review a judgment in favor of the plaintiff in an action brought to recover the contract price of certain lead alleged to have been sold and delivered by the plaintiff to the defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

*Mr. R. B. Wilkinson*, for plaintiff in error:

A state may exclude a corporation of any other state from doing business therein, or may prescribe such terms and conditions for such foreign corporation as it may think proper.

*Hartford F. Ins. Co. v. Raymond*, 70 Mich. 501; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357.

The true test of the matter is whether the burden of the tax falls on the thing which is the subject of the tax.

*General Interest Ins. Co. v. Ruggles*, 25 U. S. 12 Wheat. 419, 6 L. ed. 677.

The tax here falls upon the actual capital stock of the foreign corporation. It is paid from the money actually in the corporation before any of the goods are imported, and is not directly or indirectly paid out of the proceeds of the goods imported or sold.

*Philadelphia & S. Mail S. S. Co. v. Com.* 104 Pa. 109.

A law imposing a license on all sewing machine peddlers is not void as interfering with commerce between states, and this is so without regard to whether the machines are manufactured outside the state or not.

*House Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754.

**NOTE.**—The validity of contracts of a foreign corporation which has not complied with statutory conditions of the right to do business in the state is considered with a review of the authorities in a note to *Edison General Electric Co. v. Canadian Pac. Nav. Co.* (Wash.) 24 L. R. A. 815. But the cases there considered were chiefly in construction of the statutes as indicating an intent of the legislature in respect to making such contracts illegal. In the 25 L. R. A.

There is no tax upon the thing which is the subject of commerce, nor is there any way in which the tax falls on the buyer of the article.

*Horn Silver Min. Co. v. New York*, 143 U. S. 815, 36 L. ed. 168, 4 Inters. Com. Rep. 57.

The plaintiff in the court below did not seem to be able to distinguish between a franchise tax and a tax upon the capital stock of a corporation.

*Beach*, Priv. Corp. p. 799; *Desty*, Taxn. § 76, and cases cited; *State v. Stonewall*, 89 Ala. 338; 4 Am. & Eng. Encyclop. Law, 272d, and cases cited in note.

*Mr. A. A. Ellis*, *Atty. Gen.*, also for plaintiff in error:

I am willing to rest the validity of this act upon the decision of the United States Supreme Court in the case of *Horn Silver Min. Co. v. New York*, 143 U. S. 805, 36 L. ed. 164, 4 Inters. Com. Rep. 57, which sustained the validity of a similar statute.

Under a statute of Ohio, requiring corporations filing their articles with the secretary of state to pay a fee based on the capital stock of the company, a statute very similar to the one under discussion, it was held that it did not impose any charge on interstate commerce or prohibit foreign corporations from engaging in interstate commerce within its confines.

*Ashley v. Ryan*, 158 U. S. 486, 38 L. ed. 778.

*Messrs. Bowen, Douglas & Whiting*, for defendant in error:

The act is unconstitutional and void because it is in conflict with that portion of the Federal Constitution which provides that congress shall have the power to regulate commerce among the several states.

If by a stretch of the imagination the act could be said to be a police regulation, yet it cannot be sustained because it interferes with the exclusive authority of the federal government to deal with questions of interstate commerce.

*New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516.

Though it is a well settled principle that a state may prescribe any conditions which it chooses to prescribe, under which foreign corporations must act if they act at all, within that state.

*Home Ins. Co. v. Davis*, 29 Mich. 240; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 501; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357.

This principle is subject to some exceptions, and one of these is that any restriction or regulation imposed upon foreign corporations which interferes with interstate commerce is invalid because contrary to the "commerce clause" of the Federal Constitution.

*Paul v. Virginia*, *supra*; *Pensacola Tel. Co. v. Western U. Tel. Co.* 96 U. S. 1, 24 L. ed. 708; *Cooper Mfg. Co. v. Ferguson*, 113 U.

present case the statute expressly declares void the contracts of a corporation which has not paid the tax, and the question is as to its application to interstate commerce. For the decisions as to the power to exclude foreign corporations as affected by the constitutional provision as to commerce, see note to *Kindel v. Beck & P. Lithographing Co.* (Colo.) 24 L. R. A. 311.

S. 727, 28 L. ed. 1187; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 190, 31 L. ed. 654, 2 Inters. Com. Rep. 24; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 25, 35 L. ed. 617, 8 Inters. Com. Rep. 595; *Horn Silver Min. Co. v. New York*, 148 U. S. 814, 36 L. ed. 168, 4 Inters. Com. Rep. 57; *Gunn v. White Sewing Mach. Co.* 18 L. R. A. 206, 57 Ark. 24; *Bateman v. Western Star Mill. Co.* 4 Inters. Com. Rep. 260, 1 Tex. Civ. App. 90; *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848.

The states have no power to impose restriction or regulation upon interstate commerce.

*Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 857; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Bowman v. Chicago & N. W. R. Co.* and *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, *supra*; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 868, 2 Inters. Com. Rep. 241; *Sloutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143; *McCall v. California*, 138 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181; *Pullman Palace Car Co. v. Pennsylvania*, *supra*; *Crutcher v. Kentucky*, 141 U. S. 58, 35 L. ed. 652; *Horn Silver Min. Co. v. New York*, *Gunn v. White Sewing Mach. Co.*, and *Bateman v. Western Star Mill. Co.* *supra*; *Lyons-Thomas Hardware Co. v. Reading Hardware Co.* (Tex.) 82 Am. L. Reg. 661; *Ware v. Hamilton-Brown Shoe Co.* 93 Ala. 145; *Singer Mfg. Co. v. Hardee*, 4 N. M. 175; *Re Kimmel*, 3 Inters. Com. Rep. 114, 41 Fed. Rep. 775; *Re White*, 11 L. R. A. 284, 3 Inters. Com. Rep. 531, 43 Fed. Rep. 913; *Re Spain*, 14 L. R. A. 97, 47 Fed. Rep. 208; *Re Nichols*, 48 Fed. Rep. 164; *Re Rozelle*, 57 Fed. Rep. 155; *Wrought Iron Range Co. v. Johnson*, 8 L. R. A. 273, 3 Inters. Com. Rep. 146, 84 Ga. 754; *State v. Agee*, 2 Inters. Com. Rep. 21, 83 Ala. 110; *Simmons Hardware Co. v. McGuire*, *supra*; *McLaughlin v. South Bend*, 10 L. R. A. 357, 128 Ind. 471; *Overton v. Vicksburg*, 70 Miss. 558; *Waterbury v. Egan*, 3 Misc. 855; *Brennan v. Titusville*, 153 U. S. 289, 33 L. ed. 719.

Hooker, J., delivered the opinion of the court:

The plaintiff, a corporation of the state of Illinois, recovered a judgment in the Wayne county circuit court, from which the defendant appeals. The finding of facts shows that plaintiff was engaged in the business of shipping from Illinois goods manufactured in that state, to its customers in Michigan, on orders given it by mail, or taken by its agents in Michigan; that on January 23, 1894, the plaintiff, through its duly authorized agent, entered into a written contract with the defendant, in the city of Detroit, Mich., for the sale to him of a quantity of white lead at a specified price, 25 L. R. A.

to be paid for upon delivery; that on January 27, 1894, delivery of the lead was tendered at Detroit. The defendant refused to receive the lead, claiming the contract to be void. At the time of making such tender the plaintiff had not filed articles of association in this state, and had not paid to the secretary of state a franchise fee, as provided by No. 79 of the Laws of 1893. Counsel for plaintiff seek to avoid the effect of said act, contending that it is in conflict with the provision of the Federal Constitution that "congress shall have power to regulate commerce among the several states." Article 1, section 8. The defendant relies upon the familiar rule that states may impose conditions upon the right of foreign corporations to do business within their limits. This rule has been recognized by the federal courts where it does not conflict with the power of congress to regulate commerce. See *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 857. But, where the effect is to restrain or obstruct commerce among the states, it cannot be applied; the federal decisions, to which we must look for a construction of the constitution, holding that it is the right of persons residing in one state to contract and sell their commodities in another, unrestrained except where restraint is justified under the police power, by states, or by act of congress, and that this right extends to corporations. *Paul v. Virginia*, *supra*; *Brown v. Maryland*, 25 U. S. 12 Wheat. 425, 6 L. ed. 680; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 847; *Pennacola Teleg. Co. v. Western Union Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 585; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Moran v. New Orleans*, 119 U. S. 69, 28 L. ed. 653; *Pickard v. Pullman Southern Car Co.* 117 U. S. 84, 29 L. ed. 785; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 312, 2 Inters. Com. Rep. 134; *Fargo v. Stevens*, 121 U. S. 230, 30 L. ed. 890, 1 Inters. Com. Rep. 51; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 123 U. S. 826, 30 L. ed. 1200, 1 Inters. Com. Rep. 308; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595; *Brennan v. Titusville*, 153 U. S. 289, 33 L. ed. 719.

The law in question imposes a tax upon corporations for the privilege of doing business in Michigan. It is a tax upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which, if enforced, would embarrass plaintiff in its commerce with inhabitants of Michigan. It must therefore be held that the act in question does not apply to foreign corporations whose business within this state consists merely of selling through itinerant agents, and delivering commodities manufactured outside of this state.

The judgment of the Circuit Court will be affirmed.

The other Justices concurred.

## NEW HAMPSHIRE SUPREME COURT.

Henry J. CRIPPEN

Harry A. ROGERS *et al.*

(.....N. H.....)

**A sale to a resident by a nonresident of notes against another nonresident at a discount and with a guaranty against loss or expense in collection, which is made to avoid the insolvent law of the state where the other parties reside, will not give the transferee as an attaching creditor a position superior to that of his nonresident assignor, but his rights will be subject to such insolvent law.**

(July 29, 1892.)

ON demurrer to a bill filed to enjoin the prosecution of certain attachment proceedings which had been instituted by defendants against property of the insolvent Massachusetts firm of Potter, White & Bayley. *Bill dismissed.*

On May 25, 1891, the firm of Potter, White & Bayley, doing business in the state of Massachusetts, after consultation with one of the members of the firm of Rogers, Wood, Loring & Co., decided to make an assignment to Dunn, Allen & Bullens for the benefit of its creditors. The firm of Rogers, Wood, Loring & Co. after consultation, decided to attach property of the insolvent firm located in New Hampshire, for the benefit of all creditors of the insolvent firm who should be willing to share ratably in the assets. Subsequently they consulted Messrs. Dunn and Allen, two of the assignees, and the latter signified their assent to such a proceeding. In accordance with this agreement or understanding an attachment was levied on the evening of May 25th, and the assignment by Potter, White & Bayley was executed and delivered early on the following day. On or about May 26 or 27, 1891, the National Bank of Redemption in Boston, which held notes of Potter, White & Bayley to the amount of something over \$9,000, learned that the firm had failed and made an assignment. Thereupon it sent its attorney to the plaintiff who resided in New Hampshire, and offered to sell to him at a discount one of the notes held by it against the insolvent firm, giving at the same time the following guaranty:

"Whereas, the National Bank of Redemption has sold this day to H. J. Crippen, of Concord, N. H., a note signed by Potter, White & Bayley to their own order and indorsed by them, dated November 28, 1890, on six months, for forty-four hundred and ninety dollars, now, therefore, in consideration of the purchase of said note by said H. J. Crippen, the National Bank of Redemption hereby agrees to pay H. J. Crippen any deficit which the said Crippen may sustain by reason of his inability to recover the full amount of said

note against said Potter, White & Bayley, and also to pay said Crippen a sum equal to all his costs, charges, and expenses incurred in any attempt to collect the same, including interest.

"The National Bank of Redemption, Boston,  
"E. A. Presbrey,  
"June 1, 1891. "Cashier."

[Seal of the bank on agreement.]

The same agreement was subsequently made to cover all of the paper which the National Bank held against the insolvent firm and it was all turned over to Crippen, who drew his checks for the amount, the funds to meet which were raised by the discount of his notes. On June 4, 1891, Crippen levied an attachment upon the property which had been previously attached by Rogers, Wood, Loring & Co., and on or about October 1, 1891, he filed this bill to enjoin further proceedings by Rogers, Wood, Loring & Co. under their attachment. A few days prior to the filing of the bill he had been allowed to appear as subsequent attaching creditor in the prior attachment suit. On August 24, 1891, a petition in insolvency was filed in Massachusetts against Potter, White & Bayley, and on September 24 a warrant was issued against their joint and separate estate, a messenger was appointed, and after commencement of this suit Dunn, Allen & Bullens were appointed their assignees in insolvency.

Further facts appear in the opinions.

*Messrs. M. F. Dickinson, Jr., and Hollis R. Bailey*, for defendants, in support of the demurrer:

After the goods were attached and taken in to the custody of the sheriff, on the writ of Rogers, Wood, Loring & Co., they were not subject to attachment by trustee process.

See *Clapp v. Rogers*, 38 N. H. 435.

The common-law assignment was by its terms made for the benefit of those creditors who should become parties to it by executing it within a certain time. It provided for a discharge of the debtors and a return of any surplus to the debtors. It was conditioned to become void in case insolvency proceedings should be instituted by or against the debtors. It conveyed the debtors' property as it was on the date of the assignment, subject to whatever mortgages, liens, or attachments then existed. It was necessary for a creditor to execute the assignment in order to become entitled to a dividend under it.

*First Nat. Bank of Easton v. Smith*, 139 Mass. 26.

In *Hurd v. Slaby*, 10 N. H. 108, 34 Am. Dec. 142, a creditor who had become a party to a common law assignment in New Hampshire was allowed to afterwards attach.

The effect of the agreement with other creditors and with trustees as to the proceeds of attachment did not take away or diminish the right to attach either the person or the property of the debtor.

*Cameron v. Little*, 18 N. H. 28.

Certainly this court, as a court of equity, will not wish to lend its aid to a creditor (either Mr. Crippen or the Bank of Redemp-

NOTE.—For recognition of insolvency transfers in another state, see note to Long v. Forrest (Pa.) 28 L. R. A. 38.  
25 L. R. A.

tion) who is seeking to gain a preference. It will desire rather, if possible, to aid in an equal distribution of the assets in accordance with the maxim that equality is equity.

*Eddy v. Winchester*, 60 N. H. 68.

Rogers, Wood, Loring & Co., have not proved their claim or in any way submitted themselves to the jurisdiction of the insolvency court, and are entirely at liberty to proceed with their suit and attachment in New Hampshire, especially as their suit was begun long before the insolvency proceedings.

*Lawrence v. Batcheller*, 181 Mass. 504; *Chipman v. Manufacturers Nat. Bank*, 156 Mass. 147.

They are entitled to the same privileges in New Hampshire, as attaching creditors, that citizens of New Hampshire have.

U. S. Const. art. 4, § 2: *Sturtevant v. Armsby Co.* (N. H.) July 31, 1891.

Rogers, Wood, Loring & Co., although citizens of Massachusetts, have a right to sue and attach in New Hampshire.

*Kidder v. Tufts*, 48 N. H. 121; *Lawrence v. Batcheller*, and *Chipman v. Manufacturers' Nat. Bank*, *supra*; *Proctor v. National Bank of the Republic*, 9 L. R. A. 122, 152 Mass. 228; *Sturtevant v. Armsby Co. supra*; *Batcheller v. National Bank of the Republic*, 157 Mass. 88.

*Messrs. Streeter, Walker & Chase*, for plaintiffs, *contra*:

A party must recover according to his legal rights at the commencement of the action, and according to the legal character in which he sues.

*Tappan v. Tappan*, 80 N. H. 50.

At the time Rogers, Wood, Loring & Co. brought their writ, and as a material part of the transaction, it was understood and agreed that they should prosecute it, not for their individual benefit, but for the benefit of the creditors of Potter, White & Bayley; that the proceeds of the suit should be practically turned over to the so-called common-law assignees, Dunn, Allen & Bullens; that in legal effect the nominal plaintiffs in that suit should hold whatever they might recover as trustees for the assignees or for such creditors as should prove their claims under the assignment, which was executed on the following day.

If allowed to obtain the money on their own account by a judgment of this court they would succeed in defrauding the assignees, who might have prevented such an inequitable diversion of the debtor's assets by obtaining a mandatory order from the court of Massachusetts directing them (citizens of that state) to prosecute their suit for the benefit of the estate.

*Dehon v. Foster*, 4 Allen, 545; *Ounningham v. Butler*, 142 Mass. 47, 56 Am. Rep. 657.

Rogers *et al.* are estopped from claiming to prosecute their suit for their own benefit.

Mass. Pub. Stat. chap. 157, § 80; *Perley v. Mason*, 64 N. H. 6; *Carbes v. Mason*, *Id.* 10; *Norris v. Atkinson*, *Id.* 87.

Can assignees in insolvency appointed under the laws of another state sue in this state to the prejudice of resident creditors; or in other words, are the insolvency laws of another state enforceable here as a matter of legal right?

It must now be considered as part of the ju-

risprudence of this country, that a prior assignment in bankruptcy, under a foreign law, will not be permitted to prevail against a subsequent attachment by an American creditor, of the bankrupt effects found here.

*Saunders v. Williams*, 5 N. H. 218; *Dalton v. Currier*, 40 N. H. 287; *Dunlap v. Rogers*, 47 N. H. 281, 98 Am. Dec. 453. See also *Perley v. Mason*, *Carbes v. Mason*, and *Norris v. Atkinson*, *supra*; *Eddy v. Winchester*, 60 N. H. 68; *Fall River Iron Works Co. v. Croades*, 15 Pick. 11; *Blake v. Williams*, 6 Pick. 285, 17 Am. Dec. 872; *Ingraham v. Geyer*, 13 Mass. 146, 7 Am. Dec. 182; *Faulkner v. Hyman*, 142 Mass. 58.

If Rogers *et al.* brought their suit for the assignees in order to accomplish indirectly what the assignees could not do directly, if it was done, as appears from the case, for the express purpose of preventing New Hampshire creditors from availing themselves of their legal rights with reference to property of the debtors located here, when attacked by foreign assignees, the whole proceeding on the part of the defendants was fraudulent and void, and should be set aside by a court of equity on the application of a resident creditor.

*Tappan v. Hoane*, 11 N. H. 811; *Bay State Iron Co. v. Goodall*, 89 N. H. 228, 75 Am. Dec. 219; *Alden v. Gibson*, 63 N. H. 12; *Hale v. Nashua & L. Railroad*, 60 N. H. 838.

Smith, J., delivered the opinion of the court:

If the Bank of Redemption had brought a suit in its own name for the collection of the notes transferred nominally to Crippen, the case would present no superior equity entitling the bank to appropriate the property attached in this state exclusively to its own debt. Equity, as well as comity, would require the application of the property to the payment of all the creditors of the insolvents, under the insolvency laws of the state of the domicile of the bank. *Kidder v. Tufts*, 48 N. H. 121; *Eddy v. Winchester*, 60 N. H. 68. The plaintiff offers to prove that the transfer of the notes "was an absolute and bona fide sale of the same, giving to him the absolute ownership and control of the same." But it is clear that the finding of such a fact would have to be set aside, as being in direct and irreconcilable conflict with the admitted facts in the case, from which the only conclusion is that the transfer of the notes was a mere cover to enable the bank to gain a preference over other Massachusetts creditors. The plaintiff cites *Proctor v. National Bank of the Republic*, 152 Mass. 228, 9 L. R. A. 122, in support of the right to maintain his suits for the collection of the notes. But the reasons which controlled the majority of the court in that case, in refusing to compel a Massachusetts creditor who had obtained an advantage over the other creditors by his proceedings in another state to restore the property, or its value, to the assignee of a Massachusetts insolvent debtor, do not exist in this case. There is no want of jurisdiction of the property, or of the proper parties; and equity requires that the bank, under cover of suits in the name of a New Hampshire citizen, should not obtain an advantage over

the other creditors in Massachusetts. The leave given the plaintiff to defend the *Sturford* suits should be revoked.—*Levy v. Woodcock*, 68 N. H. 418; *Martin v. Wiggins* (N. H.) 29 Atl. Rep. 450,—and the temporary injunction dissolved.

*Bill dismissed.*

*Allen, J.*, did not sit; the others concurred.

A rehearing was subsequently asked for after which the following opinion was handed down:

"Personal property has no locality, but is subject to the law which governs the person of the owner, except in cases which directly militate against the particular laws of the country in which it happens to be located." *Saunders v. Williams*, 5 N. H. 218, 214. "The general rule is that a transfer of personal property, which is valid by the law of the owner's domicile, will operate to convey the property wherever it may be situate." *Sanderson v. Bradford*, 10 N. H. 260, 263. "In the absence of ancillary administration or statutory prohibition, the domiciliary administrator or executor has authority to take possession of and remove the goods or effects of the decedent in another jurisdiction, or to collect a debt due from a debtor residing therein, if voluntarily given up or paid, and give a good acquittance and discharge therefor. . . . So, too, he may sell and assign stock in a foreign corporation; and the corporation may voluntarily consent to its transfer by accepting the outstanding certificate, and issuing a new one to the purchaser." *Lucas v. Manchester & L. Railroad*, 68 N. H. 588, 590. "It has long been the policy of commercial states not to embarrass the free transmission of the title to personal property. And it has been very justly considered as discourteous and illiberal policy in one state to abridge and fetter the operation of foreign contracts within its limits, or to refuse to enforce them by suits maintained in its courts, or to embarrass foreign owners of personal estate within its limits, in the free enjoyment of its beneficial use, or its ready and unrestricted conveyance. . . . In the law, personality is generally regarded as having no *situs*. Its title, mode of transfer, and other incidents connected with its use and transmission, are regulated according to the law of the place of the domicile of the owner. This is confessedly true in regard to the requisite formalities in the execution of a will of personality, although essentially departing from the requirements of the law of the state, where such property happens to be situated at the time of the decease of the owner. It is the law of the place of the domicile of the owner which must control these incidents as to the operation of wills upon personal estate, and also the distribution of intestate estates, according to the general rules of international comity among civilized and commercial states. . . . But it is claimed that, in regard to the distribution of one's effects (while living) among his creditors, a different rule, to some extent, has prevailed." *Hanford v. Paine*, 82 Vt. 442, 452, 15 L. R. A.

454, 78 Am. Dec. 586. "It is said that the laws of a state or country do not have any extraterritorial operation *suo vigore*, but that such operation is only granted *ex comitate*. This is the common language of the opinions, but it is an extremely unsatisfactory ground on which to place a decision, for the fact is that the laws of one state or country are recognized by other states and countries continually, and in many different ways; and in cases in which it is stated on the principles of that branch of jurisprudence known as 'Private International Law,' or the 'Conflict of Laws,' that foreign law should apply, such law is applied as a matter of course by the courts without the exercise of any vague or irresponsible discretion.

. . . In regard to rights under contracts, the law of the place of the contract governs, although the law of the forum controls in all questions as to the remedy. So also, it is a settled rule, with regard to succession to personal property by will or intestacy, that the law of the domicile shall govern, even as to property in a foreign jurisdiction. . . . We therefore feel justified in saying that it is not generally a safe reason to assign for the decision of any of these questions that foreign laws have no extraterritorial operation." 15 Am. L. Rev. 254, 255.

A general rule that a transfer of personal property, which is valid by the law of the owner's domicile, will convey the property wherever situate, may clash with a general rule that law has no extraterritorial operation. It seems to be immaterial which is called the rule, and which the exception. The property in controversy in this case should be applied to the payment of debts under the insolvency laws of Massachusetts, unless this disposition of it would infringe the right of a citizen of this state. If the Bank of Redemption had not gone through the form of selling its notes to the plaintiff, and brought suit upon them in this state, and attached the debtors' chattels and land, the land, as well as the chattels, might become assets in the hands of the Massachusetts assignees, notwithstanding the attachment; and, as between the bank and the assignees, the justice of the case and the law of this state would require such procedure as would enable the assignees to apply the attached property to the payment of debts under the law of Massachusetts. *Eddy v. Winchester*, 60 N. H. 63, 64. Our law does not unnecessarily allow its process to be used by a Massachusetts creditor to avoid the just operation of the insolvency law of that state. The view of the agreed facts most favorable to the plaintiff is that the transaction between him and the bank is what it appears to be on the face of the writings. Upon that view, the plaintiff will make a profit of about \$1,000, if he prevails in this suit, and will lose nothing if he fails. If he prevails, the bank will get or keep \$8,000, less expenses of suits, which it is to pay in any event. The guaranty given him by the bank makes the bank the principal plaintiff in interest. The practical effect of the whole transaction is the use of the plaintiff's name in New Hampshire litigation, instituted and

carried on in behalf of the bank, and at its expense, to enable it to defeat the just law of its own state. If the bank succeeds in this enterprise, it pays him a commission of about \$1,000. If it does not succeed, it pays him nothing. The speculative interest which this arrangement gives him does not entitle him to set up a New Hampshire right as a cover under which a Massachusetts creditor can avoid the Massachusetts law. In some sense, and for some purposes, he could be regarded as the owner of the notes. But he is not the owner in any equitable sense that would give him a position superior to that of the bank in an effort to prevent the application of the attached property to the payment of debts under the law of Massachusetts. The equity of the case is with the assignees. If they had taken and held possession of the goods, their title would have

been upheld against the plaintiff. The attachment made by the defendants Rogers, Wood, Loring & Co. was not necessary for the protection of the assignees' rights against the suits brought by the plaintiff chiefly for the benefit of a Massachusetts creditor, and for his own benefit, merely as a claimant of a bonus to be paid by the Massachusetts creditor for the use of his name in litigation. The plaintiff's leave to appear in the suit brought by the defendants in Strafford county will be revoked at the next trial term in September. To prevent delay that might be caused at that term from the pendency of this action in this county, the decree dissolving the injunction and dismissing the bill is rendered at the present law term.

*Bill dismissed.*

Allen, J., did not sit; the others concurred.

### UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

Robert M. YARDLEY, Receiver of the Keystone National Bank,

*v.*  
George PHILLER *et al.*, *Appts.*

(68 Fed. Rep. 645.)

#### 1. The equities and rights arising from express agreement or implied from the nature of

dealings between a national bank and a clearing-house association or the other members thereof prior to the closing of the bank must be preserved and enforced in settling its affairs by a receiver.

#### 2. The appropriation on its own claims by a clearing house after the closing of a national bank by an examiner, of money paid by other banks on a call by the clearing house to take up drafts and checks on the insolvent bank.

#### NOTE.—Clearing-house business.

- a. *Origin and description.*
- b. *Rights and liabilities of clearing houses.*
- c. *Clearing-house loan certificates.*
- d. *Clearing-house due-bill.*
- e. *Presentation and payment through clearing house.*
- f. *Return of paper not good after receiving it through clearing house.*
- g. *Effect of clearing-house rules and customs.*
- h. *Agency of clearing house members.*
- i. *Gold clearing house.*
- j. *Country clearing house of London.*
- k. *Miscellaneous.*

##### a. *Origin and description.*

The business of clearing houses, like much of the other business of banking, has been a growth without any statutory sanction or regulation and the law of which has been developed from general principles and the usages of the business.

In respect to the origin of clearing houses, the court says in *Crane v. Clearing-House*, 22 W. N. C. 855: "The clearing-house system appears to have originated in Edinburgh, at least the bankers of that place claim the credit of establishing the first clearing house; but the earliest one of whose transactions we have any record is that of London, which was founded in 1775, or perhaps earlier, as the record is not altogether clear on the subject. The ale-house was in those times, as it still is, the general resort of persons about starting new enterprises, and it was there that the messengers or clerks first held their meetings; but as the system grew to such utility as to make it indispensable, the association procured rooms in Lombard street, for the convenience of exchanging checks and other securities, and reducing the amount of actual money used in the settlement of their accounts. This was the beginning of the clearing-house system. The New York clearing house was established 25 L. R. A.

in 1853, Boston established one in 1855, Philadelphia, Baltimore and Cleveland in 1858, Worcester in 1861, Chicago in 1865, and since that date the system has spread throughout the country, so that it is said by Mr. Bolles, in his book on Practical Banking, published in 1884, page 217, there were then thirty-one clearing houses known to exist in this country; and they also exist in Australia, France, Germany, Switzerland, Italy, and generally throughout the continent of Europe."

While all, or nearly all, the clearing-house associations in the United States are unincorporated, a statute has been passed in Minnesota (March 4, 1889) to provide for the incorporation of such organizations.

The clearing-house system of Philadelphia described in the above case represents in most particulars that adopted generally in this country. In New York, and, we believe, in all other American banking centres, the clearing-house balance is merely *prima facie* or provisionally subject to the correction of errors up to an hour named by the rules, and the exchanges at the clearing house are very quickly made.

The clearing-house system of London is essentially different from that of New York and other American cities.

In London the work of the clearing house goes on for nearly, if not quite the whole day, and is described in *Warwick v. Rogers, Mann, & Co.* 363, 6 Scott, N. R. 1, 12 L. J. C. P. 112; as follows: "The clerks from the different banking houses using the clearing house assemble there daily at 11 o'clock in the forenoon, and remain, or go backwards and forwards as the case may be, until half past five, when the clearing house is closed. Each banker has a separate drawer, into which drawer the bills, notes, and checks then due, and which are payable at such bankers, are put by the respective bankers' clerks holding the same on arrival at 11 o'clock, and so from time to time through the day. Up to four

which they had surrendered to its clerk in due course of business, in an exchange at the clearing house before the bank suspended, and which had been left there as security for a balance due from it to the clearing house, is not an unlawful preference, as the subsequent transactions do not rescind the exchange of securities made while the bank was doing business and gives no right of action to the receiver of the bank against the clearing-house committee for the amount of the drafts and checks on other banks which it surrendered on the exchange.

(Green, District Judge, dissents.)

(July 12, 1894.)

**A** PPEAL by defendants from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania in favor of plaintiff in an action brought to recover money which was alleged to have been received by defendants as a committee of the Philadelphia Clearing House to the use of plaintiff upon certain checks and drafts against the Keystone National Bank which had come into the possession of the clearing house committee and been returned to other banks, members of the clearing house, upon their delivery to the clearing house committee of cash to the amount of the face value of the checks and drafts. *Reversed.*

The facts are stated in the opinion.

*Messrs. A. T. Freedley and John G. Johnson*, for appellants:

The practice and machinery of clearing-

house associations will be found fully stated in—

Bolles, Practical Banking, 217-278; Gibbons' Banks of New York, 292-342.

And have been further explained and judicially recognized—

In England:

Chambers' Encyclopedia, title *Clearing House*; Walker, Banking Laws, 68-70; Grant, Bankers, 52; *Warwick v. Rogers*, 5 Mann. & G. 848; *Boddington v. Schlenker*, 4 Barn. & Ad. 758.

In the United States:

Morse, Banks & Banking, 2d ed. 450-457; Johnson's Encyclopedia, title *Clearing House*; Bolles, Banks and their Directors, §§ 420-426, pp. 412-423; *Fowler v. New York Gold Exch. Bank*, 67 N. Y. 188; *Crane v. Clearing House*, 32 W. N. C. 358.

The sole security for the payment of the daily balances due at the morning exchange was the agreement of the Keystone Bank that its messenger, after receiving the packages from the creditor banks, should leave these packages with the clearing-house manager until the debtor balance due on that settlement should be paid by the Keystone Bank in cash before 12 o'clock; and this agreement was acted on daily from the date it was made until the suspension of the bank.

In retaining the packages the manager was obviously acting as agent for the creditor banks at each settlement.

*National City Bank v. New York Gold Exch. Bank*, 101 N. Y. 595.

o'clock (but not later) bills, notes, and checks are put into the drawers as they arrive. Shortly after eleven o'clock the clearing clerk of each banker takes out of his drawer all the bills, notes, and checks which have then been put into it by the other bankers' clerks claiming payment, and takes or sends the same to his principal's banking house in order that the banker may examine them and determine as to the payment of them respectively; and the same course is pursued again at three o'clock in the afternoon, and from time to time afterwards during the remainder of the day, until four o'clock. Each banker examines the bills and checks so sent or taken to him by their respective clerks and the customers accounts to which they refer, and such bills or checks as are at the time intended to be paid are canceled by drawing lines along and across the name of the party for whom such payment is intended to be made. Such of the bills and checks as the bankers determine not to pay are returned by them to be deposited in the drawer at the clearing house of the bankers by whom the same were that morning brought to the clearing house . . . each banker's clerk makes up his account from time to time during the day as may suit his convenience until five o'clock, correcting it by the addition of such subsequent receipts and payments as may be necessary, according to the items which afterwards come in."

#### b. Rights and liabilities of clearing houses.

A suit against the clearing-house committee, growing out of the transactions involved in the main case of *YARDLEY v. PHILLER*, was brought by a firm which had made a deposit in the Keystone Bank of a draft on one of the other banks in the association. The plaintiffs contended that the clearing-house committee by receiving from the other banks the full sum of \$11,756.21, which was due by the Keystone Bank, had received from one 25 L. R. A.

of them on which their draft was drawn the payment of that draft. The court said: "In case the plaintiff's draft was paid by the Fourth National Bank in the larger sum it paid into the clearing house, where it was distributed among the creditor banks to pay the balances due to them by the debtor banks, including the Keystone, but which bank or banks got the money it is impossible to trace in the confusion of moneys and accounts, the plaintiffs . . . cannot compel the clearing-house committee to pay them, because its manager never had their draft, or its proceeds in his possession with knowledge of their rights, or of the existence of the draft, until demand was made upon it. *Crane v. Clearing-House*, 32 W. N. C. 358.

For suits by clearing-house committee, see *infra*, c. as to loan certificates.

Where a bill which had been accepted payable at a bank was received through the clearing house and canceled while unincumbered funds of the drawee were in the bank applicable thereto, but payment thereof was ordered by the drawee to be stopped about 12:30 P. M., whereupon the bank wrote "Canceled by mistake: orders not to pay," and returned it to the clearing house, it was held that this cancellation of the acceptance did not make the bank at which it was payable liable to the holder. *Warwick v. Rogers*, 5 Mann. & G. 848, 6 Scott, N. B. 1, 12 L. J. C. P. 113.

In *German Nat. Bank of Pittsburgh v. Farmers' Deposit Nat. Bank*, 115 Pa. 204, the court says: "The clearing-house association is not responsible for anything except the proper distribution of the money paid to settle balances, its purpose being to provide a convenient place where checks may be presented and balances adjusted." The rules of the association which were involved in that case provided that errors in exchanges should be adjusted by the banks, and that checks not good should be returned to the bank depositing them

The status of the Keystone Bank's debits and credits was fixed at the time the examiner closed the bank and took charge of its affairs, and every check and note charged off or credited after closing would have been a direct and unlawful preference against the statute.

There are two daily exchanges between the banks—one at 8:30 A. M., known as the morning exchange, and one at 11:30 A. M., known as the runners' exchange. Balances due at the morning exchange are paid in cash; balances due at the runners' exchange are paid by runners' due bill, which is deposited by the manager of the clearing house in the depository bank and paid out of the exchanges of the debtor bank at the next morning exchange.

On December 1, 1890, the fundamental articles of association were amended to meet the payment of this runners' due-bill.

The amendment of the constitution was: "Provided that the amount of the due-bill given by the defaulting bank in settlement of its debit balance in the runners' exchange of the previous day and deposited by the clearing house in its depository bank shall be deducted from the total charge of such bank and shall be the first claim against the securities deposited by the defaulting bank under article 17."

This was a perfectly valid agreement for the bank to make, and the receiver, of course, takes subject to the agreement.

*Casey v. La Soci  t   du Cr  dit Mobilier de Paris*, 2 Wood, C. C. 77; *Scott v. Armstrong*, 146 U. S. 499, 86 L. ed. 1059.

before one o'clock P. M., adding "the association not to be responsible in any case."

#### a. Clearing-house loan certificates.

Loan certificates issued to a bank by a clearing-house committee to keep up its credit at the clearing house on the security of certain collateral are recognized as valid in *Philler v. Woodfall*, 22 W. N. C. 123, in which the clearing-house committee are held entitled to recover on notes included in such collateral. The court held that the securities pledged in accordance with the articles of the corporation which provided for applying the deposits of any defaulting bank to the payment of balances due at the clearing house, or reimbursement pro rata of banks furnishing said balance, and the surplus, if any, for other indebtedness to members of the association, covered not only the amount due on daily balances, but other indebtedness to the clearing-house committee which included such loan certificates.

In an action by a clearing-house committee on a promissory note, which they had taken in substitution for other negotiable securities on their maturity, held as a pledge for loan certificates issued to the bank which transferred the note, a rule to open a judgment by default was denied. No opinion is published, but the basis of the decision seems to be that the clearing-house committee were bona fide purchasers, and the decision necessarily involves the validity of the loan certificates. *Philler v. Field*, 29 W. N. C. 129.

In a later case brought by the clearing-house committee on notes taken by the clearing house from the same bank, the Keystone National Bank, *Thayer, Ch. J.*, citing *Philler v. Field*, *supra*, said: "We have already decided that the plaintiffs had the right to acquire promissory notes in the manner in which it is averred in the affidavit that they re-

If the Keystone Bank had not given the due-bills it would have had to give cash the preceding day, or if it had not the cash it would have been obliged to realize so much of the \$70,005.46 which it presented to the clearing house the next day as would have been necessary to obtain this amount of cash. Hence just so much more cash passed into the receiver's hands; and if the Keystone Bank had not the cash, just so much less of the \$70,005.46 would that bank have been enabled to present at the clearing house the next morning.

*Dutton v. Merchants Nat. Bank*, 16 Phila. 94.

It is impossible to deal with the balance of \$70,005.46 on the footing of a pledge. That sum, whether arising by reason of packages having been presented against the Keystone Bank, or by reason of packages having been presented by the Keystone Bank, was simply a general credit of \$70,005.46 due the Keystone Bank. The Keystone Bank owed the appellants at this time the sum of \$835,000. It owed the association the sum of \$23,390.42. It owed other banks, members of the association, the sum of \$17,806.84.

The set-offs existed prior to the time of insolvency. The transfer of packages had been made before the Keystone Bank was closed. The liens, equities, and rights of the various parties entitled in and to the clearing house settlements occurred at the very time the exchange was made.

The appellants would have been entitled to have applied the entire \$70,005.46 in re-

ceived them, and that they hold the legal title thereto." *Philler v. Eler*, 29 W. N. C. 258.

#### d. Clearing-house due-bill.

A clearing-house due-bill, so named on its face, the body of which is as follows: "Due by the merchants' National Bank to Banks one thousand nine hundred dollars. This due-bill is only good when signed by one and countersigned by another authorized person, and is payable only in the exchange through the clearing house the day after issued."—is held to be a negotiable instrument so as to require indemnity in order to recover after it has been stolen, and not to be a mere certificate of deposit on special terms. *Dutton v. Merchants Nat. Bank*, 16 Phila. 94.

#### e. Presentation and payment through clearing house.

In an action on a bill of exchange accepted payable at Messrs. Harrison & Co's, *Lord Ellenborough* said: "I think a presentation to the banker's clerk in the clearing house was a presentation at Messrs. Harrison & Co's within the meaning of the acceptance. *Reynolds v. Chettle*, 2 Campb. 593.

The drawer of a check is not discharged by the failure of bankers to present it at the clearing house, although the custom, as between the bankers and their customer, makes it imperative on them to so present it, where the holder has paid it to the bankers in time for them to obtain payment by such presentation. *Boddington v. Schlenger*, 4 Barn. & Ad. 752, 1 Nev. & M. 541.

The custom of banks not to pay a draft after certain hours, but to mark it and permit it to be paid the next day at the clearing house, makes such marking an acceptance, and there is no laches in presenting it at the clearing house the next day although the drawee suspends business that morn-



duction of the \$335,000 due them by the Keystone Bank. No unlawful preference is created by such set-off.

*Scott v. Armstrong*, 146 U. S. 499, 86 L. ed. 1059; *Yardley v. Clothier*, 17 L. R. A. 462, 81 W. N. C. 214, 51 Fed. Rep. 506.

Section 5242 only applies to transfers (1) made after commission of an act of insolvency, or in contemplation thereof; (2) made with a view to prevent the application of bank assets in the manner prescribed by the statute, or with a view to the preference of one creditor to another.

The transfer must be made with a view to giving preference.

*Tuttle v. Frelinghuysen*, 88 N. J. Eq. 12; *Casey v. La Société de Crédit Mobilier de Paris*, 2 Woods, C. C. 77; *Yardley v. Clothier*, *supra*.

Banking transactions have been invariably sustained unless the bank was actually closed or had decided to close, and payments resulting from such transactions are not unlawful.

*Citizens Nat. Bank v. Dowd*, 85 Fed. Rep. 340; *Armstrong v. Chemical Nat. Bank* 6 L. R. A. 226, 41 Fed. Rep. 237.

Transfers made in good faith, with the expectation that by so doing the person will continue his business, will be upheld, and exchanges of value may be made at any time, though one of the parties to the transaction be insolvent.

*Tiffany v. Lucas*, 82 U. S. 15 Wall. 410, 21 L. ed. 198; *Cook v. Tullis*, 85 U. S. 18 Wall. 332, 21 L. ed. 938; *Clark v. Iselin*, 88 U. S. 21 Wall. 360, 22 L. ed. 568.

ing without appearing at the clearing house. *Robson v. Bennett*, 2 Taunt. 388.

The sending of notes to a bank through the clearing house is not equivalent to a formal demand at the bank for payment forthwith, but is equivalent to leaving them at the bank for collection from the maker on or before the close of banking hours. *National Exch. Bank v. National Bank of North America*, 132 Mass. 147.

The failure to present a check at the clearing house in accordance with mercantile usage, even if it would have been paid had it been thus presented, is not material, if the check was duly presented at the proper counter, since the usage merely provides a substitute for, or a waiver of, ordinary presentation, and, if the latter is made, the usage has no force. *Kleekamp v. Meyer*, 5 Mo. App. 444.

The relation between the payee of checks, certified or uncertified, and the bank in which deposits have been made to meet the checks, is declared in *People v. St. Nicholas Bank*, 77 Hun, 159, to be controlled by rules of law and not by any supposed custom which may affect members of a clearing house. In that case where deposits of checks were made in a bank on the last day that it was open, and checks drawn against the deposit, some of which the bank certified, it was held that these deposits, made in the ordinary way, were not by any clearing-house rules appropriated to these checks, whether certified or not, and that no trust existed in the deposits for the payment of the checks drawn against them. A refusal of the clearing house to effect the exchange after the suspension of the bank was held not to give the depositors any right against the receiver, either to preferred payment out of the assets of checks drawn on the last day of the bank's business nor to a return of the securities deposited on that day.

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The appellants act solely as agents for known principals.

*Fowler v. New York Gold Exch. Bank*, 87 N. Y. 188; *National City Bank v. New York Gold Exch. Bank*, 101 N. Y. 595.

The action, if maintainable, lies against the particular principal benefited by the individual transaction.

*Reynolds v. Chettle*, 2 Campb. 596; *Crane v. Clearing House*, 32 W. N. C. 358.

*Mr. Silas W. Pettit* for appellee.

*Acheson, Circuit Judge*, delivered the following opinion:

Upon a bill brought by Robert M. Yardley, receiver of the Keystone National Bank, against seven individuals, constituting the managing committee of the Philadelphia Clearing House Bank Association, the court below rendered a decree for \$70,005.46, with interest from March 20, 1891, against the defendants, who are here the appellants, upon the ground that, after the known insolvency of the named bank, they applied (as was charged) its funds in their hands or under their control to the payment of its debts to the clearing-house association, and to members thereof, with a view of giving them an unlawful preference over other creditors.

The clearing-house association of the city of Philadelphia is a voluntary, unincorporated association, composed of the national banks of that city; its main object being to effect at one common meeting place, called the "clearing-house," the daily exchanges between the associated banks. Its affairs are

Under clearing-house rules requiring exchanges at 9 A. M., and adjustment of errors before 11 A. M., the sending of managers' checks for balances at 11:30 A. M., and that any bank not able to pay its balances must inform the manager and the other banks of that fact before 10 A. M. and hold in trust all checks received at the morning exchange, a bank which failed to pay the manager's check because it had gone into possession of the sheriff, but did not give notice of its inability according to the rule, cannot be allowed, in a suit by its liquidating commissioners, to recover on checks drawn on one of the other banks and held by it on that day, where in consequence of its failure to give the required notice the drawee bank had credited its customers with the amount of checks deposited with it against the insolvent bank. *Blaffer v. Louisiana Nat. Bank*, 86 La. Ann. 231.

On the suspension of a bank which had taken a check as payment of a draft which it held for collection and placed it in its cash drawer with a memorandum to show that it belonged to the transmitting bank, and afterwards received payment thereof through the clearing house, keeping such memorandum with its cash assets to indicate that the amount of that check was the property of the other bank, it was held that the fund was not so mingled as to defeat its identification, and that the sender could recover the amount from the receiver. *First Nat. Bank of Montgomery v. Armstrong*, 86 Fed. Rep. 69.

#### 2. Return of paper not good after receiving it through clearing-house.

Marking a check as canceled at a clearing-house by mistake will not prevent its return with a memorandum of the mistake within the time allowed by clearing-house usage (which in this case was until 5 P. M.). *Fernandey v. Glynn*, 1 Campb.

under the general supervision of a committee of seven bank presidents, selected by a majority of the associated banks, and serving without compensation. This committee appoints a manager, who has immediate charge of the conduct of the business at the clearing house. All exchanges, however, are made directly between the banks themselves, through clerks representing them respectively. All the checks, drafts, and other evidences of indebtedness to be exchanged are brought to the clearing-house in sealed packages, which are never opened there. The gross amount of the alleged contents of each package is indorsed upon the envelope, but not the items. The clerk of each sending bank delivers directly to the clerk of the receiving bank the sealed package of checks and other obligations held by the former against the latter bank. Receipts pass directly between the clerks of the sending and receiving banks. After the exchanges are thus made, the gross totals only are reported to the clearing-house manager, who upon this information, makes up a sheet of differences to be adjusted and settled between the various banks. Upon this sheet each debtor bank settles the amount due by it to the creditor banks by paying the same to the clearing-house manager, who immediately distributes it to and among the creditor banks.

The Keystone National Bank of Philadelphia was a member of the clearing-house association. On March 20, 1891, at 8:30 o'clock A. M., the hour fixed for the morning exchange, the messenger of that bank ap-

peared at the clearing-house with sealed packages purporting to contain exchanges against other banks, members of the association, amounting to \$70,005.46. These packages he delivered directly to the clerks of the other banks, and received from them receipts therefor. At the same time the messengers of other banks members of the association, delivered to the clerk of the Keystone National Bank sealed packages of exchanges against it, purporting to amount to the sum of \$117,085.21, and took from him receipts therefor. Thus there was a balance of \$47,029.75 against the Keystone National Bank on that morning's exchange.

After receiving the sealed packages of checks and other exchanges purporting to amount to \$117,085.21, the clerk of the Keystone National Bank left those packages in the custody of the manager of the clearing-house until the bank should pay the \$47,029.75 difference, which it was bound to do by 12 o'clock of that day. The reason for the deposit was this: Article 17 of the constitution of the clearing-house association required each bank to deposit with the clearing-house committee collateral security for the payment of its daily balances. In December, 1890, however, at the instance and for the benefit of the Keystone National Bank, a special arrangement was entered into between it and the clearing-house committee whereby all the security held under article 17 to secure its daily balances was transferred to its loan-certificate account with the clearing-house, so as to enable it to receive upon

428, *nota*. See also *Warwick v. Rogers*, 5 Mann. & G. 348, 6 Scott, N. R. 1, 12 L. J. C. P. 118.

Under a clearing-house rule allowing return of checks not good before 1 P. M. a bank which had received a check and placed it on file and entered it in the journal, but had not carried it forward into the ledger, was held entitled to return the check on being notified to stop payment because of the failure of the payee bank, against which the drawer claimed a defense. The court said that the out in the check made by putting it on file and the entry in the journal were shown to be made merely for the convenience of the drawee bank, but did not constitute payment before the right to return it under the rules had expired. *German Nat. Bank of Pittsburgh v. Farmers' Deposit Nat. Bank*, 118 Pa. 294.

"The right of return secured by the rules of the clearing house is a special provision in compensation for payment without inspection. Instead thereof the rules give opportunity for subsequent inspection. When that has been had the special rules cease to govern; and the rights of the paying bank rest upon the general principles of law." This is the language of the court in *National Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349. In that case a forged check had been presented at the clearing house and allowed and paid in the usual manner of settling the daily balances of banks at the clearing house, and without any neglect there had been a failure to return the check within the time allowed by the rules of the clearing house, so that, as the court said, "the rights of the paying bank rest on the general principles of law," and the drawee, under the facts of the case was allowed to recover.

To the same effect it was held in *Merchants Nat. Bank v. National Eagle Bank*, 101 Mass. 281, that, if by any mistake of fact, a check paid through the

clearing house was not returned before 1 o'clock, as allowed by clearing-house rules, the payment, as between the two banks, should be treated as made under a mistake of fact precisely to the same extent and with the same right to reclaim which would have existed if the payment had been made by the simple act of passing the money across the counter directly to the payee on the presentation of the check. The clearing-house rules provided for exchange at 10 A. M., for payment of balances to the manager of the clearing house at noon, and to distribution by him at half past twelve, with other provisions for the return of checks which are not good as soon as that fact is discovered, and that "in no case shall they be retained after 1 o'clock, and also that "errors in the exchanges and claims arising from the return of checks or other cause are to be adjusted directly between the banks which are parties therein, and not through the clearing house."

The same rule was applied in *Boylston Nat. Bank v. Richardson*, 101 Mass. 287, but in that case the check, which had been held after the hour for return under the clearing-house rules, was held not to have been paid under any mistake of fact.

There being no change of circumstances consequent on the failure to return a check paid through the clearing house before 1 o'clock according to clearing-house rules which would subject the bank which had been credited therewith to loss, or render it unjust to recover back the amount, the mere fact that such bank had given credit to the depositor of the check will not prevent the bank which had paid it through the clearing house from recovering in case of payment through a mistake. *Merchants Nat. Bank v. National Bank of Com.* 129 Mass. 512.

On the other hand, the rule of the Chicago clearing house that "all checks received in the morning

that security further advances of loan certificates, and it was agreed that thereafter, at the morning exchange, the clerk of the Keystone National Bank, after receiving the packages of checks and other exchanges from the creditor banks, should leave the packages with the clearing-house manager as security that any debtor balance due by it on that settlement should be paid by the bank before 12 o'clock of the same day.

The Keystone National Bank did not pay its debtor balance of \$47,029.75 due at the morning exchange of March 20, 1891, by 12 o'clock that day, and that balance has never been paid or tendered. Shortly after 10 o'clock on the same day, by virtue of an order made by the comptroller of the currency, the Keystone National Bank was closed by William P. Drew, bank examiner, and thereafter Robert M. Yardley was appointed receiver thereof. After 12 o'clock on the same day (March 20, 1891), the clearing-house manager, acting under the instructions of the clearing-house committee, notified the banks which had presented the packages containing the checks, drafts, and other evidences of indebtedness against the Keystone National Bank for \$117,085.21, that they must make those packages good by paying into the clearing house that amount of money, and accordingly, in compliance with this demand, these banks forthwith paid to the clearing house manager \$117,085.21 in cash, and took away the packages.

After the morning exchange on that day, the state of accounts between the Keystone

National Bank and the clearing-house association was this: The debtor balance of the bank on that morning's settlement, as we have seen, was \$47,029.75. Its debtor balances on the exchanges of the preceding day amounted to \$41,197.86, for which it had issued its clearing-house due-bills,—two thereof, amounting to \$23,890.52, to the clearing-house association, and several others amounting to \$17,806.84, directly to certain banks of the association. These due-bills were in the form prescribed by the rules of the association, bore date March 19, 1891, and by their terms were "payable only in the exchanges through the clearing-house the day after issue." Then, in addition to its debtor balances on these exchanges, the Keystone National Bank owed \$335,000 on clearing-house loan certificates which had been issued to it previously by the clearing-house committee, agreeably to the provisions of a written agreement between all the associated banks. To secure the payment of this last-mentioned indebtedness for \$335,000, the bank had deposited with the clearing-house committee collateral securities; but the other banks were ultimately responsible for that debt in case of a deficiency in the collaterals, for by the terms of the written agreement referred to any loss caused by the nonpayment of clearing-house loan certificates issued by the committee to any member of the association was assessable upon all the other banks in the ratio of capital.

The money, namely, the \$117,085.21, which the other banks, upon the call of the

exchanges not found good are to be returned the same day, before 1:30 P. M., to the member from whom received, who shall immediately reimburse the holder of the same," construed with a clause of the constitution of the clearing house making the articles of association operative and binding on the members, is held by the district court of the United States in *Preston v. Canadian Bank of Commerce*, 23 Fed. Rep. 179, to constitute a contract limiting the time within which mistakes could be corrected, and the right to recover back the payment made on a check by mistake was denied, where the mistake was discovered after 1:30 and payment demanded fifteen minutes before 2 o'clock P. M. The court disapproves the Massachusetts case of *Merchants Nat. Bank v. National Eagle Bank*, 101 Mass. 281, as overlooking the rule that parties may agree to limit the time for correcting mistakes.

Where a promissory note was sent through the clearing house for payment, and the bank at which it was payable by mistake stamped it "paid," when there were no funds there for payment, but the mistake was discovered before the close of banking hours and the note duly protested, with notice to the indorsers, in an action by this bank, which had paid the amount of the note to the discounting bank, brought against the indorsers the dispute was as to the obligation to return the note by the hour fixed under clearing-house rules, but this was held not to be a condition of recovery. *Manufacturers Nat. Bank v. Thompson*, 129 Mass. 438.

In the absence of any rule of the clearing house in regard to the return of notes payable at a bank sent through the clearing house, and the amount of which is included in settlement with the clearing house by the bank at which they are payable, and in the absence of any uniform custom or usage to treat notes the same as checks in this par-

ticular, the payment of such a note made at a clearing house is provisional, to become complete when the note is paid in the usual and ordinary course of business, and if not so paid, the payment at the clearing house is treated as if made under a mistake of fact to the same extent and subject to the same right of reclamation as if made without the intervention of the clearing house. *National Exch. Bank v. National Bank of North America*, 189 Mass. 147.

In such a case, the bank at which notes are payable, and which has paid them through the clearing house, is entitled to recover the amount through the bank to which they were paid, if, before the close of the day's business, after discovering that the notes will not be paid, it demands return of payment from such other banks, with a tender of the notes. The return of the notes before 1 o'clock, in accordance with the clearing-house rule as to checks is not a condition of the recovery. *National Exch. Bank v. National Bank of North America*, *supra*.

A bank sending through a clearing house, without any notice of the fact that it was received on deposit from a stranger, a check on another bank, is not thereby guilty of negligence so as to be liable as a guarantor of the genuineness of the check, if the drawee bank on receiving it through the clearing house passes it as genuine and fails to return it or discover that it is a forgery for several days afterwards. *Commercial & F. Nat. Bank of Baltimore v. First Nat. Bank of Baltimore*, 30 Md. 11, 96 Am. Dec. 564.

The waiver of a clearing-house rule requiring a check paid by mistake to be returned on the same day is held to be established, where on a subsequent day the bank which had received the payment repaid it on its return through the clearing house, even if the waiver was induced by the

clearing-house committee, paid on March 30, 1891, to the clearing-house manager, he immediately appropriated, by the direction of the committee, in manner following: To make good the balance due by the Keystone National Bank on that morning's exchanges, \$47,029.75; to the payment of the due-bills given by the bank for its debtor balances on the exchanges of the preceding day, \$41,197.86; and the residue, \$38,808.10, he applied towards the cancellation of the clearing-house loan certificates which had been issued to that bank. Has the receiver of the bank any just reason to complain of that appropriation, or of the transaction in any respect?

The receiver of an insolvent national bank takes its assets subject to all just claims and defenses that might have been interposed against the corporation itself; and all liens, equities, and rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency, and not in contemplation thereof, remain unimpaired. *Scott v. Armstrong*, 146 U. S. 499, 510, 36 L. ed. 1059, 1068. The morning exchange on March 20 between the Keystone National Bank and its clearing-house associates, in itself, was unimpeachable. It took place before the bank examiner acted. The clearing-house association had no reason to suspect the impending failure. On the part of the bank itself the transaction was in the regular course of its business, and with a view to continued operations. It did not act in contemplation of insolvency, nor with a purpose to give one creditor a preference over another, or to prevent the application of its assets in the man-

ner prescribed by law in case of insolvency. The rights of the parties were fixed when the bank was closed. As between the Keystone National Bank and the other banks, the morning exchange had been already consummated. The packages of exchanges on the one side and the other had been delivered and receipted for. The exchange itself was an accomplished fact. What remained to be done was the payment by the Keystone National Bank of its debtor difference of \$47,029.75 to the clearing-house manager. To insure this payment by 12 o'clock, the bank, under its arrangement with the clearing-house committee, left its sealed packages in the hands of the clearing-house manager. The bank, however, defaulted, and what afterwards occurred in the clearing-house was in consequence. The situation was unprecedented. The bank had been closed by the government officer. The pledge was not an ordinary one. The sealed packages on temporary deposit with the clearing-house manager did not contain assets of the bank, but checks and drafts drawn upon it, and other evidences of its indebtedness. As the packages contained commercial paper, prompt action might be necessary to hold indorsers and drawers. In the emergency, occasioned wholly by the default of the Keystone National Bank, whose supposed equity is the foundation of this bill, the clearing-house committee made the call upon the other banks already mentioned. Whether those banks were bound to comply with that demand to its full extent we need not inquire. Under the stress of the situation they saw fit to do so, and paid into the clearing-house, of their own moneys, \$117,-

threatened refusal of the other bank to make further exchanges. *Stuyvesant Bank v. National Mechanics Bkg. Assn.* 7 Lans. 197. The effect of the rule if it had not been waived is not decided.

A bank which is not a member of a clearing house association which sends to another bank which is a member checks for presentation through the clearing house is bound by the act of the latter bank in returning payment made by mistake on on the checks, which were forged. *Stuyvesant Bank v. National Mechanics Bkg. Assn. supra.*

A bank of Hoboken, N. J., is not bound by the rules of the New York clearing house as to the time for returning checks not good in case of a check drawn upon it which the payee deposits in a New York bank and which is passed through the clearing house, although the Hoboken bank has an agent in New York, another bank which is a member of the clearing house. This does not make the Hoboken bank a member of the clearing house, and its obligation as to returning a check which its New York agent has received through the clearing house depends on the ordinary principles applicable to such cases instead of the clearing-house rules. *Overman v. Hoboken City Bank*, 81 N. J. L. 563, affirming 30 N. J. L. 61.

Proof of a usage of the New York clearing house to return checks drawn on banks within the city of New York in a certain limited period is not sufficient to show that a check drawn on a bank in Hoboken, N. J., is governed by that rule. *Overman v. Hoboken City Bank*, 81 N. J. L. 563.

The temporary custom, not usually followed by banks belonging to a clearing house, to return checks before noon, will not relieve a bank from liability to receive a check, for which there were no funds, on the day of its presentation, and which 25 L. R. A.

was not returned until 3 P. M. *Banque Nationale v. Merchants Bank*, Mont. L. Rep. 7 Sup. Ct. 388.

#### *g. Effect of clearing-house rules and customs.*

The clearing-house rules are declared by the court to have the force of law, as between the associated banks. *German Nat. Bank of Pittsburgh v. Farmers Deposit Nat. Bank*, 118 Pa. 304. See also *People v. St. Nicholas Bank*, 77 Hun, 150; *Overman v. Hoboken City Bank*, and other cases in preceding division.

#### *h. Agency of clearing-house members.*

In *Overman v. Hoboken City Bank*, 81 N. J. L. 563, the court says: "The entire system on which the business of the clearing house is transacted is inconsistent with the theory that any of the members in their transactions with each other are the agents of parties who are not members. They trust each other as principals, and hence the facility with which that immense business is transacted."

See also *Stuyvesant Bank v. National Mechanics Bkg. Assn.* 7 Lans. 197.

#### *1. Gold clearing-house.*

In case of the department of a banking corporation known as the "clearing house," which was for the business of the general clearance of contracts for the purchase and sale of gold, in which the bank acted as the common agent of dealers in gold in settling their contracts, it was held that all the transactions of the day must be regarded as one for the purpose of clearance of a dealer who presented two statements for clearance on the same day contrary to the usage of the business, and that the failure of a firm which affected one of the state

085.21, and relieved the manager of his custody of the packages. Did this work an annulment of the morning exchange? We cannot so conclude. That deduction would be highly unreasonable. That the banks which paid in this money intended such a result is incredible. The whole transaction negatives the idea of intended rescission. Indeed, the other banks had no right to undo the morning exchange without the concurrence of the Keystone National Bank. Nor was it to their interest to disturb what had taken place. Why should they pay this large sum of money into the clearing house in relief of the debtor bank? Assuredly, this money was not paid for the benefit or use of the Keystone National Bank. The other banks made the payment in promotion of their own interests as members of the association, primarily in order that they might make settlements *inter se*. This they were at liberty to do without relinquishing any of their rights or equities as against their defaulting associate. The obligation of the Keystone National Bank to pay its debtor balance remained in full force. Without the payment of the \$47,029.75, the bank was not entitled to the return of the deposited packages. Hence those packages were rightfully withheld from the bank. Nothing is better settled than the right of a transferee of a pledge to hold it until the debt for which it was given is paid. Story, Bailm. § 827; *Donald v. Suckling*, L. R. 1 Q. B. 585; *Tilly v. Freedmans' Soc. & T. Co.* 98 U. S. 821, 23 L. ed. 886. This principle is peculiarly applicable here, for the clearing-house manager held the deposited packages for the benefit of the creditor banks. It is our judgment that the morning exchange between the associated

banks was valid, and was not avoided, or the rights thereunder of the clearing-house association or of the creditor banks impaired, by what subsequently occurred.

It is quite plain that the court below proceeded upon views radically different from those we have expressed. The decree, it will be perceived, entirely overlooks the default of the Keystone National Bank, and puts the receiver in a far better position than the bank would have been in had it fulfilled the terms of its pledge. Had it done that, it would have paid into the clearing house \$47,029.75, whereas, without paying anything, the receiver has a decree requiring the defendants to account to him for the whole \$70,005.46. We are unable to accept that result as just. The principle of the decision of the supreme court in the case of *Scott v. Armstrong*, *supra*, requires that the equities and rights arising from the express agreements or implied from the nature of the dealings between the Keystone National Bank on the one side and the clearing-house association or the other members thereof on the other side, prior to the closing of the bank, shall be preserved and enforced.

Was anything done prejudicial to the rights of the Keystone National Bank or its receiver? As already stated, the clearing-house due-bills, amounting to \$41,197.86, which the bank had given for its balances on the exchanges of the preceding day, were paid out of the fund claimed by the receiver. Can the rightfulness of that appropriation be gainsaid? On the face of each due-bill it was stipulated that it was "payable only in the exchanges through the clearing-house the day after issue." Those due-bills were actually in the morning exchange on March 20,

ments was ground for denying a clearance of the other statement, although it was also held that the failure affected both statements. *National City Bank v. New York Nat. Gold Exch. Bank*, 101 N. Y. 566.

Such a bank, being the common agent for dealers in gold, employed in the settlement of their contracts, which furnished and delivered the gold to fulfill the contract of a dealer who was in default, was held estopped from denying the right of such dealer to the benefit of the contract on tendering to the bank the amount of gold so delivered with a demand for the currency received, but that the bank was entitled to retain as an indemnity for furnishing it so much of the currency received as the gold was actually worth at the time, and that the dealer was only entitled to the surplus. *Fowler v. New York Gold Exch. Bank*, 67 N. Y. 128. This case is decided on the principles governing brokers, and, although it involves the business of a so-called clearing house, seems to have less relevancy to the subject of clearing houses for banks than to the general business of stock and produce exchanges, and their system of mutual cancellations and adjustment of differences.

### 1. Country clearing-house of London.

The business of a clearing house for country banks, recognized in London, has been recognized in several cases. In *Bailey v. Bodenham*, 16 C. B. N. S. 288, it was assumed to be proper to send a check on a country bank to London for presentation at the country clearing-house, but the question actually involved was as to diligence, after the refusal of the check at the clearing house because the

drawee had ceased to have any correspondent in London.

In *Hare v. Henty*, 10 C. B. N. S. 66, a check was sent by a bank to its correspondent in London for presentation at the country clearing house to the correspondent of the drawee bank, and it was held, on the question of negligence, in presenting it toward the depositor of the check that, as it was presented through the clearing house and reached the drawee as soon as the rules required if there had been no clearing house, there was no negligence.

### 2. Miscellaneous.

The following cases are of interest in this connection although they involve clearing house only incidentally.

Payment of the amount of a statement sent by a bank as representing paper taken up at a clearing house, but which in fact includes the amount of a forged certificate of deposit which had been deposited in the bank for collection and not sent through the clearing house, and failure to discover the forgery until after the close of business hours, was held not to prevent remedying the mistake. *Allen v. Fourth Nat. Bank of New York*, 59 N. Y. 12.

A bank which has obtained an accommodation note for use at the clearing house, by solicitation of its president and sole managing officer, was held estopped to deny its own want of legal capacity to take it for that purpose. *Simons v. Fisher*, 20 L. R. A. 554, 55 Fed. Rep. 905.

For note on exceptions to the prohibition of preferences by insolvent national banks, see *Elmira Sav. Bank v. Davis* (N. Y.) *ante*, p. 544. B. A. R.

1891. They were in the packages amounting to \$117,035.21, delivered to the clerk of the Keystone National Bank. They were entitled to payment out of the bank's credit of \$70,005.46 in that morning's exchanges. The application of the \$41,197.86 to those due-bills was therefore right, even upon the receiver's hypothesis as to the origin of the fund which the clearing-house manager disbursed. The due-bills were extinguished. By no possibility can they come against the funds in the hands of the receiver.

Is the receiver in any position to question the application of the \$28,808.10 to the indebtedness of the Keystone National Bank as a member of the clearing-house association on its loan-certificate account? That liability arose from the course of dealings between the bank and the clearing house, and under an express agreement between all the members thereof, whereby the other associated banks were chargeable with any loss occasioned by the failure of the Keystone National Bank to pay. The other banks, therefore, had a prevailing equity to have applied to that debt money of their own which they paid into the clearing-house under the circumstances as disclosed. How can the receiver object that, as the outcome of the settlement between the other banks, a balance from funds which they provided was applied to the reduction of the debt due by his bank? Then, again, the receiver, who has no higher rights than his bank, is in a court of equity. Here he is met by the default of the bank in not paying into the clearing-house the \$47,029.75 it was bound to pay. He has not deemed it to be for the interest of his trust to pay that money. He does not propose to do so. How, then, can he ask a decree against the defendants for the \$28,808.10? Obviously, to the extent of his bank's default, he is without equity.

For the reasons stated, we hold that the receiver has no good ground upon which to challenge the transactions in the clearing-house. We add a single observation: As the right of set-off existed between the banks, *Scott v. Armstrong, supra*; *Yardley v. Clothier*, 51 Fed. Rep. 506, 11 L. R. A. 482, it is by no means clear that the other creditors of the Keystone National Bank would have fared better if the exchange had not taken place. With claims aggregating \$117,035.21 as against claims for \$70,005.46, it would seem improbable that anything would have been recoverable by the receiver.

Finally, the receiver does not show himself to be entitled here to equitable relief of any nature. The due-bills for \$41,197.86 are entirely out of the way. It does not appear that any items in the packages for \$117,035.21 have been proved against the funds in the hands of the receiver, or have been presented to him for payment, or that any suit thereon has been brought or is threatened. If the receiver has the right to insist upon the formal cancellation of \$28,808.10 of those items (which is the utmost he can claim), the present bill is not available to him to secure such decree. No such relief is here sought. The bill is not framed for that purpose. It is not apparent that the receiver needs the aid of a court of equity; but, if he is entitled to equi-

table relief, it is as against the other banks. Those banks are not parties to this suit.

*The decree of the Circuit Court is reversed, and the case is remanded to that court with directions to dismiss the bill of complaint.*  
**Green, District Judge, dissents.**

**Butler, District Judge concurs:**

While I believe the foregoing opinion sufficiently vindicates the conclusion reached, I desire, in view of the dissent expressed, to add a few lines. It must be kept in mind that the suit is against certain individuals as the clearing-house committee, and not against the banks involved in the exchange. If the latter did anything by which the plaintiff is aggrieved we cannot consider it here. The defendants are only liable for their own acts. These acts are those connected with the exchange of March 20, 1891. What were they? On the morning of that day the Keystone Bank delivered to their manager a package of its own obligations (received from other banks for cancellation) to be held as security for the payment of \$47,000, which it had undertaken to pay by 12 o'clock that day. It did not pay; and as the value of the security depended upon holding the indorsers, the committee, on being indemnified by the receipt of an equal sum of money from the other banks, handed the obligations over to them. On this state of facts what claim has the receiver on the committee? Until the \$47,000 are paid by the Keystone or the receiver, neither has any right to the obligations; nor can either complain of the disposition made of them. When the money for which they are pledged is paid the receiver will be entitled to them, and the committee must then produce them, or account for their value. The bank did not pay the money, and the receiver will not, because it greatly exceeds the value of the obligations—which consist of promises of the broken bank, comparatively worthless. Their value is just the amount of the dividends they will draw if not redeemed. If the receiver redeems them he, or rather the creditors of the bank, will be benefited to the extent of the dividends thus saved—nothing more.

The fundamental error of the plaintiff consists in the assumption that the exchange of obligations was annulled by the subsequent transaction between the committee and the other banks—respecting which nothing need be added to what is said in the foregoing opinion. But if we concede this assumption the plaintiff will not be helped. The annulment of the exchange, if it bound the Keystone, might and doubtless would entitle the latter to a return of the \$70,000 of obligations, which it had previously held. But it would not render the committee liable for their return. The committee never had nor saw them. But even conceding the committee's responsibility for their return, the assumption that it became liable to pay \$70,000 for failure to return them is clearly erroneous. In such case the measure of damages would be the amount the receiver lost by such failure. This would be the value of the obligations to him and the creditors. Let us see what this is. The banks owing

the obligations, held \$117,000 of the Keystone's liabilities, which were a valid set-off. The receiver could not therefore recover a cent. The obligations nevertheless had some value, as they would extinguish \$70,000 of the Keystone's liabilities, thus diminishing the claims against its assets that much; saving to the creditors the dividends which the \$70,000 of obligations would draw if not canceled. This, then, is the loss from failure to return them. If the assets will pay 80 per cent (which is very improbable), the dividends on \$70,000 would be \$21,000. Thus we see, even assuming that the exchange was annulled, and that the committee became responsible for the obligations, the receiver is not entitled to \$70,000, as claimed and awarded. As the dividend rate is not ascertained we cannot know what (in this view) the receiver's loss is.

But the plaintiff further assumes that the clearing-house received \$70,000 for the Keystone Bank, in its transaction with the other banks, after the Keystone's failure. This assumption is wholly unwarranted. Nothing I think can be plainer than that the other banks did not pay any money to the committee for the Keystone, or its receiver. Why should they? What object could they have in doing so? They owed that bank nothing. On the contrary it owed them. Why therefore should they volunteer to pay the obligations it had held against them while they held its obligations (which were an available set-off), exceeding the amount in \$47,000? In doing so they would simply throw away \$70,000, (saving the inconsiderable sum that might be recovered back in dividends). It is clear that none of the money paid to the committee was intended for the Keystone, or inured to its benefit. It gave up nothing. Its rights under the exchange remain intact. When it pays its debt the obligations must be returned or their value accounted for. The object of the other banks in paying money to the committee is not clear, and we are not called upon to ascertain it. Why it was paid and what was done with it is unimportant. It was their own, to do with as they pleased. It was probably paid to settle balances among themselves. But whatever the object was, it is clear that it was not to benefit the Keystone

Bank, and did not interest it. It is conceded that the object was to benefit themselves, alone.

The erroneousness of the decree may be illustrated by another statement. The Keystone Bank cannot claim to be placed in a better position than it occupied at the date of its failure, or to be benefited by its refusal to keep its contract and the action forced on the other banks thereby. Yet it is indisputable that the decree does place it in an infinitely better position—gives it, in effect, over \$80,000 as a premium for its faithlessness. Let us see if this cannot be demonstrated. If the bank had kept its contract, it would have paid out \$47,000, which would have been lost to the receiver and creditors—by diminishing the assets for distribution that much. It would then receive \$117,000, not of money, but of its own nearly worthless obligations, for cancellation. The receipt of these obligations would have benefited the receiver and creditors just to the extent of the dividend the obligations would draw if not canceled. Now supposing the dividend rate to be 80 per cent (which is doubtless much too high) the dividends on the \$117,000 of obligations would be \$35,100. To redeem and cancel them costs \$47,000; deducting the \$35,100 from this shows a loss to the receiver and creditors of \$11,900, as the result of carrying out the contract. The receiver acted wisely therefore in not carrying it out; he saved \$11,900. But because he did not carry it out and the committee and the other banks entered into the subsequent transaction on their own account, and for their own exclusive benefit, he is given an additional sum of \$70,000; and is thus made a gainer in \$81,900 by the failure to keep the contract. If the banks had intended to annul the exchange of obligations (which they could not do after the receiver's rights attached), they would of course have returned the obligations received by them from the Keystone, and set off against them the obligations of that bank which they held. To pay it, or for it, \$70,000 in money, as it is alleged they did, would have been an act of folly incompatible with sanity. Of course nothing of the kind was intended or done.

Reversed, 167 U. S. 844, 42 L. ed. 192.

## UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO., *Pf. in Err.*,  
v.

Mrs. D. L. NEEDHAM *et al.*

(68 Fed. Rep. 107.)

**1. The duty of opening and closing a switch** in the ordinary operation of a railroad is not one of the personal duties of the master

which cannot be delegated to a servant so as to bring negligence in respect to it within the rule as to fellow servants.

**2. The negligence of the conductor of a construction train** in leaving open a switch, which a rule of the company makes it his duty to attend to in person is the negligence of a fellow servant of a fireman on a passenger train who is injured in consequence of the open switch.

**NOTE.**—The above case is a valuable contribution to the law of fellow servants in its discussion and denial of the application of the rule as to a master's absolute duties to the closing of a switch.

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The relation of superior and inferior servants is discussed carefully in *notes* to *Dixon v. Chicago & A. R. Co.* (Mo.) 18 L. R. A. 722, and *Belyea v. Kansas City, Ft. S. & G. R. Co.* (Mo.) 18 L. R. A. 617.

(July 16, 1894.)

**E**RROR to the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment in favor of the plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion. Before Caldwell and Sanborn, *Circuit Judges*, and Thayer, *District Judge*.

*Messrs. George E. Dodge and B. S. Johnson*, for plaintiff in error:

All persons who are in the employment of the same master, working in the same common service, or engaged in the same general business, though it may be in different grades or departments of it, are fellow servants who take the risk of each other's negligence.

*Gravells v. Minneapolis & St. L. R. Co.* 3 McCrary, 352; *Vailes v. Ohio & M. R. Co.* 85 Ill. 500.

Common employment is service of such kind where employes belong to one master, are paid from the same source, and are engaged in the same business. The following employes have been held to be fellow servants.

Brakeman and engineer.

*Randall v. Baltimore & O. R. Co.* 109 U. S. 483, 27 L. ed. 1005; *Missouri Pac. R. Co. v. Texas & P. R. Co.* 81 Fed. Rep. 527.

Brakeman and fireman.

*Kersey v. Kansas City, St. J. & C. B. R. Co.* 79 Mo. 862; *Batterson v. Chicago & G. T. R. Co.* 49 Mich. 192.

Brakeman and conductors.

*Hodgkins v. Eastern R. Co.* 119 Mass. 419.

Conductors and firemen.

*Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 637.

Brakeman and yardmaster.

*Beel v. New York Cent. & H. R. R. Co.* 70 N. Y. 171.

Conductors and surveyors.

*Ross v. New York Cent. & H. R. R. Co.* 5 Hun, 488.

Engineers and yardmasters.

*Union Pac. R. Co. v. Young*, 8 Kan. 658; *Union Pac. R. Co. v. Milliken*, Id. 647.

Engineers and switch tenders.

*Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 822; *Daub v. Northern Pac. R. Co.* 18 Fed. Rep. 625; *Naylor v. New York Cent. & H. E. R. Co.* 83 Fed. Rep. 803.

Engineers and track repairers.

*Van Wickles v. Manhattan R. Co.* 82 Fed. Rep. 278; *Chicago & A. R. Co. v. Murphy*, 53 Ill. 836, 5 Am. Rep. 48; *Rohback v. Pacific Railroad*, 48 Mo. 187.

Station agent and brakeman.

*Toner v. Chicago, M. & St. P. R. Co.* 69 Wis. 188; *Gaffney v. New York & N. E. R. Co.* 15 R. I. 456.

Yardmaster and car coupler.

*Webb v. Richmond & D. R. Co.* 97 N. C. 887.

Trainmen on different trains are fellow servants.

*Van Avery v. Union Pac. R. Co.* 85 Fed. Rep. 40; *Central Trust Co. v. Wabash St. L. & P. R. Co.* 84 Fed. Rep. 616; *Easton v. Houston & T. O. R. Co.* 83 Fed. Rep. 898; *McKaig v. Northern Pac. R. Co.* 42 Fed. Rep. 288; *Ken-* 25 L. R. A.

*tucky Cent. R. Co. v. Ackley*, 87 Ky. 276; *N.-Master v. Illinois Cent. R. Co.* 65 Miss. 264; *Miller v. Southern Pac. R. Co.* 20 Or. 285; *St. Louis, I. M. & S. Railway v. Shackelford*, 42 Ark. 420.

In *Chicago, M. & St. P. R. Co. v. Ross*, 115 U. S. 377, 28 L. ed. 787, the only point the supreme court decided is, that the negligence of the conductor of a railway train is, as regards the other train hands upon the same train over which he has control, the negligence of the master.

*Mealman v. Union Pac. R. Co.* 37 Fed. Rep. 189; *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 840; *Garrahy v. Kansas City, St. J. & C. B. R. Co.* 26 Fed. Rep. 262, note; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 379, 37 L. ed. 778; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1008; *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 190, 6 U. S. App. 75, 50 Fed. Rep. 728; *Minneapolis v. Lundin*, 58 Fed. Rep. 525; *Northern Pac. R. Co. v. Cavanaugh*, 10 U. S. App. 197, 51 Fed. Rep. 517; *Enright v. Toledo A. A. & N. M. R. Co.* 98 Mich. 408; *Kerlin v. Chicago, P. & St. L. R. Co.* 50 Fed. Rep. 185.

It was not the master's duty to see that the switch was kept closed.

*Miller v. Southern Pac. R. Co. supra.*

*Messrs. James P. Clarke, J. C. Marshall*, and *C. T. Coffman*, for defendants in error:

The court instructed the jury that it was the duty of the railroad company to have that switch in proper order. If the testimony shows that it was not in proper order by reason of not having a target that could be seen by the engineer, and for that reason the injury was caused and the man came to his death, then it was the negligence of the company.

There was no exception to this declaration by the court, and it stands as the unchallenged law of the case, defining the duties of the master in respect to the switch.

Under these circumstances the jury could reach but one conclusion. This being true, any error the court might have made in any instruction relating to any other aspect of the case became immaterial.

*Northern Pac. R. Co. v. Charles*, 51 Fed. Rep. 562; *St. Louis, A. & T. R. Co. v. Triplett*, 11 L. R. A. 773, 54 Ark. 289; *West v. Camden*, 185 U. S. 521, 34 L. ed. 258.

There was no error in that part of the charge of the court which defined the relationship of the conductor, *Fertime*, to be that of vice-principal.

*Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, establishes the representative character of the conductor as the fixed status of that official.

*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 379, 37 L. ed. 778, concedes the soundness of this decision by saying that as to the duties properly pertaining to the position of a conductor, his representative character could not be changed by any rule or other action of the corporation master.

It is said that this representative character of the conductor is confined to subordinates on his own train. The principle which underlies the whole decision does not justify any such conclusion.



*Ragsdale v. Northern Pac. R. Co.* 42 Fed. Rep. 888; *Daniel v. Chesapeake & O. R. Co.* 86 W. Va. 597; *Jenkins v. Richmond & D. R. Co.* 89 S. C. 507; *Mace v. Northern Pac. R. Co.* 57 Fed. Rep. 283; *Union Pac. R. Co. v. Callaghan*, 56 Fed. Rep. 988; *Coleman v. Wilmington, C. & A. R. Co.* 25 S. C. 448, 60 Am. Rep. 516; *Woods v. Lindvall*, 48 Fed. Rep. 62.

Sanborn, Circuit Judge, delivered the opinion of the court:

Is a railroad company liable under the general law for the injury of an employé on one train caused by the negligence of the conductor of another train in leaving a switch open that it was his duty to close?

The writ of error is brought to reverse a judgment recovered by the defendant in error Mrs. D. L. Needham against the St. Louis, Iron Mountain & Southern Railway Company, the plaintiff in error, for the death of her husband. The action was brought under sections 5226 and 5226 of Mansfield's Digest of the Statutes of Arkansas, which permit the personal representatives or heirs-at-law to recover for the death of a person caused by any wrongful act, neglect, or default that would have entitled the party injured to have recovered if death had not ensued. *St. Louis, I. M. & S. R. Co. v. Needham*, 10 U. S. App. 889, 8 O. C. A. 129, and 52 Fed. Rep. 871.

A rule of the company provided: "That conductors of all trains, when approaching meeting points where they are to take the siding, must go to the forward part of trains, and attend to the switch in person. On train leaving the siding, they must set up switch for the main track in person. Conductors must not assign this duty to any one, but must attend to it in person in every instance."

The decedent was a fireman on a passenger train running south from Little Rock, Ark., December 16, 1889. About two hours before this passenger train arrived at Alexander (a station ten miles south of Little Rock), the conductor of a construction train of the railroad company caused the switch of the spur track at that place to be opened, ran his train upon that track, and then ran it north to Little Rock, and left the switch open, when it was his duty to close it. The passenger train ran into the open switch, and Mr. Needham was killed. The counsel for the company requested the court to charge the jury that the negligence of the conductor of the construction train was the negligence of a fellow servant of the deceased, on account of which the defendants in error could not recover. The court refused to grant this request, and charged the jury that, if the injury was caused by the carelessness of the conductor of any train in opening the switch and leaving it without being closed properly, then the negligence of that man was not the negligence of the fellow servant, but the negligence of the company, and that, if the death of Needham was caused by that negligence, the defendants in error could recover.

In *Minneapolis v. Lundin*, 7 C. C. A. 844, 58 Fed. Rep. 525, 527, this court held that a servant might become the vice-principal of his master, either on account of the character of the duties the performance of which was

intrusted to him, or on account of the position of general supervision and control of the entire business or a great department of the business of his master in which he might be placed. An effort is made to sustain the ruling below on both these grounds. It is contended—First, that the duty of keeping the switch in proper position for the passage of trains is an absolute personal duty of a railroad company, and that it cannot so delegate it as to relieve itself from liability for negligence in its performance (the learned judge who tried this case below has expressed his views upon this question in *Mace v. Northern Pac. R. Co.*, 57 Fed. Rep. 288); second, that the conductor of a railroad train is the head of a distinct department, and hence is a vice-principal for all of whose derelictions of duty the railroad company is responsible.

Prima facie all persons engaged in a common employment in the service of the same master are fellow servants. A servant who enters with others upon a common employment in the service of the common master assumes the ordinary risks of that service. One of these ordinary risks which he thus assumes is the risk of injury from the negligence of his fellow servants.

It is the duty of the master to use ordinary care to employ fit and reasonably careful co-workmen to assist in the common service. It is his duty to use ordinary care to furnish reasonably safe machinery and instrumentalities with which the servant may perform his work, and a reasonably safe place in which he may render his service, and to use ordinary care and diligence to keep the machinery, instrumentalities, and place in a reasonably safe condition. These are absolute personal duties of the master, and cannot be so delegated as to relieve him from liability for their negligent performance.

But is the timely opening and closing of switches in the ordinary operation of a railroad one of these absolute duties?

The quarryman who uses due care to furnish to competent servants, and to keep in repair, a strong and sound derrick, in a reasonably safe place, to handle the product of his quarry, has performed his duty as a master. He is not responsible to one of his servants because another so negligently operates the ropes or the pulleys that the safe place that the master furnished is made unsafe, and the strong derrick dangerous, so that injury results.

The manufacturer of lumber who uses due care to furnish and to keep in repair, in a reasonably safe place, suitable machinery to transform trees into the myriad forms the uses of man demand, has performed his personal duty when he has placed this machinery in the hands of reasonably competent servants to be operated. The risk that the place in which it is operated will become unsafe, or the machinery dangerous, by the negligence of some of the servants in operating it, is assumed by the servants themselves, because upon them rests the duty of careful operation.

In other words, the line of demarkation here between the absolute duty of the master and the duty of the servants is the line that

separates the work of construction, preparation, and preservation from the work of operation. Is the act in question work required to construct, to prepare, to place in a safe location, or to keep in repair the machinery furnished by the employer? If so, it is his personal duty to exercise ordinary care to perform it. Is the act in question required to properly and safely operate the machinery furnished, or to prevent the safe place in which it was furnished from becoming dangerous through its negligent operation? If so, it is the duty of the servants to perform that act, and they, and not the master, assume the risk of negligence in its performance.

The roadbed, ties, tracks, stations, rolling stock, and all the appurtenances of a well-equipped railroad together constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use due diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but, when this duty is performed, the duty rests upon the servants to operate it carefully. In the case before us there is no evidence that the conductor who negligently left the switch open was not selected with reasonable care. There is no claim that there was any defect in the switch that hindered or prevented the conductor from closing it. The company furnished a switch sufficient to move the rails, and used due care in selecting the servant to operate it. Before this servant commenced to operate it, the switch was closed, so that the passenger train on which the decedent was killed might have passed in safety. It became the duty of the conductor, in the operation of the railroad, to open this switch, and to run his train through it upon the spur track. He did so. It then became his duty to take his train off the spur track, and to close the switch. He took his train off, and proceeded south, but carelessly left the switch open. His negligence was not in the construction, preparation, or repair of the railroad, but in its operation. The railroad was safe before he made it unsafe by his negligence in operating it, and he was discharging none of the personal duties of the master, but one of the duties of the servant, when he became guilty of the fatal negligence. Any other holding would annihilate the now settled rule of liability for the negligence of fellow servants. It will not do to say that the timely movement and fastening of a switch in the ordinary operation of a railroad is requisite to provide a safe place for the next train to be operated in, and hence is one of the personal duties of the master. Under such a rule, it would become the absolute duty of the master to so operate all switches, all turntables, the levers of all engines, all brakes, all cars, and every appurtenance of the railroad that every place upon it should at all times be safe, and no negligence of any employé could ever cause an injury to another servant for which the master might not be held liable. At the instant of the injury, every place in which an injury is inflicted is unsafe. The test of liability is not the

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safety of the place nor of the machinery at the instant of injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation of the machine?

In our opinion, the duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master, but a duty of operation,—a duty of the servant,—for negligence in the discharge of which another servant of the same master, engaged in operating a train over the same railroad, cannot recover. And so are the authorities.

In *Randall v. Baltimore & O. R. Co.*, 109 U. S. 488, 27 L. ed. 1005, a brakeman working a switch for his train on one track in a railroad yard was held to be a fellow servant with the engineer of another train of the same corporation. *Mr. Justice Gray*, in delivering the opinion of the court said: "The general rule is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. . . . Persons standing in such relations to one another as did this plaintiff and the engineman of the other train are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the house of lords and in the English and Irish courts, as is clearly shown by the cases cited in the margin;" and he cites numerous authorities.

In *Naylor v. New York Cent. & H. R. R. Co.*, 88 Fed. Rep. 801, an engineer who came to his death by the carelessness of a switchman in leaving a switch open was held to be a fellow servant of the latter.

In *Roberts v. Chicago, St. P. M. & O. R. Co.*, 83 Minn. 218, a train ran off the track in consequence of a misplaced switch, negligently left open by the switchman, and caused the death of the baggage master on the train. The court held that the switchman and baggage master were fellow servants, within the rule exempting the company from liability.

In *Harvey v. New York Cent. & H. R. R. Co.*, 88 N. Y. 481, 484, the fireman on an engine which was thrown from the track by a misplaced switch, left open by the negligence of a switchman, was held to be a fellow servant of the latter. The court said: "This is a plain case. It is evident that the primary cause of the injury was the neglect of the switchman Baldwin to properly adjust the switch after using it to pass the local freight back upon track number three. As Baldwin must be deemed to have been the co-servant of the plaintiff's intestate, the plaintiff cannot recover, unless some neglect of the defendant, as principal, also contributed to produce the injury."

In *Slattery v. Toledo & W. R. Co.*, 28 Ind. 81, a brakeman on a train and one whose duty it was to attend to the switch were declared to be engaged in the same general undertaking, and it was held that the company was not liable to one for an injury caused by the negligence of the other.

In *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 822, the court held that an engineer running a switch engine and a switch tender were engaged in a common employment, and were fellow servants.

In *Walker v. Boston & M. Railroad*, 128 Mass. 10, an engineer and fireman were killed by a misplaced switch, which had been negligently left open; and, upon an action to recover damages from the company, the court below directed a verdict for the defendant, and this verdict was sustained.

In *Miller v. Southern Pac. R. Co.*, 20 Or. 285, the engineer and fireman upon one train were injured through the negligence of the conductor and brakeman of another, who had failed to properly close a switch. The court held them all to be fellow servants with each other, and refused to permit a recovery against the company. In the opinion in this case the authorities are carefully reviewed, the reasoning is conclusive, and the most satisfactory and exhaustive consideration of this subject we have found in the books is presented.

See also *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 839; *Gilman v. Eastern R. Corp.* 10 Allen, 283, 87 Am. Dec. 635; *Columbus, C. & I. Cent. R. Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 578; *Tinney v. Boston & A. R. Co.* 62 Barb. 218; *McKinney*, Fellow Servants, § 188.

But it is said that the conductor whose negligence caused the injury occupied such a position of authority, control, and supervision that he was a vice-principal of the company, for whose derelictions of duty it was responsible, whatever might be the character of the duty he engaged to perform. In support of this proposition are cited *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 877, 28 L. ed. 787; *Union Pac. R. Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. Rep. 988; *Garraty v. Kansas City, St. J. & C. B. R. Co.* 25 Fed. Rep. 258; *Ragsdale v. Northern Pac. R. Co.* 42 Fed. Rep. 388; and *Mass v. Northern Pac. R. Co.* 57 Fed. Rep. 288.

The first two cases are easily distinguishable from that before us. In the *Ross Case* the engineer on a freight train recovered from the company for the joint negligence of the conductor of his own train and the conductor of a gravel train. The court drew a distinction "between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of a corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and supervision." 112 U. S. 890, 28 L. ed. 792, and rested its decision on a ground that has no application to this case, viz., that the person injured was under the direct authority and control of the person whose negligence caused the injury. Moreover, the decision in the *Ross Case* has been so limited and restricted by the subsequent decisions of the supreme court that it cannot now be treated as authority in any case which does not present substantially the same state of facts.

In *Union Pac. R. Co. v. Callaghan*, *supra*, the plaintiff was not the direct subordinate of

the conductor. But he was riding, by direction of the company's superintendent, on a train that was under the entire control and management of the conductor, who directed at what time it should start, at what speed it should run, at what stations it should stop, and for what length of time, and everything essential to its successful movements; and it was by the negligence of this conductor in discharging his duty of supervision and control over the operation of this train, viz., in driving it too fast, and in failing to stop at proper stations, that he ran it into a defective bridge, and caused the injury.

The opinion in *Mass v. Northern Pac. R. Co.*, *supra*, rests upon the proposition that the character of the work of a switchman makes him a vice-principal,—a proposition that we have already discussed and disapproved.

So far as the cases of *Garraty v. Kansas City, St. J. & C. B. R. Co.*, *supra*, and *Ragsdale v. Northern Pac. R. Co.*, *supra*, hold that under the general law a conductor or employé on one train, whose negligence causes the injury of an employé of the same master on another train, is not the fellow servant of the latter, it is sufficient to say that they have now been so universally disapproved by repeated decisions of the national courts and by the late decisions of the supreme court that they are no longer authority.

Thus, in *Randall v. Baltimore & O. R. Co.*, 109 U. S. 488, 27 L. ed. 1005, which was decided in 1883, the brakeman engaged on one engine was injured while turning the switch for his train, by the negligence of the engineer of another engine, who ran the latter upon him. This engineer had absolute control of his engine and of all its movements at the time, but he was held to be a fellow servant of the injured brakeman, and the company was declared to be exempt from liability.

In *Quebec S. S. Co. v. Merchant*, 188 U. S. 875, 33 L. ed. 656, which was decided in 1889, the stewardess of a steam vessel was injured through the negligence of the porter and carpenter of the same vessel. The latter failed to properly secure a railing across the gangway, and the stewardess leaned over it, and fell into the water. The persons composing the ship's company were divided into three departments—the deck department, the engineer's department, and the steward's department. The carpenter and porter were in the deck department, and the stewardess in the steward's department; but she was held to be a fellow servant of the carpenter and porter, and was denied a recovery against the steamship company.

In *Baltimore & O. R. Co. v. Andrews*, 1 C. C. A. 636, 50 Fed. Rep. 728, 17 L. R. A. 190, 6 U. S. App. 75, decided by the circuit court of appeals for the sixth circuit in 1892, a brakeman on one train was held to be the fellow servant of the conductor and engineer of another train, by whose negligence a collision was caused in which the brakeman was killed.

In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 379, 37 L. ed. 778, decided in 1893, the supreme court held that an engineer who, under the rules of the company, was "re-

garded as conductor," and who had the direction and control of his engine and of his fireman upon it, was not a vice-principal of the company, and that the latter was not liable for an injury to the fireman, caused by the engineer's negligent disregard of his orders.

And, finally, in *Northern Pac. R. Co. v. Hamby*, 154 U. S. 849, 38 L. ed. 1009, decided May 26, 1894, the supreme court held that the conductor and engineer of a passenger train who negligently drove their train upon and injured a common laborer, employed under a section foreman in repairing the railroad, were fellow servants of the laborer, and that he could not recover of the company for their negligence.

So far as the national courts are concerned, these authorities conclude the discussion, and establish the proposition that, in the absence of statutory regulation, conductors, as well as other employes, whether they are charged with the duty of handling switches or of driving trains, are, so far as actions against the common master for negligence are concerned, the fellow servants of all other employes engaged in the common object of securing the safe passage of trains; and it conclusively follows that the conductor who left open this switch in the case before us was the fellow servant of the fireman on the train who was carried through it to his death.

But it is said that, if the court erred in its charge upon the subject we have been considering, that error did not prejudice the company, because there was uncontradicted testimony that there was no target on the

switch; and the court charged the jury that if the switch was not in proper order because it had no target upon it, and for that reason the injury and death were caused, the company was liable.

This position cannot be successfully maintained. The testimony was such that the jury might well have found that the injury was neither caused nor contributed to by the absence of the target, and that it resulted solely from the negligence of the conductor, who left the switch open. The defendants in error charged two acts of negligence upon this company,—the failure to provide the target; and the failure of the conductor to close the switch. Issues were raised and submitted to the jury to determine whether either of these acts caused or contributed to the injury. The verdict was general, and its generality prevents us from discovering upon which of these acts of negligence charged it was founded. A general verdict cannot be upheld where there are several issues tried, and upon any one of them error is committed, in the admission or rejection of evidence, or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling. *What Cheer Coal Co. v. Johnson*, 6 C. C. A. 148, 151, 56 Fed. Rep. 810; *Maryland v. Baldwin*, 112 U. S. 490, 492, 28 L. ed. 822, 823.

*The judgment below must be reversed, and the cause remanded, with directions to grant a new trial; and it is so ordered.*

## NORTH DAKOTA SUPREME COURT.

Terrence MARTIN, *Appt.*,

*v.*

Evan S. TYLER *et al.*, *Respts.*

*SAME*, *Appt.*,

*v.*

George E. NICHOLS, Treasurer, *et al.*,  
*Respts.*

*SAME*, *Appt.*,

*v.*

H. L. STAFFORD *et al.*, *Respts.*

(.....N. Dak.....)

\*1. A statute was entitled "An act to provide for establishing, constructing, and maintaining drains in this state." Laws 1893, chap. 55. It provided, *inter alia*, for the appointment of a drain commission, and vested in it the powers of the act. It provided for levying special assessments to pay for the cost of constructing drains. It provided for the issuance of county bonds to meet such expenses, and for the creation of a sinking fund to pay such bonds. *Held*, not vulnerable to the constitu-

tional objection that the bill embraced more than one subject, or that the subject was not expressed in the title.

2. Creating such drain commission, and vesting in it the powers of the act, did not violate section 172 of the Constitution, which declares that the "fiscal affairs" of the county shall be transacted by a board of county commissioners.

3. Under section 14, article 1, of the Constitution of North Dakota, which reads: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived."—*Held*, that private property cannot be taken for public use for right of way without just compensation in money being first made to, or paid into court for, the owner, even though it is sought to be taken by a municipal corporation.

4. Further, payment by an order drawn by the drain commissioners upon the

\*Headnotes by BARTHOLOMEW, CH. J.

NOTE.—The above case presents some very important questions, especially as to provisions for payment in taking property by condemnation. 25 L. R. A.

See also notes to *Alloway v. Nashville* (Tenn.) 8 L. R. A. 122, and *Miffin Bridge Co. v. Juniata County* (Pa.) 12 L. R. A. 431, on these questions.

drainage fund, which order the statute declares "shall be deemed a sufficient security for the amount thereof," was not such payment as the constitution required.

5. Further, that since the statute failed to provide compensation, as required by the constitution, the power of eminent domain could not be exercised under the statute; and, shorn of the provisions relating to the exercise of the right of eminent domain, the statute becomes so incomplete and ineffectual that we cannot presume that the legislature would have passed it as thus emasculated; hence the entire statute would fail.

6. Further, that a provision in the statute that the warrant for damages, in case the owner was unknown, should be deposited with the county auditor for his use, was a violation of the constitutional provision that required compensation to be paid into court.

7. Further, that, when a municipal corporation sought to take plaintiff's property for public use, he was not entitled to have the compensation ascertained by a jury.

8. The drainage statute provides that the cost of the drain shall be apportioned by the drain commissioners between the cities and townships and property benefited by the drain, and provides, further, that such cost, so apportioned, shall be entered upon the tax list, and collected in one year; but the county commissioners may issue bonds of the county, running not more than twenty years, in sufficient amount to cover cost of drains in such county, the proceeds of the bonds to go direct to the drain fund, to pay the costs of such drains. In that event the assessment must be divided into as many parts as the bonds have years to run, and one part only be collected in each year, the collections so made to constitute a sinking fund to reimburse the county for the principal and interest paid on such bonds. Held, that such transaction constitutes a loan of the credit of the county to the corporations and individuals primarily and ultimately liable, and, as such, is a violation of section 185 of the Constitution, and the law is to that extent void.

(September 11, 1894.)

**A** PPEALS by complainant from judgments of the District Court for Cass County overruling demurrers to the answers in three actions against the Drain Commissioners, Treasurer and County Commissioners of Cass County to enjoin the construction of a ditch, the payment of a warrant issued for a debt incurred in such construction, and the issuing of bonds to be used in the prosecution of the work. *Reversed.*

The facts are stated in the opinion.

Messrs. Miller & Resser and Newman, Spalding & Phelps, for appellant:

The act is in conflict with section 60 of the Constitution.

*State v. Smith*, 85 Minn. 257; *Tingue v. Port Chester*, 101 N. Y. 394.

The title of the act is not comprehensive enough to include its provisions.

*State v. Nomland* (N. Dak.) Dec. 7, 1893.

The act is in conflict with sections 170, 171, and 172 of the Constitution, in that it devolves the duties imposed on the county commissioners upon a special commission known as county drain commissioners.

35 L. R. A.

It is in conflict with section 14 of the Constitution.

The provision for levying special assessments is void. Section 176 is the only constitutional provision for the levy of taxes. Article 6 permits the levy of special assessments, but this provision does not extend to counties.

*Noonan v. Stillwater*, 88 Minn. 198, 53 Am. Rep. 38; *Stinson v. Smith*, 8 Minn. 366.

Messrs. Charles A. Pollock and Robert M. Pollock, for respondent:

The language of section 38 shows clearly that the legislature, after fully expressing the subject, "establishing, constructing, and maintaining," went on to "create the means and instrumentalities required for its own accomplishment."

*State v. Woodmanse*, 11 L. R. A. 420, 1 N. Dak. 246; *State v. Haas*, 2 N. Dak. 202; *State v. Nomland* (N. Dak.) Dec. 7, 1893.

When property is taken by the state, or by any municipal corporation, by state authority, as in this case, it has been repeatedly held not essential to the validity of a law for the exercise of the right of eminent domain, that it should provide for making compensation before the actual appropriation.

*Cooley*, Const. L. 694; *Rogers v. Bradshaw*, 29 Johns. 785; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. 9, 81 Am. Dec. 318.

It is not essential that the public of a whole state or community should be benefited. A local use is public. The number enjoying the use is immaterial. It is the right of the public to the use that constitutes the public use.

*Beckman v. Saratoga & S. R. Co.*, 23 Am. Dec. 690, note.

There can be no doubt that the legislature has power to authorize the condemnation of private property for the purpose of promoting the public health.

*Ibid.*

The power exercised, where the chief object was to improve the land and render it fit for human habitation and cultivation, is constitutional.

*Ibid.*; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Re Application for Drainage in Passaic, Essex and Morris Counties*, 85 N. J. L. 497; *Hartwell v. Armstrong*, 16 Barb. 166; *Talbot v. Hudson*, 16 Gray, 417; *Norfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787.

The public to be benefited then in this case is in the county.

As such the county has a perfect right, when authorized by the legislature, to issue its bonds in aid of its own public improvements.

6 Am. & Eng. Encyclop. Law, p. 11, note.

Section 176 of the Constitution does not exempt the property of the state from the payment of assessments for benefits accruing to its property, hence section 16 is constitutional.

*Hassan v. Rochester*, 67 N. Y. 528.

There is a well-established and marked distinction between the words "tax" and "assessment" as generally used in statutes and constitutions.

1 Desty, Taxn. p. 5; *Hagar v. Yolo County* *Supra*, 47 Cal. 384.

Laws for the purpose of draining land, thereby reclaiming and improving such land, and preserving the public health, have been

enacted by the legislatures of most of the states of the Union, and the courts of the several states have held such laws to be within the legitimate exercise of legislative authority, and the expense is usually provided for by special assessments.

*Ibid.*; 6 Am. & Eng. Encyclop. Law, pp. 2-14.

The appointment of drain commissioners falls within the police power.

*State v. Stewart*, 6 L. R. A. 394, 74 Wis. 620. See also *Daley v. St. Paul*, 7 Minn. 390; *Bryant v. Robbins*, 70 Wis. 258.

Where the legislature makes provision for taking private property for public use, and there is anything in the act from which the court can spell out an intention that just compensation shall be made, and by whom it shall be made, and there is a mode given for ascertaining the amount, it must give a construction to the act that will sustain it.

*Woodruff v. Glendale*, 26 Minn. 78.

If the funds are in the county treasury, and set apart for the purpose, it is sufficient.

*Tehama County v. Bryan*, 68 Cal. 57.

The Constitution of Georgia is practically the same as ours.

Charters and Constitution, 65, p. 408; *Moore v. Atlanta*, 70 Ga. 612, following *Stetson v. Chicago & E. R. Co.* 75 Ill. 74.

California and Washington statutes are the same as ours. In *Brown v. Seattle*, 18 L. R. A. 161, 5 Wash. 85; and *Lewis v. Seattle*, 5 Wash. 741, the courts seem to hold that the money must be first paid—but in *Lewis v. Seattle*, *supra*, the court distinctly held that "where the warrant is accepted it is a waiver of first payment."

None but owners can raise an objection when property is taken by the state without fair compensation.

*Waterloo Woolen Mfg. Co. v. Shanahan*, 14 L. R. A. 481, 128 N. Y. 845.

Nor is it any objection to the law that benefits to be offset.

*Pacific Coast R. Co. v. Porter*, 74 Cal. 261; *Butte County v. Boydston*, 64 Cal. 110.

Bartholomew, *Ch. J.*, delivered the opinion of the court:

These cases have been submitted together. They are brought by the same plaintiff against different defendants, but to accomplish one purpose, and that purpose is to relieve plaintiff from the payment of a certain assessment laid upon his land, under the drainage law hereafter mentioned. The first action is against the drain commissioners of Cass county, and asks that they be perpetually enjoined from constructing a certain drain in said county, which they had caused to be established and partially constructed, and had assessed a certain per cent of the cost of said drain against the property of plaintiff, which said commissioners declared to be benefited by the construction of such drain. The second action is against the treasurer of said county and the holder of a certain warrant issued by the drain commissioners in payment of damages sustained by the construction of said drain. An injunction is sought perpetually restraining the payment of such warrant. The third case is

against the county commissioners of said county, and seeks to enjoin them from issuing bonds of said county to pay for the construction of the drain in question and other similar drains, which it was alleged they were about to do. The answers in the several cases alleged, in substance, strict compliance with the provisions of chapter 55, Laws 1898. A general demurrer to the answers was overruled, and the plaintiff appeals.

The case turns exclusively upon the question of the constitutionality of said chapter 55. The act is a general drainage law, and is largely copied from the Michigan drainage laws. From a financial standpoint, it is one of the most important statutes ever enacted in the state. Thousands of dollars have already been expended under the law, and the drains now in process of construction and in contemplation throughout the state will, if completed, cost many thousands more. It is of importance to the taxpayers that the validity or invalidity of the law be definitely settled, and at once. Many objections are urged against the law, and we deem it our duty to notice each of them. The statute is too long for reproduction here, but a synopsis of it, with quotations of portions, is absolutely necessary to an understanding of the rulings that we are required to make.

The act is entitled "An act to provide for the establishing, constructing, and maintaining drains in this state." The first part of section 1 reads: "Watercourses, ditches, and drains for the drainage of swamps, marshes, and other low lands may be established, constructed, and maintained in the several counties and townships of this state whenever the same shall be conducive to the public health, convenience or welfare, under the provisions of this act." The balance of the section defines a drain. Section 2 provides for the appointment by the county commissioners of three drain commissioners in each county, fixing their term of office at two years, and providing for their removal and for filling vacancies. Section 3 provides for their oath and official bond. Section 4 relates to drains in more than one county, and need not be further noticed here. Section 5 provides for the application by five or more freeholders, residing within proper limits, to the drain commissioners, for the establishment of a drain, and for an inspection of the ground by the said commissioners, and, if they so order, a preliminary survey by a competent surveyor, and for maps, with plans, specifications, and estimates, to be filed by said surveyor with the county auditor. Section 6 makes applicants liable for costs when drain not necessary, but, if commissioners determine drain to be necessary, they shall proceed to establish the same. Section 7 reads as follows: "If, within twenty days after such determination, all of the persons on whose lands the proposed drain is to be placed shall not have executed a release of right of way and all damages on account thereof, the board of county drain commissioners shall appoint a time and place of hearing upon the application, which shall not be less than ten nor more than twenty

days thereafter, and shall immediately make application to the district court of the county to ascertain the necessity for such drain and for taking private property for the use and benefit of the public for the purpose thereof, and the just compensation to be made therefor. Such application shall be made in writing, and shall describe the drain and the route and dimensions thereof, according to the survey, and shall state the facts which constitute the public necessity therefor and shall also state the time and place of hearing upon the application for such drain. The court to whom such application is made shall at once appoint a time for hearing and considering the same, and shall issue a citation to all persons whose lands are traversed by such drain to appear at the time appointed and be heard with respect to such application, if they desire to do so, which citation shall be annexed to a copy of the commissioners' application to the court and served in like manner with other process of the said court." Section 8 provides for personal service of citation upon owner or occupant of lands traversed by the drain, and service by posting in exceptional cases. Section 9 provides for the hearing in court upon the application, and requires the jury to determine—First, "whether such ditch will be conducive to the public health, convenience, or welfare;" second, "whether the route thereof is practicable;" third, "amount of damage allowed to any person or persons or corporations." The section then proceeds: "And the court shall enter the proper judgment thereon. The damages allowed shall be irrespective of the benefits which the particular parcel of land will receive by the construction of such ditch, but such land shall be assessed for such benefits. The costs of all such proceedings shall be paid out of the fund raised for the purpose of constructing such ditch if the construction of the same be ordered. If no ditch is established such costs shall be paid by the county. Any party aggrieved may appeal from the judgment of the district court as in civil cases, and upon such appeal costs may be awarded in the discretion of the court." Section 10 reads: "An order drawn by the board of county drain commissioners on the treasurer of the proper county for the amount of any damages awarded from the location and construction of the said drain and tendered to the person entitled to such damages shall be deemed a sufficient security for the amount thereof. If the owner of any lands upon which any damages may be awarded be unknown, and such lands be not occupied, an order for the amount therefor shall be drawn, payable to the owner of the description of land upon which such damages were awarded, describing such lands by their legal subdivision in such order, which order shall be delivered to the county auditor to be held by such auditor, to be delivered to the owner of such lands when called for, or otherwise lawfully demanded, and the same shall thereby be deemed lawfully tendered to the owner of the lands: provided, the amount chargeable against such lands on account of the cost of construction of the drain, if less than 25 L. R. A.

the damages, shall apply in payment of the damages, and if equal to or more than such damages, the same shall apply to the full amount thereof, and for the purpose of accuracy in keeping the account the board of county drain commissioners shall furnish to the county treasurer, or other officer having the collection of the drain tax, a memorandum of the amount of the damages, and such treasurer or other officer shall credit the amount thereof upon the tax when he receives the tax roll, or so much thereof as may be equal to the tax, and such memorandum shall be a voucher for so much money as paid by such treasurer, and shall be allowed him on settlement." Section 11 reads: "Upon the release of the right of way the board of county drain commissioners shall make their order establishing the drain, and they shall give the same a name by which it shall be recorded and indexed; they shall also assess the per cent of the costs of construction and maintenance of such drain which any township, city or village shall be liable to pay by reason of the benefit of such drain to the public health, or as to the means of improving any public highway, and they shall assess the benefits to accrue to the roadbed of any railroad or turnpike by reason of the construction of such drain, and they shall assess proportionately the benefits to accrue, either directly or indirectly, to any piece or parcel of land by reason of the construction of such drain, whether such lands be immediately drained by the said ditch, or whether they can be drained only after the construction of other and connecting ditches, but such assessment shall be subject to review by the commissioners upon the request of parties in interest, at or before the time of letting the contracts for the construction of such drain." Section 12 provides that commissioners shall make full returns, after drain is established, to county auditor; and the auditor shall make and preserve a record thereof. Section 13 provides for letting contracts for the construction of the drain. Section 14 provides for a hearing upon the rate of assessments and the letting of the contracts. Section 15 reads: "Upon the letting of such contracts the commissioners shall make a computation of the cost of such drain, which shall include all the expense of locating and establishing the same, including the drain commissioners' fees, cost of survey, and fees and expenses of the special commissioners, advertising and all other expenses, the amount of damages awarded by the special commissioners and the amount of contracts, and in case contracts shall not have been let for the construction of the whole of such drain, the board of county drain commissioners shall estimate the cost of the unlet portion, predicated their estimate so far as may be upon the cost of those portions that have been let. They shall add the whole in a gross sum, and shall add thereto ten per cent to cover contingent expenses, delinquencies, and any extra charges that may accrue, and the sum thus ascertained shall be the cost of construction of such drain." Section 16 reads: "The board of county drain commissioners shall apportion to each township, city, or village benefited by such drain

from sanitary or other considerations, the amount chargeable against such municipality on account of the construction of such drain, according to the per cent which, by section 12 [11] of this act, they are required to fix and determine, and they shall apportion the balance of the cost of construction upon the lands to be benefited by such drain, and assess the amount to be paid on each description of land in proportion to the benefits it receives from such drain. They shall make a list showing such apportionment and assessment and shall serve a copy thereof upon the clerk of each township or upon the clerk of any city or village against which any sum is assessable or in which any lands are situated that are assessable under such apportionment, and the amount assessable upon any such township, city, or village shall be levied as part of the township tax for the year, and the amount assessable upon any description of land shall be assessed and levied against such land by the assessing officer as drain taxes, naming the particular drain for the construction of which the same is assessed. Within two days after the service of such notice as aforesaid, the board of county drain commissioners shall appoint a time and place of such apportionment and assessment and shall give notice thereof by a notice which with such apportionment list, must be published once in each of two consecutive weeks in a newspaper of general circulation printed and published in said county, and on the day mentioned in such notice such commissioners shall meet and hear all complaints on such apportionment and assessment and correct and confirm the same, and the said list shall thereupon be filed in the office of the county auditor in which such lands, cities, towns and townships are located, and shall constitute the assessment roll of such drain. Said commissioners may adjourn from day to day and if a quorum be not present less than a quorum may adjourn such meeting." Section 17 reads: "In case of drains established by the board of county drain commissioners, the drain taxes, when collected, and all moneys received on account of state lands shall be returned to the county treasurer, and all moneys so collected or returned shall be credited to the drain fund to which they belong, and such county treasurer shall be the treasurer of such drain fund. Orders drawn by the drain commissioners in payment for the construction of any drain shall be payable from the proper drain fund and shall be receivable for the taxes levied for the construction of such drain by the county treasurer or by the state treasurer, as the case may be." Upon that portion of the statute from sections 18 to 37, inclusive, no point is raised. Section 38 reads: "The board of county commissioners of each county wherein such ditch or ditches are proposed to be located and established are hereby authorized to issue the bonds of said county, in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in locating, constructing, and establishing the same, said word 'expenses' to be construed to mean and cover every item of costs of said ditch, from its inception to its completion, and the

said counties to be reimbursed as hereinbefore provided. Said bonds shall bear interest at a rate not exceeding 7 per cent and shall be payable not exceeding twenty years from the date thereof, and the said commissioners shall provide a sinking fund for the payment of said bonds at maturity and for the payment of the annual interest on the same. The bonds issued under the provisions of this act shall be signed by the chairman of the board of county commissioners of said county, and countersigned by the county auditor, who shall keep a record of the bonds issued under the provisions of this act. The said board shall have the power to negotiate said bonds as they shall deem best for the interest of said county: provided, that they shall not negotiate the same at less than par value. All such bonds shall contain a recital that the same are issued in accordance with the provisions and pursuant to the authority of this act. Whenever such bonds shall be issued the tax and assessment hereinbefore provided for shall not be collected all in one year, but shall be divided into as many parts as such bonds have years to run, and one of such parts shall be extended upon the tax roll by the county auditor against the proper parcel of land in each and every year and collected in such year, and such fund shall constitute the sinking fund provided by this section, and the board of county commissioners shall in each year, at the time of levying the taxes, levy a tax sufficient to pay the annual interest on said bonds." Section 39 provides for the repeal of certain specified acts and all other acts inconsistent with the provisions of this act.

In passing upon the constitutionality of any statute, there are certain elementary principles of which courts must ever be mindful. These principles render that certain which otherwise might be uncertain; that simple which otherwise might be complex; that safe which otherwise might be dangerous. We must remember that legislative power is primarily plenary, and that constitutions are not grants of, but restrictions upon, that power. Hence he who would challenge a legislative enactment must be able to specify the particular constitutional provision that deprived the legislature of the power to pass the enactment. We must remember that it is the duty of courts to reconcile statutes with the constitution when that can be done without doing violence to the language of either, and in all cases of doubt the doubt must be resolved in favor of the constitutionality of the statute. Thus much deference the judicial department of government owes to the legislative. But we must remember, also, that the constitution is the shield which the state, in its sovereign capacity, has provided for the protection of private rights. This protection is necessary. Every period in civilized history, however remote or however recent, but emphasizes the fact that unrestrained legislation is inimical to individual rights. Having provided the shield, the state has created its courts, and charged them with the special duty of seeing that every legislative blow improperly aimed at the life, liberty, happiness, or property of



the individual falls harmlessly upon that shield. The court that fails in this duty fails in the purposes of its creation, and should be barred from further participation in governmental affairs. With these general guides, let us examine this statute.

It is first urged against this statute that it violates section 61 of the Constitution of North Dakota, which reads: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." It is claimed that this provision is violated (1) in the creation of a special drainage commission, and vesting in it the powers of the act; (2) in the levying of special assessments to pay the costs of constructing drains; (3) in providing for the issuing of bonds and a sinking fund to pay the same; and (4) in the repealing provisions of section 39. This constitutional provision has been passed upon by this court in *State v. Woodmanee*, 1 N. Dak. 246, 11 L. R. A. 420; *State v. Haas*, 2 N. Dak. 202; *State v. Noland*, 3 N. Dak. —, 57 N. W. Rep. 85. We do not wish at this time to add anything to what was said in those cases upon this point, but, applying the principles as there announced, it is clear to us that this objection cannot be sustained. The title to the act in question is very broad: "An act to provide for the establishing, constructing, and maintaining drains in this state." It covers the entire subject. Whatever means and instrumentalities are necessary or usual and proper for effectuating the purposes of the act may be provided in the act. The objections go only to the means and instrumentalities. Upon the provision relating to the issuance of bonds, counsel cite us to the cases of *Nashville v. Ray*, 86 U. S. 19 Wall. 468, 23 L. ed. 164; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. ed. 470; and *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069. These cases hold that authority to a municipality to make improvements or incur indebtedness does not carry with it, by implication, the power to issue negotiable paper. This proposition may be granted. The question here is different. It is not what power passes by implication, but what power may be expressly granted under a title authorizing internal improvements. We think authority to pay for such improvements in some manner other than the ordinary taxation, particularly when, as in this case, the limit of ordinary taxation might be totally inadequate to meet the expense, is entirely germane to the title, and the issuance of bonds is perhaps the most common means known to the law for meeting such expenses. It is claimed that the repeals contained in the thirty-ninth section of the Act violate this constitutional provision, under the rulings in *State v. Smith*, 35 Minn. 257, and *Tingus v. Port Chester*, 101 N. Y. 294. The cases are not applicable. In the Minnesota case the act was entitled "An act to amend chapter 1 of the General Laws of 1878 to provide for the assessment and collection of taxes, being chapter 11, General Statutes of 1878." This title was restrictive, and, by its terms, confined to an amendment

of chapter 1 of the General Laws of 1878, yet the legislature under that title, proceeded to repeal another statute which the court held might coexist with the amendment. The principle of the case from New York is very similar. But here we have a new enactment,—a statute complete in itself, and requiring in its operation no aid from other provisions. Being the latest expression of the legislative will, it might, by implication, repeal all inconsistent statutes. But repeals by implication are not favored in law; hence it was highly proper that inconsistent statutes be repealed in express terms. It was the proper means of placing the new enactment in successful operation.

The second objection urged against the statute is that it violates section 173 of the Constitution, which declares that the fiscal affairs of the county shall be transacted by a board of county commissioners. If we carefully consider sections 170, 171, and 172 of our state Constitution, we are forced to the conclusion that the words "fiscal concerns," "fiscal affairs," and "affairs," and "government" are used interchangeably. Section 170 authorizes the legislature to provide by general law for township organizations under which any county may organize; and, when such organization is adopted in any county, "so much of this constitution as provides for the management of the 'fiscal concerns' of said county by the board of county commissioners may be dispensed with by a majority vote of the people voting at any general election, and the 'affairs' of said county may be transacted by the chairmen of the several township boards of said county." But it cannot be claimed for a moment that the duties of the township chairmen, when in charge of the "affairs" of the county, would differ in any manner from the duties of the commissioners when in charge of the "fiscal concerns" of the county. Section 171 reads: "In any county that shall have adopted a system of government by the chairmen of the several township boards, the question of continuing the same may be submitted to the electors of such county at a general election in such a manner as may be provided by law, and if a majority of all the votes cast upon such question shall be against said system of government, then such system shall cease in said county and the affairs of said county then be transacted by a board of county commissioners as is now provided by the laws of the territory of Dakota." Here the conduct of the county business by the township chairmen is called a "system of government," and it is provided in what manner this system shall cease; "and the affairs of the county shall then be transacted by a board of county commissioners as is now provided by the laws of the territory of Dakota." But the board of county commissioners provided for by the territorial laws was identical with the board provided for by the next section of the constitution, and the duties of that board were specifically fixed by the statute section 592, Comp. Laws. This statute is continued in force by section 2 of schedule to constitution. These duties are such as are common to all the counties in the

state; such as they ordinarily and usually perform as a part of their permanent functions. Section 172 of the Constitution then provides that, until the change is made to the township system, the "fiscal affairs" of the county shall be transacted by a board of county commissioners, consisting of not less than three or more than five members. We fully agree with the learned counsel for appellant that the words "fiscal affairs," as here used, are not limited to matters pertaining solely to public revenue, as they doubtless are in some connections. They mean rather the business transactions of the county,—the performance of such duties as the law has defined and placed upon county commissioners, or such as uniformly pertain to that office. In *Bryant v. Robbins*, 70 Wis. 258, Chief Justice Cole, for the full court, said: "It may admit of doubt, as argued by the counsel of the appellants, whether the power to construct drains, etc., given to town and county officers under the general law, is, strictly speaking, a part of the 'system of government' belonging to those political corporations, within the meaning of the constitution. It is rather a special authority, conferred for a special purpose, calculated to promote the public health and welfare. The powers and duties of county and town officers are those which they ordinarily and usually exercise as a part of the regular and permanent administration of the town and county governments. It is a significant fact in this discussion that no drainage law was enacted for several years after the adoption of the constitution, nor was any such power as is now conferred given to town and county officers to execute such work. There is therefore strong reason for saying that the power to construct drains is in no proper sense a part of the usual powers belonging to town and county governments, but is a special authority, given for a particular purpose, and which may be conferred upon any persons or body upon which the legislature may see fit to confer it." Surely, this language is applicable to this case. It will not be contended for a moment that, under their general powers, the county commissioners could engage in the work of constructing drains; that they could for that purpose exercise the power of eminent domain,—assess benefits and institute proceedings to ascertain damages. This was a special purpose, and its accomplishment required special legislative authority, which might be placed where the legislature saw proper. See also, *Shaboygan County Suprs. v. Parker*, 70 U. S. 8 Wall. 93, 18 L. ed. 83.

Section 14, article 1, of our Constitution reads as follows: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived."

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It is very forcibly pressed upon us by learned counsel that the drainage act violates this provision, in the following particulars: (a) Because section 10 of the Act provides that damages may be paid by warrants drawn by the drain commissioners upon the drainage fund, while there might be no money in that fund until the drain was established, the benefits assessed, the tax levied and collected, hence the property would be taken without just compensation being first made, and without payment in money. (b) Said section 10 also provides that such warrants may be delivered to the county auditor for unknown owners, while the constitution requires the compensation to be made to or paid into court for the owner. (c) Because the compensation is not ascertained by a jury. Under section 9, the jury determines the "amount of damages allowed to any person," but the damages allowed shall be "irrespective of benefits." The benefits are assessed by drain commissioners. The "just compensation" is the amount of damage, if any, remaining after benefits have been deducted. This balance the jury is not permitted to find. Section 14 of the Constitution of North Dakota was copied literally from section 14, article 1, of the Constitution of California adopted in 1879. The California Constitution of 1849 simply reads: "Nor shall private property be taken for public use without just compensation." Section 8, article 1. Under the old constitution, it was held that taking private property for public use without making compensation at the time, or, in case of a municipal corporation, providing a fund certain from which payment should be made upon the termination of condemnation proceedings, was a violation of the constitutional provision (*McCann v. Sierra County*, 7 Cal. 121; *Colton v. Rossi*, 9 Cal. 595; *Johnson v. Alameda County*, 14 Cal. 106); and that property was "taken," within the meaning of the provision, when it passed from the possession and control of the owner, and not when the title ultimately passed to the corporation. *Davis v. San Lorenzo R. Co.* 47 Cal. 517, overruling *Fox v. Western Pac. R. Co.* 31 Cal. 588; and *Sanborn v. Belden*, 51 Cal. 266. In this latter case it is purposely left undecided whether or not precedent payment or tender of payment must not be made even when the property is taken by a municipal corporation. These decisions were all rendered prior to the adoption of the Constitution of 1879, and enable us the better to understand what was sought to be accomplished by the new provisions upon that subject introduced into that instrument. Section 14 of our Constitution divides naturally into two parts. The first reads: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner." As originally reported by the judiciary committee of the California Constitutional Convention of 1879, the section contained nothing more. See Constitutional Debates, 346. At that time the provision as thus introduced existed substantially in the constitutions of a large number of the states. See notes on pages 659, 697, Cooley, Const.

Lim. 5th ed. The term "just compensation" had already been defined in California to be that compensation which was based upon damages sustained and benefits received. *San Francisco, A. & S. E. Co. v. Caldwell*, 81 Cal. 368; *California Pac. R. Co. v. Armstrong*, 46 Cal. 85; and to the same purport are *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 686; *Trinity College v. Hartford*, 32 Conn. 452; *State v. Graves*, 19 Md. 851; *Page v. Chicago, M. & St. P. R. Co.* 70 Ill. 324; *Harlow v. Marquette, H. & O. R. Co.* 41 Mich. 386. These cases make it reasonably certain that the words "just compensation," as used in the California constitution, and later in our own constitution, mean the excess of damages sustained over benefits received. For cases that reject this definition of "just compensation," see *Carpenter v. Jennings*, 77 Ill. 250; *Ison v. Mississippi Cent. R. Co.* 86 Miss. 300; *Penrice v. Wallis*, 37 Miss. 172; *Robbins v. Milwaukee & H. R. Co.* 6 Wis. 686.

Under constitutional provisions declaring that private property shall not be taken for public use without just compensation, and silent as to the time of payment, it has generally, if not universally, been held, when property was thus taken by a private corporation, that payment must precede the taking; but, where the property was taken directly by the state or a municipality of the state, it has generally been held a sufficient compliance with the provision if the compensation was definitely ascertained, and made a charge upon a municipal fund for which the credit of the municipality was pledged. *Rogers v. Bradshaw*, 20 Johns. 744; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 9, 81 Am. Dec. 818; *Chapman v. Gates*, 54 N. Y. 132; *Brock v. Hishen*, 40 Wis. 674; *Long v. Fuller*, 68 Pa. 170; *Orr v. Quimby*, 54 N. H. 590. The same ruling has been made in Minnesota and Michigan, where the constitution requires the compensation to be first paid or secured. See *State v. Messenger*, 27 Minn. 119; *State v. Bruggerman*, 81 Minn. 498; *People v. Michigan Southern R. Co.* 3 Mich. 496. But we are cited to no case (and, if such a case existed, we are sure the tireless industry of counsel would have found it) arising in those states having the constitutional provision as thus reported to the constitutional convention of California, and as found in the first part of section 14 of the Constitution of this state, where it has been held that the state or any municipality acting for the state could take private property for public use unless just compensation therefor accompanied or preceded the taking. The point does not seem to have arisen. Indeed, the language is so plain and express that judicial construction would be superfluous. It has sometimes been asserted broadly that private property could not be so taken, as in the Mississippi cases *supra*. In New Jersey, where practically the same provision is found, but limited to individuals or private corporations, the chancellor, in discussing the meaning of the word "first," in *Redman v. Philadelphia, M. & M. R. Co.*, 83 N. J. Eq. 165, said: "Its meaning, to my mind, is perfectly obvious; indeed, it is its own expositor. When this is the case, reasoning

and illustration have no office. The provision under consideration plainly ordains that compensation shall precede appropriation; and, if the legislature in this enactment have not observed this direction, they have transcended their power." The fact that the provision is, in this state, unlimited in its application, cannot change the clear meaning of the words used. It becomes clear, then, that, under the provision as originally reported to the California constitutional convention, the owner of private property, when the same was taken for public use, could in no case demand more than "just compensation,"—i. e. such compensation as represented the excess of damages sustained over benefits received; but in all cases such just compensation should be paid to, or paid into court for, the owner, before the property could be taken.

We may now proceed to analyze the amendment which was offered and adopted, and which constitutes the balance of section 14 of the Constitution of this state, and reads: "And no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived." We notice that this provision relates to the appropriation of right of way. If private property be taken for any other public use, it falls within the first provision in the section. This right of way must be appropriated to the use of a corporation "other than municipal." If a municipal corporation appropriate a right of way, it still falls within the first provision. For this right of way, thus appropriated by a corporation other than municipal, full compensation must be made in money; that is, a compensation "irrespective of any benefits." Strictly speaking, full compensation is required in every case; but, except in cases of the appropriation of a right of way by a corporation other than municipal, this full compensation may be paid in benefits received to the extent of such benefits, leaving the balance only, or the just compensation, to be otherwise paid. From the fact that the constitution directs that, for right of way appropriated to the use of a private corporation, full compensation shall be paid in money, learned counsel argue that, for right of way appropriated to the use of a municipal corporation, just compensation need not be paid in money, but may be paid in warrants; and it is claimed that this is a recognition of the fact that municipalities habitually pay by warrant. To this we cannot assent. The word "money" is used to exclude benefits. Just compensation, when ascertained, must always be paid in money. Money is the measure of compensation. Compensation represents the money value of property taken or damaged. Just compensation can be made in no other medium. Dill. Mun. Corp. 4th ed. § 612; Cooley, Const. Lim. 963; *State v. Ravine Road Sewer Comrs.* 39 N. J. L. 665; *Com. v. Peters*, 2 Mass. 125; *Okenpeake & O. R. Co. v. Halstead*, 7 W. Va. 801; *Van-*

*Arno v. Dorrance*, 2 U. S. 2 Dall. 804, 1 L. ed. 891; *Mills*, Em. Dom. § 135. Further, the statute does not treat the warrant as payment. It says the order "shall be deemed a sufficient security for the amount thereof. Security negatives payment. It is that which is given to insure payment at some future time. The manner in which this provision found its way into our statute is entirely clear. It was the result of a literal copy of the Michigan drainage act. But in Michigan the constitution requires the compensation to be paid or secured. Our constitution requires payment. Security is wholly inadmissible. It is clear to us that there is no such provision for compensation contained in said chapter 55 as our constitution imperatively requires; hence the act will not warrant the exercise of the power of eminent domain. *Thacher v. Dartmouth Bridge Co.* 18 Pick. 501; *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 1-87; *Mount Washington Road's Petition*, 85 N. H. 184; *Eastman v. Amoskeag Mfg. Co.* 44 N. H. 143-160, 82 Am. Dec. 201; *Weaver v. Mississippi & Rum River Boom Co.* 80 Minn. 477; *Watkins v. Walker County*, 18 Tex. 586, 70 Am. Dec. 298; *Foster v. Stafford Nat. Bank*, 57 Vt. 128.

We here meet another question that is not without difficulty in this case. It is this: Granting that the power of eminent domain cannot be exercised under this statute, and that the provisions upon that subject are unconstitutional and void, must the whole statute for that reason fail? If there were no attempt in this statute to provide for compensation, then the law would conclude that it was not the legislative intent to exercise the power of eminent domain, but that the right of way was to be acquired by private contract. *Mills*, Em. Dom. § 128, and cases cited. But we cannot so treat this statute. There was a clearly expressed intent to provide for compensation, but therein the law was unconstitutional; and whether or not the law can stand with such portions eliminated depends, nakedly stated, upon whether or not there remains a complete enactment capable of enforcement, and one that it may reasonably be presumed the legislature would have passed shorn of its unconstitutional features. It is our duty to sustain statutes in their entirety when possible, and to that end we must indulge all reasonable presumptions in favor of their constitutionality. But, when a statute has been once emasculated, these presumptions no longer obtain in support of the remainder. It should then be manifestly clear that the remaining portion can stand by itself, and that the legislature did not intend that such portion should be controlled and modified in its construction and effect by the rejected part. See note to page 218, *Cooley*, Const. Lim. 5th ed. In many cases where provisions for compensation in statutes authorizing the exercise of the power of eminent domain have been held unconstitutional, the entire statute has been treated as void. *Eastman v. Amoskeag Mfg. Co.* *supra*; *People v. Leovs*, 89 Hun, 490; *Bloodgood v. Mohawk & H. R. R. Co.* 18 Wend. 9, 81 Am. Dec. 818; *Thacher v. Dartmouth Bridge Co.*; *Watkins v. Walker County*, and 25 L. R. A.

*Weaver v. Mississippi & Rum River Boom Co.*, *supra*. While this holding is not entirely uniform (see *Lewis*, Em. Dom. § 453), and while, perhaps, a uniform rule would not be desirable in all cases where the exercise of this power of eminent domain fails, yet we are convinced that in this case the entire statute should be held void. When we eliminate from the statute the power of eminent domain, we take out, bodily, sections 7, 8, and 9, and various clauses in other sections. We have left only a weak, inefficient statute, incapable of enforcement. Enforcement carries with it the idea of execution without consent. That which is done by consent, and can only be done by consent, is not enforced. With the right to exercise the power of eminent domain gone, it might be possible to construct a drain under the statute if every landowner through or along whose land it was sought to establish the drain would voluntarily release the right of way and damages; but it is inconceivable that the legislature would have placed upon the statute book an important and far-reaching statute dependent for its effectiveness upon the whim of any one man whose land might be needed for right of way. We cannot, in support of a fragmentary statute, indulge a presumption so unreasonable, and must therefore hold the entire statute nugatory. The provision which requires the warrant for damages, where the owner is unknown, to be deposited with the county auditor, is a clear violation of the provision of the constitution which requires the compensation to be made to or paid into court for the owner. It need only be stated to be understood, and renders the statute, to that extent at least, void. *National Docks & N. J. Junction & Connecting R. Co. v. United New Jersey R. & Canal Co.* (N. J.) 28 Atl. Rep. 673.

We do not think that the manner in which compensation is ascertained under the statute is any violation of section 14 of the Constitution. It is true that the ascertainment of just compensation is a judicial proceeding, but a party has no inherent right to have such compensation fixed by jury. This has been repeatedly held. *Kohl v. United States*, 91 U. S. 875, 28 L. ed. 453; *United States v. Jones*, 109 U. S. 518, 27 L. ed. 1015; *Great Falls Mfg. Co. v. Garland*, 25 Fed. Rep. 531; *Ames v. Lake Superior & M. R. Co.* 21 Minn. 241; *People v. Smith*, 21 N. Y. 595. The original provision in said section 14 of the Constitution, as reported to the California convention, contained no reference to a jury. That was added in an amendment which created an exceptional class of cases, and, in the connection in which it was placed, we think it applied only to such exceptional cases. The entire section speaks of two different characters of compensation. First it speaks of "just compensation" as applied generally. It then creates the exceptional class, and for that class it demands "full compensation," and adds "which compensation shall be ascertained by a jury." Ordinarily, these words would not include both characters of compensation, but would include that last under discussion, to wit, full compensation; and such we think was the

intention. If we are correct in this, it follows that under our constitution, whenever private property is appropriated for right of way by a corporation other than municipal, the compensation must be ascertained by a jury, while in all other cases a jury is unnecessary. But it would not follow that a provision for a jury in such other cases would be unconstitutional. The legislature may not curtail the rights of the citizen below the limit fixed by the constitution, but they may properly expand such rights. We see no violation of any constitutional provision, and no possibility of injustice to the property owner, in having the total damages, in cases of this character, ascertained by a jury, and having the benefits assessed and the balance struck by the other tribunal, to wit, the drain commissioners. This principle was involved and sustained in *Cleveland v. Wick*, 18 Ohio St. 303.

We ought to remark in this connection that the right of plaintiff to raise the questions we have been discussing under section 14 of the Constitution has not been denied. The questions have been fully discussed on their merits by both parties, and plaintiff's right to raise the same has thus been conceded, and, being conceded, a ruling upon the questions became necessary to a decision of the case.

Section 88 of the statute does not appear in any drainage law that we have examined. We believe it to be new in this connection. It provides for the issuance and sale of county bonds, running for a series of years, and drawing interest at a rate not to exceed 7 per cent. The proceeds of these bonds are to be passed to the drainage fund, and used to meet the expenses of establishing and constructing drains. Provision is made by which the county is to be repaid, certainly to the amount of the principal, and, as we construe it, the interest also, by the municipalities and persons upon whom special assessments are laid under the law. It is urged upon us that this violates section 185 of our state Constitution, which prohibits any county from loaning or giving its credit or making donations to or in aid of any individual association or corporation except for necessary support of the poor. An analysis of other provisions of this statute shows that the special assessments upon the corporations and persons benefited, and which assessments must equal the entire estimated cost of the drain, with 10 per cent added, to cover contingencies, must be levied and collected in one year. This might often prove a hardship, and, to avoid it, section 88 was enacted. When bonds are issued by the county under that section, then the special assessment, which otherwise must be paid in one year, must be divided into as many parts as the bonds have years to run, and only one part is to be extended upon the tax roll and collected in any one year; and the sums thus collected constitute the sinking fund for the payment of the bonds at maturity, and of the annual interest on the same. By this means the payment, which must otherwise be made in one year, may be extended over twenty years. This indulgence to the corporations and persons benefited and specially assessed

is obtained by means of the credit of the county. Its bonds are issued under the drainage act, and must so state on their face. The proceeds of the bonds go, not into the control of the county commissioners, but at once into the drainage fund, controlled exclusively by the drain commissioners. The county has its compensation in the provisions which enable it to collect the special assessments out of which to reimburse itself. But, however much or however little may be realized from the special assessments, the county, as such must pay the bonds at maturity, as well as the annual interest thereon. No refinement of construction or technical rule of law can make this transaction less than a loan of the credit of the county to the parties primarily liable for the costs of the drain. Judge Cooley, speaking for the court in *People v. State Treasurer*, 23 Mich. 499, said: "The legislature can neither compel the taxation of municipalities in aid of railroad companies, nor empower them, in order to give such aid, to tax themselves, or to contract indebtedness which must be paid by taxation,"—citing *People v. Salem Twp. Board*, 20 Mich. 452. It is true that the Supreme Court of the United States in *Pine Grove Twp. v. Talcott*, 86 U. S. 19 Wall. 666, 23 L. ed. 227, a case which went up from the western district of Michigan,—refused to follow the Michigan court; but it was on the ground that the Michigan prohibition against loaning credit extended to the state only, and did not in terms include counties and townships. See also, upon this point, *Webb v. Lafayette County*, 67 Mo. 333; *Thomas v. Port Huron*, 27 Mich. 320.

But it is urged that draining swamp and overflowed lands, when it will conduce to the health and welfare of the community and benefit the highways, is a public service, for which it was within the power of the legislature to make the county originally liable, and that power must include the power to make the county temporarily liable. The conclusion is not warranted under our constitution. It was within the power of the legislature to designate the localities that would be benefited by the drains, and that should bear the burdens thereof. *Stons v. Charlestown*, 114 Mass. 214; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142; *King v. Portland*, 2 Or. 146; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508. This determination of the legislature is, of course, final. In this case, by placing the benefits and burdens elsewhere, the legislature has declared that the county, *quoad hoc*, is not benefited. The whole burden is thrown upon other corporations and persons. The obligation rests entirely upon them, and they are never relieved. All the county can do is to obtain for them an extension of the time of payment by the loan of its credit. This the constitution prohibits; and the plaintiff, being a property owner and taxpayer within the county of Cass, is entitled to a writ against the said county commissioners perpetually enjoining them from the issuance of bonds of the county under the provisions of said section 88 of said Drainage Act.

One more objection is urged against the-

statute. It is claimed that it violates the provisions requiring uniformity in taxation, found in section 176 of the Constitution. It is first claimed that the provision for special assessments is void. We think not. Section 180 of the Constitution directs the legislature to provide by law for the organization of municipal corporations, restricting their powers as to levying taxes, assessments, etc. It is said this does not apply to counties. It is immaterial. It does not authorize a grant of power to make assessments. It simply recognizes the existence of such power, and directs its restriction. The rule "*expressio unius*," etc., does not apply. We understand counsel to admit—granting the existence of the power to levy special assessments—that such assessments differ radically in their nature and purpose from ordinary taxation, and that the rule which requires uniformity in taxation has no application whatever to special assessments. This has now become so elementary that citations are unnecessary. The real difficulty lies deeper. It is claimed that under this law the special assessments must equal the total cost of establishing and constructing the drain, without regard to the benefits received; that, while the assessments must be in proportion to the benefits received, as between the parties benefited, yet the assessment in each case may exceed the individual benefit, and in the aggregate exceed the total benefits. It is then claimed that special assessments are based upon, and must be measured by, benefits received; and that, when a special assessment exceeds the benefits received, it ceases as to such excess to be a special assessment, but is to that extent taxation proper; and that, under the statute, such taxation is laid upon particular property belonging to particular taxpayers, while, under the rule of uniformity required by the constitution, it should be paid upon

all property within the taxing district. The constitutional question thus raised is of much importance, and its solution is not without difficulty. It is not entirely clear from the reading of the statute that it was the legislative purpose to permit special assessments to exceed actual benefits; and, as we hold the entire statute unconstitutional upon other grounds, we decline at this time to pass upon this question; but, in view of the possibilities of future legislation, it may not be improper for us to say that courts seem to view with disfavor any attempt on the part of the legislature to charge property with special assessments for improvements in excess of the actual benefits received by such property by reason of such improvements. See *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Creighton v. Manson*, 27 Cal. 614; *Crawford v. People*, 82 Ill. 557; *Nichols v. Bridgeport*, 28 Conn. 189, 60 Am. Dec. 686; *Stephani v. Catholic Bishop of Chicago*, 2 Ill. App. 249; *Chamberlain v. Cleveland*, 84 Ohio St. 551; *State v. Ramsey County Dist.*, 29 Minn. 63; *State v. Seymour*, 35 N. J. L. 49; *Dyar v. Farmington*, 70 Me. 515. But, *contra*, see *Keith v. Boston*, 120 Mass. 108; *Kingman, Petitioner*, 153 Mass. 568, 12 L. R. A. 417; *Spencer v. Merchant*, 100 N. Y. 585, affirmed in 125 U. S. 345, 31 L. ed. 768.

In closing, we wish to acknowledge our obligation not only to the able counsel in these cases, but also in the case following and ruled by this, *infra*, and to W. J. Kneeshaw, Esq., who filed a brief in support of the law in behalf of Pembina county.

The district court will reverse the judgment in each case, and sustain plaintiff's demurrer to the answer, and enter judgment as prayed for in the complaint.

*Reversed.*

All concur.

## OHIO SUPREME COURT.

### CONSOLIDATED COAL AND MINING CO., *Plff. in Err.*,

*v.*

John M. FLOYD, Admr., etc., of George D. Clay, Deceased.

(.....Ohio.....)

\*1. Where, in the course of a jury trial, objection is made to the giving of one

\*Headnotes by the Court.

NOTE.—Statutory regulations for the protection and safety of workmen in mines.

- I. Props.
- II. Cages and signals.
- III. Shafts and fences.
- IV. Escape and ventilation shafts.
- V. Miscellaneous.

#### I. Props.

Under III. Rev. Stat., chap. 93, § 16, providing that mine owners must have suitable prop timbers, it is the duty of the miners themselves to inspect the roof from day to day and set the props,

of a series of seven special charges by the court to the jury, a special exception should be made to the giving of the objectionable proposition. An exception to the giving of the entire series is too general to bring the objection before a reviewing court.

2. Section 6871 of the Revised Statutes, which provides that "any miner or other person, employed in any mine governed by the statute, who intentionally and willfully neglects or refuses to securely prop the roof of any working place un-

if there is no timberman. *St. Louis Consol. Coal Co. v. Scheller*, 42 Ill. App. 619.

But a mining company neglecting to supply timber props after notice that such are needed is liable under Mo. Act March 23, 1881, giving a right of action for willful failure of mine owners to keep a supply of timber for props when required, even where another party is operating the mine, if the owner has any proprietary interest. *Lealie v. Rich Hill Coal Min. Co.*, 110 Mo. 31.

The failure of a coal mining company to furnish and use props does not violate III. Rev. Stat., chap. 93, § 16, which provides that timber for props shall be kept when required and sent down when

der his control," etc., shall be guilty of an offense, is intended, in connection with the other provisions of the act regulating coal mines and the working thereof, to protect the lives and limbs of those engaged in a perilous business. It imposes an obligation to perform a duty to others, and anything which tends to operate in opposition to that obligation violates the policy of the statute. Hence a custom which imposes upon another employé the work of posting and propping the roof of a room in which coal is to be mined, cannot have the effect to exonerate the miner from the duty enjoined by the statute, nor to shift the risk undertaken by himself over upon the company.

3. In an action against a coal mining company to recover for death caused by the negligence of one of its employes, the result of his incompetency, it appeared by evidence of the plaintiff that the deceased was killed by the falling upon him of a portion of the roof of the room in which he was engaged in operating a machine in the mining of coal, which falling was due to insufficient support, and that, by reason of a custom prevailing at the mine, the work of posting and propping the roof was imposed on an employé called "a filler," whose principal business was that of filling coal, and who had no control over the miner, no relation of subordination or subjection existing between them, but both were under the orders of a common superior called "a mine boss." *Held:*

(a.) Such a state of facts does not make a case where the appliance or place is furnished by the master for the work in which the employes are to be engaged, but a case where the furnishing and preparation is itself a part of

the work which they are employed to perform in order to effect a common object, viz.: the digging of coal, and the relation of the filler to the miner is that of a fellow-servant.

(b.) In such case the liability of the master is governed by the law applicable to the relation of fellow servant. Hence, in order to attach liability to the company for the negligence of the filler in not properly posting and propping the roof, the plaintiff must show that the company had knowledge, before the accident, of the incompetency of the filler to perform the duty of posting and propping, or, by the exercise of due care, might have known it, and that he was himself ignorant of such incompetency, and could not, by the exercise of ordinary diligence, have learned it.

(c.) And where, by the plaintiff's evidence, it is shown that the deceased knew of the incompetency of his fellow servant, if it existed, or, being an experienced miner had equal opportunity with the company of knowing, and could have known by the use of ordinary care, and was aware, also, of the danger of working in a room insufficiently propped, and continued his work without complaint, such a case of contributory negligence is shown as will prevent a recovery.

(October 16, 1894.)

**E**RROR to the Circuit Court for Hocking County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injury which resulted in the death and were alleged to have been caused by defendant's negligence. *Reversed.*

required. Consolidated Coal Co. of St. Louis v. Yung, 24 Ill. App. 255.

And where a statute imposes liability for willful failure to keep sufficient supply of props, the question of willful failure should be kept prominently before the jury. Hawley v. Dailey, 15 Ill. App. 301.

## II. Cage and signals.

Pa. Act March 8, 1871, providing for health and safety of persons employed in coal mines, requiring signal system and cage covering and brakes, is constitutional as within the police power of the state. Com. v. Bonnell, Jr., 8 Phila. 584.

And Ill. Rev. Laws 1874, chap. 70, § 14, providing liability for willful failure to comply with the act requiring a covering for a cage, applies where a person was injured while upon the cage, for the purpose of being hoisted, and a lump of coal fell down the shaft killing him, the cage not being covered. Lithfield Coal Co. v. Taylor, 51 Ill. 590.

So under Mo. Act March 28, 1881, requiring the cages in shafts to be kept covered, a cager working at the bottom of the shaft who is injured by a lump of coal falling from an uncovered cage, may recover. Durant v. Lexington Coal Min. Co. 97 Mo. 62.

And the owner of a mine is liable for failure to provide the kind of cage required by Mo. Act March 28, 1881, when he is to furnish and operate the machinery, although he has engaged another to open the coal mine. Fell v. Rich Hill Coal Min. Co. 23 Mo. App. 216.

And a mine owner is liable for failing to perform his statutory duty as required by Illinois statute of furnishing safe means of hoisting and lowering the cage, although the injured party was guilty of contributory negligence. Illinois Fuel Co. v. Parsons, 25 Ill. App. 153.

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Ill. Rev. Stat., chap. 93, § 14, requiring a brake to prevent accidents in case the machinery gives out, applies where such brake would have prevented an injury, although no part of the machinery was broken. Beard v. Skeldon, 13 Ill. App. 54, affirmed in 118 Ill. 584.

Under the Illinois act for safety of miners it is the duty of the company to provide safe hoisting apparatus, sufficient brake, sufficient light, and not to place incompetent engineer or boy under eighteen years of age in charge, and a recovery was allowed where the company willfully failed to comply with the statute. Consolidated Coal Co. of St. Louis v. Maehl, 130 Ill. 551. See also Niantic Coal & Min. Co. v. Leonard, 136 Ill. 216.

And the owners of a mine are liable where the men were drawn up a shaft in a bucket without guides, under Eng. Metalliferous Mines Regulation Act 1872, § 23, subsec. 10, 35 & 36 Vict. 77.

Where a shaft of a lead mine was completed and a tunnel had been driven from the bottom for ore, although no ore had been taken out. Foster v. North Hendre Min. Co. [1891] 1 Q. B. 71.

But the failure of deceased to put catches on the cage at the top of the shaft as required by statute, is such contributory negligence as bars a recovery for his death caused thereby. Beaucoup Coal Co. v. Cooper, 13 Ill. App. 373.

And although Pennsylvania Act, April 18, 1877 (Pub. Laws, 55, § 6), requires a traveling way at the bottom of the shaft for miners to pass, yet if a miner fails to look and listen before stepping under a descending cage, he cannot recover. McDonald v. Rookhill Iron & Coal Co. 135 Pa. 1.

Ill. Rev. Stat., chap. 93, § 8, providing for signals, applies to all coal mines without reference to the motive power. Sangamon Coal Min. Co. v. Wiggerhaus, 25 Ill. App. 77, 123 Ill. 273.

Satatement by Spear, J.:

The action below was brought to recover for the unlawful killing of George D. Clay, a coal miner, whose death occurred October 10, 1891, in a coal mine operated by the defendant company, by reason of the falling upon him of a portion of the roof of the room in which he was working. Negligence was alleged against the company in not keeping a supply of timber on hand at the place Clay was working for the proper propping and support of the roof, and in failing to properly post, prop, and support the roof, which duty to prop did not devolve upon Clay, but, by reason of a custom existing at the time at that and other mines, did devolve upon the company, and also in imposing upon one Dalton, who was in the employ of the company in a different capacity from Clay, and over whom Clay had no control, the work of propping, he, Dalton, being wholly incompetent to perform the duty, and who negligently failed and refused to do and perform the same, of all which the company at the time had knowledge, but of which said Clay was ignorant.

A demurrer to the petition being overruled, an answer was filed which took issue upon the averment as to custom, and alleged that if it existed it was in direct violation of section 6871 of the Revised Statutes, and upon all charge of negligence of the company, and of Dalton, and averred that the death of Clay was caused by his own want of care.

Reply was filed denying that the custom was in violation of the statute, and denying negligence on the part of the deceased.

Upon trial verdict and judgment were given for the plaintiff below, which was affirmed by the circuit court. To reverse these judgments the present proceeding in error is prosecuted. A summary of the material facts will be found in the opinion.

**Mr. E. W. Kittredge**, for plaintiff in error:

Wherever there are two or more employes of one master, who are engaged in carrying out a common object, they are fellow servants; and a master, whether an individual or a corporation, is responsible to his servants for his own negligence, but not for that of their fellow servants.

*Pittsburg, Ft. W. & O. R. Co. v. Lewis*, 33 Ohio St. 198; *Manville v. Cleveland & T. R. Co.* 11 Ohio St. 417; *Chicago & O. Railroad v. Margrat*, 31 Ohio L. J. 247, 51 Ohio St. —; *Chicago & O. Coal & Car Co. v. Norman*, 49 Ohio St. 598.

Where the place that an employe is to work in is a room in a coal mine, this place is provided in the progress of the work by the employes themselves. It is made secure or otherwise by the way in which they perform their respective duties. It is just like the scaffold upon which painters or builders stand in prosecuting their labor.

*Waddell v. Simson*, 112 Pa. 573.

The excavation of the coal being the primary object, the creation of the room in the mine from which the coal is taken, and the protection of it from danger, is itself the very work which those engaged in this common service are employed to perform. And the employer

### III. Shafts and fences.

A mine owner willfully violating Illinois Laws 1873, p. 307, requiring the top of each shaft and entrance to a vein to be fenced, is liable for employes' death notwithstanding contributory negligence. *Catlett v. Young*, 143 Ill. 74.

So under Illinois Act 1872, requiring the top of each shaft to be fenced, if the company was not prepared to comply at once, it should suspend operations. *Bartlett Coal & Min. Co. v. Roach*, 68 Ill. 174.

But Pa. Act March 3, 1870, Pamph. Laws, 3, providing for fencing off dangerous machinery in mines, does not impose liability where proper protection was made and the plank was removed by a coemploye. *Honor v. Albrighton*, 98 Pa. 475.

So Mo. Acts 1881, p. 168, providing for liability for failure to fence the shaft opening does not dispense with the rule that contributory negligence bars a recovery where a fence would not have prevented injury. *Spiva v. Osage Coal & Min. Co.* 68 Mo. 63.

### IV. Escape and ventilation shafts.

Where an old mine has the statutory outlets and is then worked further several hundred feet along the seams, it then becomes a new mine and an outlet for ventilation and escape is required by Pennsylvania Act 1870. *Com. v. Wilkesbarre Coal Co.* 15 Mining Rep. 31, 29 Phila. Leg. Int. 213.

And in an action for death by negligence the question whether a manway required by Pa. Act April 18, 1870, was sufficient, is one for the jury. *Cambria Iron Co. v. Shaffer* (Pa.) Feb. 14, 1887.

The Illinois Act of 1879, § 3, in regard to escapement shafts repealed the Act of 1877, except such portions of the act as were retained and kept in force by the proviso that nothing in this section shall be construed to extend the time allowed by 25 L. R. A.

law for constructing escapement shafts. *Hamilton v. State*, 102 Ill. 367.

And the Illinois Act, May 23, 1879, providing for escapement shafts in coal mines was intended for protection of employes and not for the purpose of requiring mine owners to construct escapement shaft for other owners. *Loose v. People*, 11 Ill. App. 445.

Under Illinois Act, July 1, 1872, providing for liability for wilful failure to provide two outlets to mines where more than fifteen miners are employed, the company is liable where the second shaft is not provided and at an alarm of fire a miner fell down a shaft, in the effort to escape, for fear his outlet would be cut off, although if he had remained at his post there would have been no danger. *Wesley City Coal Co. v. Healer*, 84 Ill. 124.

So a mining company willfully neglecting to prevent accumulation of gas as required by Illinois Act July 1, 1887, is liable for injuries to an employe caused thereby. *Muddy Valley Mtn. & Mfg. Co. v. Phillips*, 39 Ill. App. 376.

And that the ventilation as required by 35 & 36 Vict., chap. 73, would have cost an outlay of £209 will not excuse the agent unless he pointed out the alterations required to the owners and demanded the same. *Hall v. Hopwood*, 15 Mining Rep. 42, 4 L. J. M. C. 17, 41 L. T. N. 8, 797.

Under 18 & 19 Vict., chap. 108, § 4, requiring ventilation constantly if colliery "be worked," the suspension of actual work from Saturday to Monday will not suspend the requirements as to ventilation during that time. *Knowles v. Dickinson*, 3 El. & El. 705, 29 L. J. M. C. 125, 6 Jur. N. S. 678, 9 Week. Rep. 411.

And under 23 & 24 Vict., chap. 151, an act for the regulation and inspection of mines, so much of the mine must be kept ventilated as to render the



cannot, under any principle applicable to the relation of master and servant, be held liable to one of these employés for the negligence of his fellow servant in the performance of this work.

*Armour v. Hahn*, 111 U. S. 818, 28 L. ed. 440; *Chicago & O. Coal & Car Co. v. Norman*, *supra*.

*Mr. L. D. Vickers* also for plaintiff in error.

*Messrs. Price & Wright*, for defendant in error:

The workman takes upon himself the risks ordinarily incident to the employment he engages in; and those include the results of negligence upon the part of others engaged in the same service.

On the other hand, the master is bound to use ordinary care in providing suitable structures and engine and proper servants to carry on his business, and is liable for any negligence in this respect. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient either at the time of procuring them, or at any subsequent time, he fails in his duty.

*Arkerson v. Dennison*, 117 Mass. 412; *Wood, Mast. & S.* 830, 416-418, 430, 441; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 87 Ohio St. 549; *Smith v. The Wm. Powell Co.* 23 Ohio L. J. 436, and authorities there cited; *Wright v. New York Cent. R. Co.* 25 N. Y. 562; *Warner v. Erie R. Co.* 89 N. Y. 471; *Laylor v. Chicago, B. & Q. R. Co.* 53 Ill. 401; *Columbus, O. & I. Cent. R. Co. v. Troesch*, 68 Ill. 545; *Connolly v. Poillon*, 41 Barb. 866; *Shearm. & Redf. Neg.*

working places safe. *Brough v. Humfray*, 15 Min. Rep. 6, 1 L. R. 3 Q. B. 771, 37 L. J. M. C. 177, 16 Week. Rep. 1123, 9 Best & S. 492.

The word "mine" in Illinois *Sess. Laws* 1838, p. 114, providing for examination for fire damp, with safety lamp, applies to a place where the miners are working in a mine although not actually mining coal at the time. *Coal Run Coal Co. v. Jones*, 19 Ill. App. 385, reversed in 6 West. Rep. 500.

And under Pa. Mining Act 1870, requiring mining bosses to have main doors attended and guarded to prevent their being left open, he has no discretion. *Com. v. Reynolds*, 1 Luzerne Legal Rep. 218.

But under Pa. Act 1835, regulating the employment of mine bosses, it is no part of the boss's duty to employ or discharge men; his duty is to look out for ventilation and drainage and props, etc. If he has the power to employ men and was negligent, he is not a coemployé and there can be a recovery for death caused by his wrongful act in absence of contributory negligence. *Weaver v. Iselin*, 151 Pa. 336.

Pa. Act March 3, 1870, prohibiting the working of mines not having two shafts for every seam of coal worked, with a proviso that this shall not apply to opening a new mine nor making communications between shafts so long as not more than twenty persons are employed in such new mine, the operating of the first and third seams simultaneously with the opening of the fifth which had but one outlet is not within the prohibition as the fifth seam was simply in preparation for working. *Haddock v. Com.* 103 Pa. 243, reversing 1 Luzerne Legal Rep. 320.

A superintendent of a mine is not criminally liable for failing to make safety holes and to keep the same free from obstructions at the bottom of all slopes and planes under Pa. Min. Act, June 30, 25 L. R. A.

§§ 180, 191, 204, and *note* 2, p. 348, § 823; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755; *Ford v. Pittsburgh R. Co.* 110 Mass. 240, 14 Am. Rep. 598.

Negligence in employing the servant is the test, and willfulness is not an essential element.

*Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605; *Blake v. Maine Cent. R. Co.* 70 Me. 60, 35 Am. Rep. 297; *Tyoon v. South & North Ala. R. Co.* 61 Ala. 554, 32 Am. Rep. 8; *Delaware & H. Canal Co. v. Carroll*, 89 Pa. 374; *McDonald v. Hazeltine*, 53 Cal. 35.

The master is bound to inquire as to the servant's qualifications for the service.

*Gilman v. Eastern R. Corp.* 10 Allen, 232, 87 Am. Dec. 635; *Wright v. New York Cent. R. Co.* 28 Barb. 80; *Laning v. New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Alabama & F. R. Co. v. Waller*, 48 Ala. 459; *New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Mass. 258.

The duty imposed upon the master in this respect is substantial and absolute. He must at his peril exercise reasonable care in the selection of the appliances of the business and of coservants, and whether he has done so or not is essentially a question for the jury.

*Gilman v. Eastern R. Corp.* and *Wright v. New York Cent. R. Co. supra*; *Walker v. Bowling*, 23 Ala. 294; *Grissle v. Frost*, 8 Fost. & F. 622.

Proof of the unfitness of a servant at the time of employment makes out a prima facie case against the master, and throws upon him the burden of disproving negligence, in the selection.

*Orandall v. McIlrath*, 24 Minn. 127; *Beach*,

1865, where no inspection had been made for over a year and written request had not been made by the inspector. *Com. v. Waddell*, 6 Kulp, 56.

And a mining company providing a competent boss as required by Pa. Act March 3, 1870, is not liable for death of a miner from an explosion caused by the negligence of such boss in failing to ventilate, as he was a fellow servant. *Delaware & H. Canal Co. v. Carroll*, 89 Pa. 374.

And the same was held under Act April 23, 1877. *Redstone Coke Co. v. Roby*, 115 Pa. 264.

Where the men had worked at the place some two or three hours, with an open lamp, before the accident occurred, this showed that the failure to examine the place with a safety lamp in the morning as required by statute in no manner contributed to the accident. *Coal Run Coal Co. v. Jones* (Ill.) 6 West. Rep. 500.

The ventilation law of Pennsylvania of March 3, 1870, does not apply to an air shaft until a communication is formed between it and the mine, where such shaft is being constructed by an independent contractor and the mine owner only supervised to see if it was according to contract. *Welsh v. Lehigh & W. Coal Co. (Pa.)* 8 Cent. Rep. 386.

Where a miner was killed by explosion of fire damp the question as to the applicability of 23 & 24 Vict., chap. 151, requiring ventilation was not decided. *Wilson v. Merry*, 1 L. R. 1 H. L. Sc. 341.

Workmen stopping up an airway of a mine for their employer, who is contesting the right of property with another, are not guilty of felony under 7 & 8 Geo. IV., chap. 30, if they did not know that the act of their master was malicious. *Reg. v. James*, 8 Car. & P. 131.

Under Pa. Act 1870, for ventilation of mines where a competent superintendent and proper machinery were provided, the company was not liable for the death of one boss through act of an-

Contrib. Neg. § 858, and *note 2*, pp. 454, 455, see also § 854; *Pittsburgh, O. & St. L. R. Co. v. Adams*, 105 Ind. 151; *Wright v. New York Cent. R. Co.* 25 N. Y. 562.

It is the duty of those who use hazardous agencies to control them carefully, to adopt every known safeguard, and to avail themselves from time to time of every improved invention to lessen the dangers to others. An omission in any of these respects is negligence.

*Frankford & B. Turnp. Co. v. Philadelphia & T. R. Co.* 54 Pa. 845; *Cleveland v. Spier*, 16 C. B. N. S. 399; 4 Wait, Act. & Def. 653, 654.

The company owed to Clay, under the custom existing, and also the law, the personal duty to provide a safe working place for him.

A personal duty cannot be delegated so as to exempt the employer from liability.

Beach, Contrib. Neg. p. 85, and *notes*, pp.

414, *notes*, p. 419, § 328, *note 3*; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Wilson v. Madison & C. R. Co.* 18 Ind. 236; *Colorado Cent. R. Co. v. Martin*, 7 Colo. 592; *Johnson v. Boston Tea Boat Co.* 135 Mass. 209, 46 Am. Rep. 458; *McGee v. Boston Cordage Co.* 139 Mass. 445.

One may be a fellow servant concerning a certain employment, although he has other duties in exercising which he is the *alter ego* of the master.

*Brick v. Rochester, N. Y. & P. R. Co.* 98 N. Y. 211; *Borgman v. Omaha & St. L. R. Co.* 41 Fed. Rep. 687; *Orinwell v. Pittsburgh, O. & St. L. R. Co.* 30 W. Va. 798; *Taylor v. Beansville, & T. H. R. Co.* 6 L. R. A. 584, 121 Ind. 124; *Clotworthy v. Hannibal & St. J. R. Co.* 80 Mo. 221; *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4; *Anderson v. Bennett*, 16 Or. 515; *Slater v. Chapman*, 67 Mich. 523; *Peterson v. Chicago &*

other boss in slowing down the ventilator causing fire damp, as this is the act of a fellow servant. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 423, 10 Mining Rep. 80.

Under the 7th section of the Illinois Act for "health and safety" of miners, a mining company which employs an incompetent engineer or one under eighteen years of age, is liable for all injuries caused thereby to a miner. *Niantic Coal & Min. Co. v. Leonard*, 126 Ill. 216. See also *Consolidated Coal Co. of St. Louis v. Maehl*, 130 Ill. 551.

And a charter master cognizant that more than the number allowed by 23 & 24 Vict., chap. 151, were being lowered down in a coal pit at the same time is liable under that act. *Howells v. Wynne*, 15 C. B. N. S. 32; 33 L. J. C. P. 241, 9 Jur. N. S. 1041, 11 Week. Rep. 807.

But a mining boss for each opening does not have to be employed under Pa. Act, June 30, 1885, requiring the employment of a competent boss, as a coal mine means such territory, whether one or more drifts, as lies compactly adjacent, and in its working constitutes but a single operation. *Com. v. Wigton*, 2 Pa. Dist. Rep. 51.

No recovery can be had for injury caused by negligence of mining boss to coemployee, if the company complies with the statute in obtaining a competent boss. *Reese v. Biddle*, 112 Pa. 72; *Waddell v. Simonsen*, 112 Pa. 567; *Howells v. Landore Siemens Steel Co. Limited*, L. R. 10 Q. B. 62, 44 L. J. Q. B. 25, 33 L. T. N. S. 19, 22 Week. Rep. 835; *Lincok v. Susquehanna Coal Co.* 157 Pa. 153; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 423, 10 Mining Rep. 80; *Delaware & H. Canal Co. v. Carroll*, 60 Pa. 374; *Redstone Coke Co. v. Roby*, 115 Pa. 864.

And the fact that a mining boss has no certificate of competency as required by Pa. Act 1885 (Pub. Laws, 217, § 15), will not render the company liable under such act, where the lack of the certificate had nothing to do with the accident. *Christner v. Cumberland & R. L. Coal Co.* 146 Pa. 67.

#### V. Miscellaneous.

The Tennessee Statute of 1881, prohibiting the use of a furnace inside a mine where the coal brakes and chute buildings are built directly over and covering the top of the shaft for the purpose of producing a hot up cast of air, does not apply to a mine where the coal is removed through an entry and not a shaft, although suffocation was caused by buildings at the entrance of the intake being burned. *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711.

Under Ill. Act May 11, 1877, providing a penalty if the person in charge of the mine does not at once report an accident to the mining inspector, the mine owner is not the responsible party unless he was 35 L. R. A.

personally in charge. *Sholl v. People*, 98 Ill. 121.

Pa. Act April 12, 1887 (Pub. Laws, 79), for the better protection of person, property, and life in the mining region, providing for the appointment of police officers to preserve the peace, is constitutional as the creation of the officers is not prohibited by the constitution. *Northumberland County v. Zimmerman*, 75 Pa. 23.

A mine owner is not relieved from compliance with the Pennsylvania statute by the fact that in a particular mine certain requirements are unnecessary. *Am. v. Kingston Coal Co.* 6 Kulp, 241.

In order to convict the contractor of a mine for employing women in mines, under 5 & 6 Vict., chap. 99, where two women had been seen lowering parties into the pit, it was held that this is insufficient to impute knowledge to the contractor, but it would be different if the evidence had showed that such was the habit or custom. *DReg. v. Handley*, 1 L. T. N. S. 827.

Pa. Act of March 3, 1870, providing for the health and safety of persons employed in mines and requiring inspection, etc., takes effect at once. *Com. v. Conyngham*, 66 Pa. 92.

A miner is liable for attempting to ascend the shaft when the hook-on forbids exit at that time, under 25 & 26 Vict., chap. 76, authorizing miners to establish rules, and a rule prohibited a miner from going down or up into the pit contrary to the direction of the bankmen or hook-on, and a miner wanted to quit the employ before the hour for ascent. *Higham v. Wright*, L. R. 2 C. P. Div. 397, 48 L. J. M. C. 223, 37 L. T. N. S. 187, 10 Mining Rep. 24.

A mandamus was granted compelling justices to hear complaint against part of the owners of a mine who failed to provide a boiler with a proper steam gauge as required by 18 & 19 Vict., chap. 103, § 11, as the act renders any owner, agent, or viewer liable for neglect to observe the rules. *Reg. v. Brown*, 7 El. & Bl. 787, 36 L. J. M. C. 123, 3 Jur. N. S. 745.

The Regulation Miners' Statute 1877, sections 4, 11, and 16, in regard to liability of persons in charge of machinery in connection with the working of a mine, does not apply to the erection of machinery at a mine. *Dunstan v. Stewart*, 6 Vict. Law Rep. 175.

In an action by a miner for injuries received by the fall of a piece of timber placed in the sides of a shaft, and the complaint was under the Regulation of Mines Statute of 1877 (No. 589), the fact that plaintiff had been aware of the fact that such timber was loose for a long time, and did not notify some one in authority is not conclusive evidence of contributory negligence so as to bar a recovery. *Eureka Ext. Co. v. Allen*, 9 Vict. Law Rep. 361.

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*W. M. R. Co.* 64 Mich. 621; *Hussey v. Coger*, 39 Hun, 639; *Reddon v. Union Pac. R. Co.* 5 Utah, 344; *Little Miami R. Co. v. Stevens*, 20 Ohio St. 425; *Krans v. Long Island R. Co.* 128 N. Y. 1.

If the person in question is employed to perform any of the personal duties of the master that a master alone may properly do, then is the person no longer a mere servant, but is at once and *ipso facto*, the agent, the *alter ego* of his employer.

Beach, Contrib. Neg. § 823, p. 419; *Gunter v. Graniteville Mfg. Co.* 18 S. C. 263, 44 Am. Rep. 573; *Shearm. & Redf. Neg.* 4th ed. § 230; *Lindvall v. Woods*, 4 L. R. A. 793, 41 Minn. 212; *Loughlin v. State*, 105 N. Y. 159; *Fiske v. Boston & A. R. Co.* 58 N. Y. 549 13 Am. Rep. 545; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *McCooker v. Long Island R. Co.* 84 N. Y. 77; *William Bros. v. Carter*, 53 Mo. 373; *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586; *Fones v. Phillips*, 39 Ark. 17, 48 Am. Rep. 264; *Lanning v. New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755; *Shearman & Redf. Neg.* §§ 204, 205; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97.

It is the duty of the employer to select and retain servants who are fit and competent for the service, and to furnish safe and sufficient materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by this omission.

*Northern Pac. R. Co. v. Herbert*, *supra*; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661; *Cooper v. Pittsburg, C. & St. L. R. Co.* 24 W. Va. 87; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 20 L. ed. 612, 616; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 475; *Benzing v. Steinway & Sons*, 101 N. Y. 547; *Pittsburgh, C. & St. R. Co. v. Adams*, 105 Ind. 151; *Collier v. Pennsylvania R. Co.* 49 N. J. L. 59; *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Sandborn v. Madera Flums & Trading Co.* 70 Cal. 261; *Kelly v. Erie Teleg. & Teleph. Co.* 84 Minn. 321; *Gunter v. Graniteville Mfg. Co.* 18 S. C. 263, 44 Am. Rep. 573; *Pantear v. Tilly Foster Iron Min. Co.* 99 N. Y. 368; *Krans v. Long Island R. Co.* 128 N. Y. 1; *Krueger v. Louisville, N. A. & O. R. Co.* 111 Ind. 51; *Wood, Mast. & S.* § 334; *Lawler v. Androscoggin R. Co.* 63 Me. 466, 16 Am. Rep. 492.

The claim that the opportunity of Clay to know the condition of the roof of said room was equal to that of the defendant, is nonsense.

Whatever Dalton knew or ought to have known, the company knew or ought to have known.

The company's knowledge was superior to that of Clay; and Clay had a right to rely upon that superior knowledge.

*Faren v. Sellers*, 39 La. Ann. 1011; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Wood, Mast. & S.* 2d ed. § 366, pp. 750, 751; *Patterson v. Pittsburg & C. R. Co.* 76 Pa. 389, 18 Am. Rep. 412; *Wood, Mast. & S.* 2d ed. § 358, p. 736.

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The rule that plaintiff in an action for negligence, must himself be free from negligence, requires only that he should have used such care as a man of ordinary prudence would employ under the circumstances.

He does not forfeit his redress for wrongful negligence of another because he might have escaped injury by higher vigilance on his own part.

*Fero v. Buffalo & S. L. R. Co.* 23 N. Y. 209, 78 Am. Dec. 178; *Richmond & D. R. Co. v. Anderson*, 81 Gratt. 512, 31 Am. Rep. 750; *Pennsylvania Co. v. Sinclair*, 69 Ind. 301, 30 Am. Rep. 185, 190, and notes; *Shearm. & Redf. Neg.* p. 368, note 4, p. 369, note 1, §§ 85, 99, note 1, pp. 163, 164; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 225, 25 L. ed. 612, 617; *McGowan v. La Plata Min. & Smelting Co.* 8 McCrary, 393; *Wood, Mast. & S.* § 319, pp. 634, 635, and notes; *Keruhacker v. Cleveland, U. & C. R. Co.* 80 Ohio St. 172, 62 Am. Dec. 246; *Darling v. Williams*, 35 Ohio St. 58; *Cincinnati H. & D. R. Co. v. Kassen*, 16 L. R. A. 674, 49 Ohio St. 230; *Lake Shore & M. S. R. Co. v. Murphy*, 50 Ohio St. —, 29 Ohio L. J. 168.

Ignorance of a master of the defects in the instrumentalities used by his servants in performing his work is no defense to an action by the employé who had been injured by them, when by the exercise of proper care and inspection the master could have discovered and remedied the defects, or avoided the injury therefrom.

*Benzing v. Steinway & Sons*, 101 N. Y. 547; *Wood, Mast. & S.* §§ 348, 349; *Jones v. Lake Shore & M. S. R. Co.* 49 Mich. 578; *Bunnell v. St. Paul, M. & M. R. Co.* 29 Minn. 306.

It being the duty of the owner of the property to use reasonable care to provide a safe place for the mason to work, the jury might, though finding plaintiff free from negligence, find the owner negligent if the general plan which was adopted for protecting the bank from falling was inadequate.

*O'Driscoll v. Faxon*, 156 Mass. 527; *Holden v. Fitchburg R. Co.* 129 Mass. 263, 37 Am. Rep. 343; *Ryan v. Tarbox*, 135 Mass. 207.

Negligence of a servant does not excuse the master from liability to a coservant for an injury which would not have happened had the master performed his duty.

*Coppins v. New York Cent. & H. R. R. Co.* 123 N. Y. 557; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Rogers v. Leyden*, 127 Ind. 50; *Cone v. Delawares, L. & W. R. Co.* 81 N. Y. 206, 37 Am. Rep. 491; *Fisk v. Central Pac. R. Co.* 73 Cal. 38; *Stringham v. Stewart*, 100 N. Y. 516; *Cooley, Torts*, 2d ed. p. 662; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549.

Where the negligence of the master, combined with the negligence of his servant, produces injury to a fellow servant, the injured servant may recover, if he is, himself, free from fault.

*Boyce v. Fitzpatrick*, *Rogers v. Leyden*, *Pittsburgh, C. & St. L. R. Co. v. Henderson*, *Fisk v. Central Pac. R. Co.*, *Coppins v. New York Cent. & H. R. R. Co.* and *Stringham v. Stewart*, *supra*; *Hancock v. Keene*, 5 Ind. App. 408; *Beach, Contrib. Neg.* § 304; *Cooley, Torts*, 2d ed. 662; *Smith v. The Wm. Powell Co.* 23 Ohio L. J. 436; *Lake Shore & M. S. R. Co. v.*

*Murphy*, 50 Ohio St. — 29 Ohio L. J. 168; *Monmouth Min. & Mfg. Co. v. Erling*, 148 Ill. 521; *Grand Trunk R. Co. of Canada v. Cummings*, 106 U. S. 700, 27 L. ed. 266.

The servant has a right to assume that all reasonable attention will be given by his employer to his safety, so that he will not be carelessly, and needlessly exposed to risks which might be avoided by ordinary care and prudence.

*Shearm. & Redf. Neg.* § 189, p. 323, note 2; *Boyce v. Fitzpatrick*, 80 Ind. 526.

The servant's mere continuance in the service, after knowledge of a defect, such as incompetency of a fellow servant, is not, as a matter of law, contributory negligence.

*Shearm. & Redf. Neg.* § 209, p. 361, note 5.

Servants do not assume any risks which are not known or discoverable, nor any which do not exist at the time when he enters into his master's service, and to which his attention is not called before he suffers therefrom.

*Shearm. & Redf. Neg.* §§ 178, 185, p. 302, notes; 4th ed. p. 143, and note 1; *Nashville & C. R. Co. v. Elliott*, 1 Coldw. 611, 78 Am. Dec. 506; *Wood, Mast. & S.* §§ 827, 852; *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662; *Whitaker v. West Boylston*, 97 Mass. 273.

*Messrs. Weldy & Buerhaus* also for defendant in error.

**Spear, J.**, delivered the opinion of the court:

The first proposition argued is that the common pleas erred in overruling the demurrer to the petition. A majority of the court is of opinion that, under our liberal rules of construction, the pleading, in the absence of a motion to make more definite, is sufficient.

The next proposition is that the common pleas erred in giving, in its charge to the jury, one of a series of seven requests asked by plaintiff. To this the exception entered was in this form: "to which ruling of the court in giving the special charges, as asked by the plaintiff, the defendant at the time excepted." We are of opinion that this exception is too general to bring the objection before a reviewing court. The exception should have been directed to the particular proposition to which objection was made.

Another proposition argued is that the trial court erred in refusing to give to the jury instruction No. 10, asked by the defendant, which instruction is as follows:

"10. The defendant asks the court to say to the jury that if they find from the evidence that Clay was in control of the room where he got killed, that then under the Criminal Statute, section 6871, Revised Statutes of Ohio, it was his duty to properly post the room, and no custom existing at the time at the mine could relieve him of that duty."

Upon this point, in its general charge, the court said to the jury that if they found that Clay "violated a criminal statute, for which violation he could have been prosecuted had he lived, such violation will not preclude a recovery in this action."

It is further contended that the undisputed evidence given at the trial shows that there was no case made by the plaintiff justifying

a verdict, and that the trial court, therefore, erred in not sustaining the defendant's motion for a new trial. In order to judge of the bearing of the request which was refused, and the charge given respecting the section of the statute referred to, and the claim above stated, it will be necessary to look somewhat at the facts as shown by the record. It is proper here to correct a misapprehension on the part of counsel for defendant in error. They contend in their brief that the general charge of the court cannot be considered because it was not made part of the bill of exceptions. Doubtless the manner in which the record is printed misled the counsel. The original bill of exceptions shows that the charge is properly attached to and made part of the bill, and we are not, therefore, embarrassed by a defective record.

Geo. D. Clay, the deceased, a man of about twenty-two years of age, was employed at the time of his death in working a machine used in mining coal in the mine of the defendant company. With him at the time, as a helper, was one Harry Devault, who met his death at the same time and by the same accident. Clay had been engaged in mining about three years in all, most of the time as a helper, having had charge of the machine about two months. He was a man in good health, and of average intelligence. The mine embraced a number of rooms in which cutting with the machine was done. The operation of the machine is to punch or jab the coal and so make a bearing in and under the coal for the driller who follows and drills holes in the face of the coal near the top for the reception of the blasting material. The driller is succeeded by the filler, who shoots down the coal, loads it into cars, etc. Three sets of men are thus engaged in the room, but at different times, and at distinct employments. Necessarily, therefore, the one having charge of these several operations has, for the time being, control of the room.

The man Dalton was a filler, and had enjoined upon him, in addition, by direction of the mine boss, one Dilch, the work of posting in the two rooms where he worked as filler, one being the room in which Clay met his death. He had worked in the mine some eighteen months, having been employed originally as a helper, which position did not require him to attend to the work of posting, and later had been advanced to the place of a filler, and had been engaged in posting only about two months at the time of the accident. In the course of his work he was required to shoot down the coal, fill it into cars, prop the roof where necessary, and get the room ready for the machine to come in again. In the two rooms thus posted by Dalton, Clay had followed in after him during the two months and cut the coal. The operation of cutting occupies about two and a half hours in each room. Ten rooms are usually assigned to one machine, and are cut one after another until the entire number are cut, when the first room is again reached. It does not appear that either Clay or Devault at any time made complaint of the way in which Dalton was performing his duty, either to Dalton himself, or to the bank boss.

Dalton was called by the plaintiff below, and it was shown by his testimony, not contradicted, that on the day Clay and Devault were killed, Dalton was present when they started in to cut the room. He said to Clay that he had better examine the room to see whether there was anything loose or not; to see whether there was any danger there or not. Thereupon Clay took a pick and sounded the roof; and said it was all right. It appears by this and other witnesses that sounding the roof with a pick was the usual way of determining whether it was secure or not, and, by witnesses called by plaintiff, that the sounding of the roof was not a hard thing to learn, but an easy thing, and that a common man could do it; if a man had just gone in green he wouldn't know, but if he had gone in knowing the place to be dangerous and tried to learn, it is easy. No evidence was offered tending to show that any propping done by Dalton previously to the work in the room in which the decedents were engaged at the time of the accident, had been defectively or insufficiently done. Nor was any evidence given by plaintiff tending to show that the company did not furnish proper timber for supporting the roof at the place Clay was working, but evidence given by defendant, undisputed, shows that proper timber was so furnished.

Clay and Devault were killed by the falling upon them of a piece of slate some nine feet square and about a foot in thickness.

At the time of the accident, and for a long time before, a custom existed at this mine whereby the work of posting and propping was given to the workmen called fillers. By force of this custom Dalton was required to post and prop, as before stated.

In their respective duties Dalton did not have the control of Clay, nor did Clay have control over Dalton. Each was under one common superior called the mine boss.

It was in evidence by the defendant, not contradicted, that the mine boss gave instructions to both Clay and Devault to the effect that they were to cut nothing they thought dangerous; to take nobody's word for it, but to examine the place for themselves before they went to work, and if found unsafe leave it until it was fixed.

The section of the revised statutes referred to provides, among other things, that "whoever knowingly does any act whereby the life or health of the persons, or the security of any mine and machinery are endangered, or any miner or other person employed in any mine governed by the statute, who intentionally and willfully neglects to securely prop the roof of any working place under his control, shall be guilty of an offense," etc. The same section makes it the duty of the mine owner to keep at the working place of the miner a supply of timber suitable for posting. No doubt exists that the statute applies to this mine. The provision quoted was enacted in substance April 29, 1872 (69 Ohio Laws, 193), the words being as follows: "... or if any miner or person employed in any mine governed by the provisions of this act shall neglect or refuse to securely prop or support the roof and entries under

his control," etc. The provision has been continued in all the amendments to the act to the present. The act was entitled "An act regulating coal mines, and the working thereof," and has for its principal object, apparent on the face of all its provisions, the protection of the health and lives of those who work in coal mines.

So extensive is this industry in the state that legislation affecting those engaged in it as a daily vocation may be regarded as of public interest, and where a statute, as does the one cited, undertakes to outline and prescribe a particular duty owing by persons so engaged not only to themselves but to others, it may be properly regarded as indicating a public policy on the subject, and where the same provision has remained in force for so long a time, about twenty years at the time of this occurrence, the policy may be treated as a settled one. This provision clearly points out a duty devolving upon all who come within its terms, a grave duty, one so nearly related to the protection of life and limb that it ought not to be lightly esteemed nor easily avoided.

In the case of *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471, where the company sought to avoid liability for an injury caused to one of its employes by reason of the negligence of another employe placed in authority over him because of a contract between the company and the injured party, made as part of the contract of employment, that such liability should not attach, this court held that the plea could not avail inasmuch as the liability of the master was founded upon consideration of public policy. And in the opinion of Owen, *Ch. J.*, it is said: "The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employes, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employes simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements."

If the principle of this case has application to the one at bar, and no reason is perceived why it does not, it would seem to follow that the custom set up in the petition ought not to be held to have absolved the deceased from the obligation enjoined by the statute. The object of the statute is to encourage carefulness; regard not only for the life of the miner, but for the lives of all who may be subjected to like risks. It imposes an obligation to perform a duty to others. Anything, therefore, which tends to operate in opposition to that obligation would violate the policy of this statute, and hence, whatever right the custom at this mine imposing upon Dalton the work of propping and posting the roof of the room, may have given Clay to call upon Dalton to do the manual work of posting, and delay his own work until that had been properly done, such custom ought

not to have the effect to exonerate Clay from the duty enjoined by the statute, nor shift the risk undertaken by himself over upon the company. We think the trial court erred in refusing to give the instruction requested and in the charge as given upon the subject.

It is insisted by the defendant in error that the duty of the defendant company in respect to furnishing a safe working place, was such that it was liable for the negligence of Dalton, irrespective of the question of his incompetency, and of the company's knowledge thereof, and the case was given to the jury by the learned judge of the common pleas upon this theory. Necessarily this view of the law proceeds upon the assumption that Clay and Dalton were not fellow servants, but that, as respects the posting and propping, Dalton was the *alter ego*, of the company, and hence the superior of Clay. The claim is sought to be sustained by a class of cases which hold that the duty of the master to provide a safe working place and machinery for his employes cannot be delegated so as to absolve the master from liability in case of failure of the vice-principal to perform that duty. It does not seem necessary to review these cases. They are, as a rule, based upon the proposition that where the appliance, or place, is one which has been furnished for the work in which the servants are to be engaged, there the duty above stated attaches to the master. We need not discuss this proposition for we have not that case. Here the place was not furnished as in any sense a permanent place of work but was a place in which surrounding conditions were constantly changing, and instead of being a place furnished by the master for the employes within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform. The distinction is shown in a number of cases, among which may be cited *Fraser v. Red River Lumber Co.* 45 Minn. 235; *McGinty v. Athol Reservoir Co.* 155 Mass. 188, and *St. Louis Consol. Coal Co. v. Scheller*, 42 Ill. App. 619. See also *Hall v. Johnson*, 8 Hurlst. & C. 589; *Waddell v. Simonsen*, 112 Pa. 567.

It cannot be necessary to restate the rule of law as to what determines the relation of fellow servant as it is recognized in this state. The principle laid down in *Cleveland, C. & C. R. Co. v. Keary*, 8 Ohio St. 201; in *Whaalan v. Mad River & L. E. R. Co.* 8 Ohio St. 249; in *Columbus & X. R. Co. v.*

*Webb*, 12 Ohio St. 475, and reiterated in divers cases since, is too well established to need repetition, and we think that the facts in this case clearly bring the two men Dalton and Clay into that relation. Applying that rule to this case it was necessary, in order to a recovery, that the plaintiff should show, upon this branch of the case, not only that Dalton was guilty of negligence which was the direct cause of the death of Clay, but that he was incompetent and that this incompetency was known, or could with reasonable diligence have been known, to the company prior to the accident; and beyond this, if plaintiffs proof raised the presumption that such incompetency was known to Clay, or with reasonable diligence might have been known to him, then to overcome that presumption. If so known, the duty, therefore, to notify the bank boss of the fact, and refuse to continue in the dangerous employment until the risk was removed, followed. As to the effect of a neglect of this duty, see *Chicago & O. Coal & Car Co. v. Norman*, 49 Ohio St. 598. Instead of this being done, it seems to us entirely clear, by the case made by the plaintiff, that whatever incompetency had been shown in the work of Dalton was known to Clay; at least he had the fullest opportunity of noticing Dalton's manner of posting from day to day as he followed after him from room to room to cut the coal, and, so far as the record shows, no effort to give notice of incompetency was made. And while it is true that it was the duty of Dalton, as between him and his employer, to post the roof of the room to prevent it from falling, yet the plaintiff's evidence shows that Dalton, Clay, and Devault were engaged in one common object in which it was not less the duty of Clay and Devault than of Dalton, because of the nature of the employment, their common interest and their common peril, to watch every appearance of danger, and, if we may consider the uncontradicted evidence of defendant, because of the instructions of their employer the further duty to give warning promptly, and forbear exposure of their persons while the dangerous conditions existed.

It appears to us, upon a consideration of the whole record, that the verdict and judgment were the result of the erroneous view of the law taken by the trial court, inasmuch as there was no evidence given at the trial which, in law, will sustain the verdict.

*The judgment will, therefore, be reversed.*

## CONNECTICUT SUPREME COURT OF ERRORS.

CRAFT REFRIGERATING MACHINE  
CO., *Appts.*,

vs.  
QUINNIPIAC BREWING CO.

(.....Conn.....)

1. A cause of action for breach of con-

tract to pay for a machine and one for tort for forcibly preventing the seller from regaining possession of the machine may properly be joined in one complaint which seeks to merely recover the purchase price of the machine.

2. A single count is sufficient in an

NOTE.—Without at this time attempting to annotate the question of joinder of causes of action for tort and breach of contract under modern code 33 L. R. A.

systems of procedure, we report the above case as presenting a valuable discussion of the subject, as well as an important adjudication.

1 action in which the relief sought is merely the recovery of the purchase price of a machine, although two causes of action are relied upon to sustain the recovery, one for breach of contract in failing to pay the purchase price and the other in tort for forcibly preventing the seller from regaining possession of the machine.

3. There can be no reversal of an order dismissing the suit because of plaintiff's refusal to comply with the direction of the court to elect upon which cause of action stated in his complaint he will proceed, although the direction is erroneous, since until reversed the direction is binding and as capable of enforcement as any other order, which may be by dismissal of the suit for disobedience.

(*Carpenter and Torrance, JJ., dissent from proposition 3.*)

(December 12, 1893.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for New Haven County dismissing a suit brought to recover the purchase price of certain refrigerating machines. *Affirmed.*

The complaint stated that the plaintiff sold and delivered to the defendant two machines at a certain agreed price. That the defendant claimed that the machines did not comply with the contract. That plaintiff agreed to take them back and sent for them, but the defendant forcibly prevented him from taking them and continued to use them as its own, thereby converting them. The court required the plaintiff to elect on which cause of action it would proceed, on the ground that the two causes of action, one on contract and the other in tort, could not be stated in a single count. The plaintiff refused to make the election and the suit was dismissed.

Further facts appear in the opinion.

*Messrs. Henry Stoddard and John W. Bristol* for appellant.

*Messrs. William C. Case, William H. Ely, and Edmund Zacher* for appellee.

**Baldwin, J.,** delivered the opinion of the court:

Complaints, under the practice act, are to "contain a statement of the facts constituting the cause of action." Gen. Stat. § 872. This is to be "a plain and concise statement of the material facts on which the pleader relies." Id. § 880. "Acts and contracts may be stated according to their legal effect" (Practice Book, p. 14, rule 3, § 1), and "the plaintiff may claim alternative relief, based upon an alternative construction of his cause of action." Id. p. 13, rule 2, § 9. Several causes of action may be united in the same complaint if all are "upon claims, whether in contract or tort or both, arising out of the same transaction or transactions connected with the same subject of action; but they must be separately stated," and "if it appear to the court that they cannot all be conveniently heard together, the court may order separate trials of any such causes of action, or may direct that any one or more of them be expunged from the complaint." Gen. Stat. § 878. "Transactions connected with the same subject of action may include any

transactions which grow out of the subject-matter in regard to which the controversy has arisen; as, for instance, the failure of a bailee to use the goods bailed for the purpose agreed, and also an injury to them by his fault or neglect." Practice Book, p. 15, rule 3, § 7. Where separate and distinct causes of action (as distinguished from separate and distinct claims for relief, founded on the same cause of action or transaction) are joined, "the complaint is to be divided into separate counts." Id. p. 13, rule 2, § 4. Any exception for misjoinder of causes of action, whether in the same or separate counts, must be taken by demurrer, and, if not so taken, will be deemed to be waived. Id. p. 17, rule 4, § 13. These various statutory provisions and rules of court are all designed to enable the plaintiff to state his grievance to the court, untrammelled by artificial forms of pleading, and regardless of most of the ancient distinctions of procedure as to law and equity, or contract and tort. There is no attempt to bring the parties to issue upon some "single, certain, and material point." Each paragraph of the complaint is to contain "as nearly as may be a separate allegation" (Gen. Stat. § 880), and it is declared that "the denial of any material allegation shall constitute an issue of fact," Practice Book, p. 17, rule 4, § 12. If, in any case, so many of these issues are formed that the court fears the jury cannot properly dispose of all at one hearing, it "may order that one or more of the issues joined be tried before the others." Gen. Stat. § 1032. And, if the issues made up by the parties are indefinite or indecisive, the court may direct them "to prepare other issues, and such issues shall, if the parties differ, be settled by the court." Id. § 880.

The plaintiff's complaint sets forth two causes of action, stating them in separate paragraphs, but not in separate counts. One cause of action is for breach of a contract to take, and pay for, two refrigerating machines, at an agreed price. The other cause of action is for a conversion of the machines. It was proper to join these different causes of action in one complaint, either if both arose out of the same transaction, or if, while one arose out of one transaction, and the other out of another, both these transactions were "connected with the same subject of action." This notion of completed action strongly characterizes the word in the Latin language, from which, through the Normans, we have derived it, although we gain little assistance otherwise from these sources in determining its meaning, since both the Romans and the French have used it mainly as a juridical term to signify an agreement of parties in settlement of differences. Dig. II. 15, "De Transactionibus;" Civil Code of France, art. 2044. As the word is employed in American codes of pleading and in our own practice act, a "transaction" is something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. The transac-

tion between the parties to the present action began when they made the contract for the manufacture and sale of the two machines. Then followed the delivery of the machines, the refusal to accept them, the attempt of the plaintiff to retake them, the forcible prevention of their removal, and the subsequent continuance of their use in the defendant's business. Without taking each and all of these events into consideration, the legal relations of the parties could not be fully determined. From the delivery of the machines to the commencement of the action, they had remained continuously in the defendant's possession. It had simply dealt with them in a different way at different times. The practice act is to be "favorably and liberally construed as a remedial statute." Practice Book, p. 21, rule 9, § 4. It has taken the word "transaction," not out of any legal vocabulary of technical terms, but from the common speech of men. So far as we are aware, it has never been the subject of any exact judicial definition. It is therefore to be construed as men commonly understand it, when applied, as in our practice act it certainly is applied (Gen. Stat. § 878), to any dealings between the parties resulting in wrongs, without regard to whether the wrong be done by violence, neglect, or breach of contract. It seems to us hardly to be doubted that any ordinary man would consider everything stated in the complaint as properly belonging to a narrative of the whole transaction between the parties, and necessary for the information of one who was to form a judgment as to their respective rights. That a broader meaning should be given to the term "transaction" than it has received in some of the courts of our sister states is plain from the provision in the Practice Book (page 13, rule 2, § 7) that "where several torts are committed simultaneously against the plaintiff (as a battery accompanied by slanderous words) they may be joined as causes of action arising out of the same transaction, notwithstanding they may belong to different classes of actions." This was the deliberate adoption of a view of the meaning of the word in question which had been previously disapproved in New York, as well as by Judge Bliss in his treatise on Code Pleading (sec. 125), though accepted in Kansas. *Anderson v. Hill*, 53 Barb. 238, 245; *Harris v. Avery*, 5 Kan. 146. It follows that both the causes of action declared on were properly united in one complaint. The same result would also be reached if what we have viewed as one transaction could be regarded as consisting of several transactions, since such would all be connected with the same subject of action; that is, the two machines, and the title to them.

The plaintiff had a right to declare in separate counts. *Bassett v. Shares*, 63 Conn. 39, 41; Practice Book, p. 37, form 80. We think, however, that it had an equal right to use but one. While two causes of action were set up as the basis of its right to damages, there was really but one on which a recovery was claimed. The plaintiff was not seeking to be paid twice for its machines. If they conformed to the contract, or if, though not conformable to it, the defendant, after full

opportunity for examination, had finally accepted them under the contract, it was liable for the contract price. If the defendant, on the other hand, had rightfully refused to accept them under the contract, and the plaintiff had acquiesced in such refusal, but had been forcibly prevented from taking them back, and the defendant had afterwards used them as its own, it would be liable for their value as on a conversion. The measure of the damages would differ according to the true construction of the plaintiff's cause of action. It had a right to present claims for "alternative relief, based upon an alternative construction" of this cause of the action. Separate counts are required for separate and distinct causes of action, but not for the presentation of separate and distinct claims for relief founded on the same cause of action or transaction. Practice Book, p. 12, rule 2, § 4. This rule does not require separate counts in all cases where the plaintiff declares on several causes of action, but only where these are separate and distinct from each other. In one sense, every cause of action must be separate and distinct from any other, but evidently this cannot be the sense in which these terms of description are employed in the rules under the practice act, for it would make them mere surplusage, in this connection. Separate and distinct causes of action, within the meaning of this rule, must be such as are both separable from each other, and separable by some distinct line of demarcation. In form 91 of the Practice Book (page 65), there is alleged in a single count the breach of a contract to print a book from stereotype plates furnished by the plaintiff, and also a conversion of the plates. This form is referred to in the index to the Practice Book (page 278)—an index carefully prepared by the commission which framed the practice act, and afterwards, by request of the judges, the rules to carry it into effect—as a complaint for a conversion "as part of an entire transaction." Had the wrong done by the breach of contract which occurred at an earlier stage of the transaction thus declared on been regarded as "separate and distinct" from the wrong done by the conversion which ended the transaction, two counts would have been necessary.

To separate and distinguish the two causes of action set up in the complaint before us would be no easy task. In substance, they amounted rather to separate and distinct claims for relief founded on the same transaction. In form 15 of the Practice Book (page 30) is found a complaint in a single count against two defendants, setting up a contract made by one as the agent of the other, and the denial by the latter of the existence of any agency. Relief in damages is sought against one or the other in the alternative. Here, obviously, are different causes of action. Not only are they several because each is against a different defendant, but one sounds in contract, and the other in tort, since the only remedy in this jurisdiction against one who contracts as an agent without authority from the supposed principal is by an action for the wrong done by his false assumption of authority. *Johnson v. Smith*, 21 Conn.



627, 634. Yet the Practice Book here, again, as in form 91, does to treat them as "separate and distinct," within the meaning of rule 2. Our laws formerly cast on the plaintiff the duty of construing his rights with respect to the form in which they ought to be brought before the court, and the relief to which he might be entitled, at the risk of losing everything if he mistook his remedy. The practice act enables him, in a case like the present, to throw this duty of construction upon the court. It is enough for him to tell his story as plainly and concisely as may be, and to state the different kinds of relief, one of which he thinks he may fairly claim. The court will then apply the law to the facts alleged and proved, and award such relief as the case may call for. The plaintiff in the case at the bar, upon the facts stated in its complaint, might well doubt whether it was entitled to the contract price or the market value of the machines; that is, whether its recovery should be made to rest on a breach of contract or a conversion,—on the defendant's refusal to pay for its own property, or its wrongful appropriation of the plaintiff's property. To determine this question, it was necessary to consider the whole of the transaction alleged. Without this, it could not be certain that justice between the parties would be done. The connection between the defendant's notice that the machines were not accepted, and its forcible resistance to their removal, was so close that the plaintiff's story would have been but half told, had mention of either been omitted. The substantial question in dispute was whether the defendant had so ordered and dealt with the machines that it was bound to pay for them. Whether the liability rested on a contract or a tort was matter of form, except as it might affect the assessment of damages; and if the plaintiff was entitled to judgment the interest of both parties would be promoted by having the amount of recovery ascertained by the proper rule at the same hearing in which the right of recovery was established. The defendant refers to *Turner v. Davis*, 48 Conn. 397, 400, as affirming it to be a rule of pleading that a plaintiff can never "occupy at one and the same time, with reference to the same subject-matter, and for the accomplishment of the same object, two positions utterly inconsistent with each other." The question in that case was whether the mortgagee of a reversion, who, after accepting an attornment from the tenant, and giving him a lease, had sought and obtained a foreclosure and judgment of ejectment against the mortgagor, on a complaint alleging that he was in possession, could then change his position, and maintain summary process against the tenant on the lease he had himself executed. This depended on the effect of a judgment by way of estoppel. The remarks quoted from the opinion of the court were pertinent to the case before it, where the plaintiff's rights had been fixed by a previous election. They have no application to the interpretation of the practice act in relation to the joinder of causes of action, between which no election has been previously made. It is the rule in some states that inconsistent claims cannot be set

up in the same complaint, nor inconsistent defenses in the same answer; but a different policy has been adopted here. Practice Book, p. 11, rule 1, § 8; *Id.* p. 13, rule 2, § 9; *Id.* forms 15, 16, 389. The plaintiff's complaint, therefore, was in proper form; and, in our opinion, it set up no claims that could not be properly and conveniently heard together. It follows that the trial court erred in requiring the plaintiff, during the progress of the trial, to elect between proceeding under its claim for breach of contract, or under its claim for a tort.

The order, however, while erroneous, was not void. The court had power to direct that one or the other of these claims should be expunged from the complaint, and to make the selection for this purpose itself. Gen. Stat. § 878. By the action taken, the power and duty of selection, instead of being exercised by the court, were cast upon the plaintiff. The court had jurisdiction over the parties and the cause. It was its duty to see that the issues were so framed and tried as not to embarrass the jury by any confusion of questions which could only be satisfactorily disposed of when separately presented. The right to require an election, within proper limits, and at the proper time, between different causes of action combined in a single proceeding, is one generally incident to courts of justice. *State v. Tuller*, 84 Conn. 280, 299. The error of the trial court was therefore committed in the exercise of its legitimate jurisdiction, and it was incumbent upon the plaintiff to obey the order, or abide the consequences. Full warning was given by the court that a refusal to elect would be deemed sufficient ground for a dismissal of the suit. Gen. Stat., § 999, directs that "if the plaintiff shall refuse to obey the order of the court in pleading he shall be nonsuited," and the general rules of practice (58 Conn. 577), expressly provide that "if a party fails to comply with an order or rule he will be nonsuited or defaulted." It is not for him to refuse obedience to such an order because he deems it erroneous, or because it is erroneous. Until revoked or reversed, it is the law of the case. He can take his exception, but such exception will not suspend the course of justice. The order will still remain in force, and must be obeyed, or the suit dismissed, if the authority of the court, and the dignity of the state which it represents, are to be maintained.

It is urged by the plaintiff that had it made the election required, and then failed to recover a verdict, it could never have sued again on the cause of action which had not been submitted to the jury. But the order of the court was made simply to facilitate the disposition of the case on trial. Its effect was limited by its object. An election forced upon a plaintiff under such circumstances would be simply an election for the purpose of the trial; and his selection of one out of two causes of action arising out of the same transaction would no more have extinguished that not chosen than if it had arisen out of a totally different transaction. As to one cause of action, only, would the plaintiff have had his day in court. The other would stand as

if wholly unheard. And, as to both, if the order were erroneous, and a proper exception taken before making the election, a new trial could be had on the original complaint.

The only exception taken by the plaintiff at the trial of this action in the court below was to the order dismissing the complaint; but, as another suit may be hereafter brought, we have thought it better to express our views fully as to the question of pleading and practice which had previously arisen, and which would be not unlikely to recur in any subsequent proceedings between the parties.

*There is no error in the judgment appealed from.*

**Andrews, Ch. J., and Fenn, J.,** concurred.

**Carpenter, J.,** dissenting:

We all agree that the court erred in requiring the plaintiff to elect whether to claim a judgment on a contract or in tort. The result is that, for disobeying an erroneous order, the plaintiff has been nonsuited. In correcting that error, ought not the plaintiff to be restored to its former position in court? The answer is that the order, although erroneous, was the law of the case, until reversed, and should have been obeyed. But is that strictly true? If the order was not within the jurisdiction of the court, how could it be the law of the case? And was the plaintiff bound to obey it? I suppose the plaintiff had a right to state the facts constituting his cause of action, and call upon the court to render the appropriate judgment. What power, then, had the court to order the plaintiff to decide in advance what the appropriate judgment was, and elect to claim that judgment only? Suppose the plaintiff has two separate causes of action stated in different counts. Has the court the power to compel him to strike out one of the counts, and to claim a judgment only on the other? The case before us, and the one supposed, seem to me to depend upon the same principle. If my Brother Torrance is right,—and I am inclined to think he is,—that there is no statute or rule of court authorizing a nonsuit in such a case, then, unless it is within the general powers of the court, the punishment was unauthorized, and the judgment of nonsuit should have been reversed on that ground.

**Torrance, J.,** dissenting:

In this case the majority of the court hold that the trial court erred in requiring the plaintiff to elect between two causes of action stated in his complaint. In that conclusion, I fully concur. They further hold that the complaint was rightfully dismissed. In that conclusion, I do not concur. This last conclusion seems to be based upon two propositions: First, that the order to elect, though erroneous, was "the law of the case" until revoked or reversed, and therefore should have been obeyed; second, that the trial court had the power to dismiss the complaint for non-compliance with the order. I grant the first proposition, but I deny the second. That the

trial court had ample power, in some way, to enforce this order, I concede. Whether it had the power to dismiss the complaint for refusal to obey is the only point in dispute. It unquestionably had power to hear and finally determine the cause. Did it also have the power to refuse to hear and determine for noncompliance with its ruling? In other words, did it have power to render the particular judgment of which the plaintiff complains? Unless it had, then its judgment of dismissal was certainly erroneous, and perhaps void, notwithstanding the fact that it had jurisdiction over the parties, the subject-matter, and the cause. *Windsor v. McVeigh*, 98 U. S. 274, 28 L. ed. 914. The power to compel a party to submit to a nonsuit or a default, and to dismiss a complaint, for mere noncompliance with some rule of practice or procedure, or some order made incidentally in a particular case, is certainly a very important one. In this state, where such power exists, it has, so far as I am aware, invariably been conferred specifically by some statute or general rule of practice made in pursuance of law; and, when thus conferred, the law or rule conferring the power has uniformly prescribed the particular circumstances under which it might be exercised. This power has been conferred as occasion seemed to demand from a very early period. Thus, in the Revised Statutes (1808), such power appears to have been conferred as follows: In 1667, to nonsuit for want of appearance (page 84); in 1709, to render judgment against a defendant for failing "to make his plea or join issue" (page 551); in 1713, to default for nonappearance of defendant (page 38); in 1754, to nonsuit for failure to give bond to prosecute (page 39); and in 1784, to nonsuit in an action for usury for refusing to be examined on oath when required (page 679). In 1852, power to nonsuit was specially given for failure to make out a prima facie case (Pub. Acts 1852, chap. 4); in 1871, to nonsuit in a flowage case on failure to pay costs and expenses when ordered (Gen. Stat. 1888, § 1225); in 1878, to nonsuit on failure to give a "new bond" in replevin (sec. 1829); in 1883, to nonsuit on failure to give a "new indorser," in an action on a probate bond (sec. 899); and in 1889, to nonsuit or default on failure to disclose (Pub. Acts 1889, chap. 22). This power has also, in a very few instances, been conferred by the general rules of practice made by the judges pursuant to law, as may be seen by reference to such rules hitherto or now in force. There are doubtless other instances where the power in question has been thus specially conferred; but the above are, I think, sufficient to show that in this state the superior court has not been deemed to possess such power unless it was thus specially conferred. Indeed, the power to confer it, even in this way has been questioned or doubted by the bench and the profession in some instances. See *Hoyt v. Brooks*, 10 Conn. 190, and *Naugatuck R. Co. v. Waterbury Button Co.* 24 Conn. 468. The right and the power, however, to confer it in this way, are no longer open to question. I know of no instance where the power in question has been exercised in this state, un-

less it has been thus specially conferred by statute or rule of practice; and I feel warranted, therefore, in assuming that, unless it is so conferred, it does not exist.

In the present case the power of the court to dismiss the complaint is claimed under rule 5 of the general rules of practice adopted in 1890, and found in 58 Conn. 577, and under section 999 of the Revision of 1898. Unless thus conferred, the power, I think, does not exist. Let us examine these two sources. The rule reads as follows: "If a party fails to comply with an order or rule, he will be nonsuited or defaulted, and upon motion to set aside such nonsuit or default the court may grant the motion upon compliance with such terms as the court may impose." Under this rule the question is whether the ruling or order to elect in the present case was "an order or rule," within the meaning of rule 5. The words "order or rule," standing alone, as in rule 5, are ambiguous. They may mean a general rule or order of practice or procedure, or some particular order or ruling made between parties in a given cause. To ascertain which of these meanings is the one intended, we must apply the ordinary rules of interpretation. These words are practically synonyms, and are freely used as such in the dictionaries and in common speech. They are so used in law also. 1 Black. Judgm. pp. 5, 6. I think they are used synonymously in rule 5, and must mean either a general rule made by the judges pursuant to law, or a special incidental order or ruling made by the court in the trial of a cause. If the latter, then every "ruling" made in a cause is a "rule or order," within the meaning of rule 5, for the dictionaries define a "ruling," as a "decision or rule" of a judge or court. If this be the correct interpretation of rule 5, then a party may be nonsuited for noncompliance with or disobedience of any such ruling, and thus may be put out of court, against his will, for a great many causes besides those specifically provided for by statute or general rule. This certainly works a very great and radical change in our practice in this respect, for prior to 1890, as we have seen, this power was always conferred specifically in given cases, under clearly defined circumstances, that usually left no room for doubt or dispute; and, whether given by statute or by general rule, it was given quite sparingly, and only in cases where it was deemed advisable to confer it. But, under the claim now made, it is given generally, and without apparent limitation, and, of course, may be used in cases where there may be great doubt as to whether the ruling is or is not erroneous. I cannot believe that in adopting rule 5 the judges intended to depart so widely and so radically from the former practice. It may well be doubted whether they had the power to provide by general rule sanctions of this kind for every special ruling or order made in a cause. They are expressly empowered to make general rules, and this, by necessary implication, gives the power to provide sanctions for these rules; but the power to provide sanctions for every special ruling is a very different matter, and is not given, I

think, either expressly or by implication. But if we assume that they had the power, I think they have not exercised it. Had they intended to depart so widely from the former practice as is now claimed, they would have expressed themselves to that effect more clearly than they have in rule 5. There existed in 1890 no good reason why they should confer the power to nonsuit or default in this general way, for the superior court, as a court of general jurisdiction, already possessed ample power to enforce its special orders and rulings by methods quite as efficient as those pointed out in rule 5. Besides this, it already possessed the power to nonsuit or default in all special cases where the legislature or the judges had deemed it advisable to confer it. Under these circumstances, I do not think the judges intended to confer it in all cases without limitation, and thus render superfluous the statutes by which it was specially conferred, especially when there existed no good reasons for so doing. For these reasons, I think the rule invoked does not confer the power in question.

The power to dismiss is also based upon section 999 of the General Statutes. The difficulty here is that, even under the most liberal construction of the statute, the order in question does not fairly fall within it. The object of the statute is to compel the parties to "make their pleas and join issue." If the plaintiff fails to do this according to the order of the court, he shall be nonsuited. If the defendant so fails, judgment may be rendered against him as upon *nilhil dicit*. The end of the statute is attained when the parties have "made their pleas and joined issue." The court cannot use the power thus conferred for any other purpose. In the case at bar the pleadings were closed; the defendant, under section 18 of rule 4 of the Practice Book, had waived any exception for misjoinder; and the trial was in progress. Under these circumstances, the plaintiff, having offered evidence of a breach of contract, then offered evidence to prove a tort. Thereupon, the defendant claimed that the plaintiff could not proceed for both causes of action, and that it had already elected to proceed for breach of contract. The court held that the plaintiff had not made its election, but ordered it to do so. This was not an "order of the court in pleading," within the statute. If, in a criminal case, like that of *State v. Bates*, 10 Conn. 372, the court orders the prosecutor to confine himself to the act concerning which evidence has first been given, or if the prosecutor, charging two distinct and separate felonies in one information, is ordered to elect, these can hardly, with propriety, be called orders of the court relating to the pleadings in such cases. Or if, under section 1032 of the General Statutes, the court orders one or more of the issues joined to be tried before the other, such order can hardly be called an "order of the court in pleading," within section 999. The truth is, the court made no "order in pleading." The pleadings were not to be changed at all, but were to remain precisely as the parties had made them. The power to dismiss a cause in this way ought not to be exercised except in

cases where it is clearly conferred; and, even in such cases, it ought to be exercised sparingly, for such a power is "not the daily

bread, but the strong medicine," of the law. For these reasons, I think the judgment of the court below was either erroneous or void.

## OREGON SUPREME COURT.

STATE of Oregon, *ex rel.* A. C. TAYLOR,  
*Rept.,*  
*v.*  
Sylvester PENNOYER *et al.*, Commission-  
ers of Public Buildings, *Appts.*

(.....Or.....)

**An injunction against using state moneys to build a state institution, such as a branch insane asylum, elsewhere than at the seat of government, cannot be granted merely on the ground that the constitution requires its location at the capital, where it does not appear that the cost to the state will be any greater at one place than the other.**

(October 16, 1894.)

**A** PPEAL by defendants from a decree of the Circuit Court for Marion County overruling a demurrer to a complaint filed to restrain proceedings for the location of a branch insane asylum. *Reversed.*

The facts sufficiently appear in the opinion.

*Mr. J. C. Moreland*, for appellants:

The mere allegation of irreparable injury is not sufficient; the facts must be stated.

*Burnett v. Whitesides*, 18 Cal. 156; *Branch Turnp. Co. v. Yuba County Supra*. Id. 190; *Hoke v. Perdue*, 62 Cal. 545; *Portland v. Baker*, 8 Or. 356; *Schurmeir v. St. Paul & P. R. Co.* 8 Minn. 113, 83 Am. Dec. 770.

When an individual seeks to bring in the aid of the state he must be injured.

*State v. Shively*, 10 Or. 267.

A civil action cannot be maintained in the name of the state to redress private wrongs.

*People v. Albany & S. R. Co.* 57 N. Y. 161. See also *People v. Miner*, 2 Lans. 396.

There is no authority in the statute for the district attorney to bring this proceeding.

Courts cannot supply omissions in legislation.

*State v. Simon*, 20 Or. 373; *Baker v. Payne*, 22 Or. 341; *King v. Burrell*, 12 Ad. & El. 468.

The complainant who seeks an injunction must be able to specify some particular act, the performance of which will damnify him, and it is such act alone that he can restrain.

*Gibbs v. Green*, 54 Miss. 613.

In no case will an injunction be granted unless the right thereunto be clear.

*Tongue v. Gaston*, 10 Or. 328; High, Inj. 8d ed. § 1327; *People v. New York Canal Board*, 55 N. Y. 897.

*Mr. T. H. Crawford* also for appellants.  
*Messrs. James McCain, Dist. Atty., H.*

**NOTE.**—The right to an injunction against illegal appropriations is considered in a *note* to *Russell v. Tate* (Ark.) 7 L. R. A. 180.

In the present case, the alleged constitutionality of the use of the moneys being based merely on the place and not on the substance of the use, presents a somewhat novel question.

25 L. R. A.

*J. Bigger*, and *W. H. Holmes*, for respondent:

A taxpayer is the proper party to enjoin illegal diversion of public funds and property.

*Carman v. Woodruff*, 10 Or. 153; *White v. Multnomah County Comrs.* 13 Or. 317, 57 Am. Rep. 20, 54 Am. Rep. 832; *Wormington v. Pierce*, 22 Or. 606; *Baker v. Payne*, Id. 335; *Rice v. Smith*, 9 Iowa, 570; *Drake v. Phillips*, 40 Ill. 388; *Colton v. Hanchest*, 18 Ill. 615; *Wester v. Harwinton*, 32 Conn. 181; *Portland & W. R. Co. v. Portland*, 14 Or. 188, 58 Am. Rep. 299.

The relator need not be the real party, or have any special interest to enforce a public right, but as a voter and citizen he has a general interest in the execution of the law.

*State v. Ware*, 13 Or. 380; *Pike County v. People*, 11 Ill. 208; *Hall v. People*, 57 Ill. 307; *Glencoe v. People*, 78 Ill. 383; *People v. Packer*, 29 Cal. 212; *Linden v. Alameda Supra*. 45 Cal. 7; *Sanger v. Kennebec County Comrs.* 25 Me. 291; *Hefner v. Com.* 28 Pa. 106; *People v. Regents of University of Michigan*, 4 Mich. 98.

Injunction is the proper, in fact the only, remedy, as the defendants have acted in violation of the constitution.

*State v. Judge of Seventh Jud. Dist. Or. 2d* La. Ann. 1104; *Bradley v. Powell County Comrs.* 2 Humph. 428, 37 Am. Dec. 563; *Ford v. Farmer*, 9 Humph. 157; *Bridgenor v. Rodgers*, 1 Coldw. 259; *Marion County v. Grundy County*, 5 Sneed, 490; *Hilliard, Inj.* 443; High, Inj. §§ 1308, 1319, 1321, 1327; *Cooley, Const. Lim.* 81-98; *Sutherland, Stat. Const.* §§ 307, 303.

The appellants have no discretion.

Throop, Pub. Off. §§ 555, 546, *note* 5, 563, *note* 3.

Constitutions are to be construed strictly.

*Gibbons v. Ogden*, 22 U. S. 9 Wheat. 183, 6 L. ed. 63.

**Wolverton, J.**, delivered the opinion of the court:

This suit was instituted for the purpose of having the defendants, acting in their capacity as a board of commissioners of public buildings of the state of Oregon, enjoined and restrained from purchasing 640 acres of land in Union county, in this state, to be used as a site for a branch insane asylum, and expending therefor, of the public funds, the sum of \$25,000; from constructing buildings thereon to be used as a hospital for the care of insane persons who should be lawfully committed thereto for care and treatment at the expense of the state; and from expending the funds appropriated therefor. The legislative assembly, at its last session, passed an act "To provide for the location and construction of a branch insane asylum in the eastern portion of Oregon and appropriating money therefor," which provided, among other things: That the

governor, secretary of state, and state treasurer, acting in their capacity as a board of commissioners of public buildings of the state of Oregon, should, within sixty days after the act took effect, locate a site for a branch insane asylum, to be known as the "Eastern Oregon Insane Asylum," at some point in one of the following named counties: Wasco, Sherman, Gilliam, Morrow, Umatilla, Union, Crook, or Baker. That said board shall contract for and purchase in the name of and for the state, at the place selected for said asylum, a tract of land consisting of not less than 320 acres nor more than 640 acres, and shall, in the manner provided for by the act, proceed to erect and construct upon said premises an asylum building and outbuildings, and make suitable improvements, and supply the same with furniture and fixtures and everything necessary and requisite to fully complete and equip said Eastern Oregon Asylum, at a cost not exceeding the sum of \$165,000. For the purpose of purchasing the land and erecting the asylum buildings, the act appropriates out of the public treasury of the state, from any moneys not otherwise appropriated, \$165,000, or so much thereof as may be necessary.

The complaint alleges, in substance, that the relator is a taxpayer and citizen of the state; that the defendants, Pennoyer, McBride, and Meischen, as governor, secretary, and treasurer of the state of Oregon, constitute the board of commissioners of public buildings of the state; that by virtue of the powers in them vested, as such board, under the provisions of a pretended act of the legislative assembly, which it is claimed passed the assembly at its seventeenth biennial session, the defendants are about to purchase with the moneys of the plaintiff, sought to be appropriated by said legislative assembly for the purpose, 640 acres of land in Union county, Or., for the sum of \$25,000, to be used as a site for a branch insane asylum for the state; that defendants, in their capacity as such board, are about to expend of the moneys of the plaintiff, sought to be appropriated as aforesaid, the sum of \$140,000 in constructing buildings on said land, to be used as a hospital for the care of a portion of the insane of said state who may be hereafter lawfully committed to such institution for care and treatment at the expense of the state; that said asylum, if constructed as intended, will be one of the public institutions of the state, and that, unless restrained, defendants will purchase and pay for said lands, and build and pay for said buildings, with the money of the state, to the great and irreparable injury of plaintiff; and that plaintiff has no other plain, speedy, or adequate remedy at law. To this complaint the defendants interposed a demurrer, and, for ground thereof, alleged: First, that neither the state nor the relator nor the plaintiff has any legal capacity to bring this suit; second, that the complaint does not state facts sufficient to constitute a cause of suit against the defendants, or either of them; third, the complaint does not state facts to constitute any injury threatened to the plaintiff; fourth, that no cause is stated in said complaint for the issuance of an injunction. The demurrer was overruled by the court below, and the cause is here for our consideration

upon the questions arising upon the complaint and demurrer.

This case is only distinguishable from the case of *Sherman v. Bellows*, 24 Or. 553, in that it is brought in the name of the state upon the relation of a private individual, instead of in the name of the private individual directly. It is the settled doctrine of this state that an individual taxpayer, whose burdens would be increased by the wrongful acts of public officers, and where a fraudulent or illegal diversion or misapplication of the public funds is about to be consummated, has such an interest, by reason of the special and peculiar injury he would sustain, as would give him a standing in a court of equity by injunction to restrain such acts, and prevent such diversion of the public funds. *Carman v. Woodruff*, 10 Or. 183. This doctrine is so well established and sustained by the undoubted weight of authority in the United States that it is unnecessary to enumerate the cases sustaining it. The taxpayer must, however, present such a case as will bring him within the ordinary equitable rules which govern when relief by injunction is sought. He must show that some act is threatened or imminent which will result in some material injury to himself, for which there is no adequate remedy at law. It is not sufficient that he apprehends injurious consequences, which neither actually exist nor are threatened. Fanciful, speculative, or even possible evil results are too remote and indefinite upon which to call into requisition the restraining process of a court of equity. This rule is applicable as well when the state is a party plaintiff as where a individual occupies a like position. *Allen, J., in People v. New York Canal Board*, 55 N. Y. 896, says: "When the state, as plaintiff, invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors; that is, it must establish a case of equitable cognizance, and a right to the peculiar relief demanded." See also 2 High, on Injunction, § 1327. So that in legal effect the position occupied by plaintiff herein is not superior to or different from that of the plaintiff in *Sherman v. Bellows*, *supra*. The state represents the aggregate of individual taxpayers; the individual himself only, but incidentally the whole people, and the object sought to be attained is identical. The act violative of law or trust relations, which will result in material injury to the individual, must be threatened or imminent, to entitle him to the interposition of a court of equity, and in principle there exists no reason why a different equitable rule should apply where the state is plaintiff.

The contention of the plaintiff is that the legislative act aforesaid is in contravention of section 3, article 14, of the state Constitution, which is as follows: "The seat of government, when established as provided in section 1, shall not be removed for the term of twenty years from the time of such establishment; nor in any other manner than as provided in the first section of this article; provided, that all public institutions of the state, hereafter provided for by the legislative assembly, shall be located at the seat of government,"—and therefore void and inoperative. That the clause "public institutions of the

state" means or includes the public buildings thereof; that the branch insane asylum provided for by the act is a public institution, in that sense, and therefore should, under the constitution, be located at the seat of government. In *Elliott v. Oliver*, 22 Or. 47, *Mr. Justice* Lord says: "As a general rule a court will not pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause;" citing in support thereof *Ex parte Randolph*, 2 Brock. 448, Fed. Cas. No. 11,558; *Hoover v. Wood*, 9 Ind. 287; *Cooley*, Const. Llm. \*168. This rule arises out of the due respect which one co-ordinate branch of a state government entertains towards another. The legislature, in adopting laws for the government of the people, does so under its construction of the constitution, and the just presumption always prevails that the business of the legislature is transacted with due regard for the fundamental law by which its acts are limited and governed. It must be a clear case, therefore, and one in which the constitutional question is the very *lis mota*, before courts will assume the responsibility of declaring an act of the legislative assembly void upon constitutional grounds, and reverse the judgment of a co-ordinate branch of the state government. Does the plaintiff present such a case? and has it exhibited such equities as to entitle it to the relief demanded? The legislature, acting in its legislative and discretionary capacity, has, by adopting the act in question, declared, in effect—First, that a new asylum building is required for the accommodation and proper care and treatment of the insane and idiotic of the state; second, that it is to the best interests of the state and such unfortunates that the same be located in the eastern part of the state; and, third, that \$165,000 is required for its construction and completion, and makes an appropriation accordingly. No one will contend but what the legislature had a perfect constitutional right to determine upon the necessity for an additional building, and the amount of funds necessary for the construction thereof, and to make an appropriation therefor. What the difference will be between the cost of construction and maintenance of such a building as an asylum at the seat of government, and a like building and its maintenance in eastern Oregon, is not made apparent by the complaint; and this is wherein the plaintiff fails to show that the burdens of taxation of its citizens will be increased, or that any additional amount of public funds will be required, as a consequence of its erection at the latter place. This is the exact ground upon which the case of *Sherman v. Bellows*, *supra*, was decided, and we see no reason now for disturbing that decision. *Mr. Justice* Moore, speaking for the court in that case, says: "Conceding, without deciding, that the soldiers' home is a public institution of the state, provided by the legislative assembly, and that section 8 of article 14 of the Constitution required the trustees to locate it at Salem; that they had threatened to violate their official duty by locating it at Roseburg,—does it appear that the plaintiff has sustained a personal injury thereby? If it were alleged that, in

consequence of the location of the soldiers' home at Roseburg, plaintiff's property would be subjected to a burden of taxation in addition to that which it would be required to bear if located at Salem, then he would sustain a personal injury; and, since an adequate compensation cannot be had at law, he would be entitled to an injunction to prevent such location." *Mitchell, J.*, in *Thompson v. Canal Fund Commr.*, 2 Abb. Pr. 252, in speaking of the equitable remedy by way of injunction, says: "It was never granted merely to prevent an officer from carrying out a law of the state because it was deemed unconstitutional, where some equity was not the foundation of the bill." 2 High. Inj. § 1826. *Chalmers, J.*, in *Gibbs v. Green*, 54 Miss. 592, says: "Neither an executive nor a ministerial officer can be enjoined generally from putting a law into force (citing *Mississippi v. Johnson*, 71 U. S. 4 Wall. 475, 18 L. ed. 437). The complainant who seeks an injunction must be able to specify some particular act, the performance of which will damage him, and it is such act alone that he can restrain. This court has no power to examine an act of the legislature generally, and declare it unconstitutional. The limit of our authority in this respect is to disregard, as in violation of the constitution, any act or part of an act which stands in the way of the legal rights of a suitor before us; but a suitor who calls upon a court of chancery to arrest the performance of a duty imposed by the legislature upon a public officer must show conclusively, not only that the act about to be performed is unconstitutional, but also that it will inflict a direct injury upon him." The case at bar presents the peculiar situation of the state calling into requisition one co-ordinate branch of the government to enjoin the executive and ministerial officers of the state, acting in the capacity of a board of commissioners of public buildings, from carrying out the provisions of a law adopted by another co-ordinate branch of the same state government. The contention of the state is that the court must interpose by the extraordinary remedy of injunction, and render nugatory the solemn enactment of a co-ordinate branch of its government, as in contravention of the fundamental law, without at the same time alleging any facts showing wherein and in what manner the state would be damaged, and without exhibiting any good or sufficient reason for the exercise of such extraordinary power. A mere suggestion that the act complained of is unconstitutional, and that the legislature has exceeded its constitutional limitations, is insufficient to call into requisition a court of equity. "The court, as such, has no supervisory power or jurisdiction over public officials or public bodies." *People v. New York Canal Board*, *supra*.

The state, when equitable relief is sought, such as is prayed for in the present proceeding, must, like private individuals, bring itself within the known and fixed rules of equitable interference before the court will grant its petition.

It follows from these conclusions that the demurrer should be sustained, and it is so ordered, and that the cause be remanded to the court below for further proceedings not inconsistent with this opinion.

# RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1894, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.
- V. FIDUCIARIES AND REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; LIENS; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

## I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

### *Constitutional amendment.*

The question of the adoption of a constitutional amendment in Montana turns on the failure to publish it for the time specified before election, and this is held fatal on the ground that the provision is mandatory. (Mont.) 560.

A peculiar case respecting a constitutional amendment is presented in California, in which a proposed amendment by the legislature is held invalid because it would not become operative on adoption by the people without subsequent acts and the exercise of discretion by certain officers. (Cal.) 812.

### *Apportionment.*

The validity of an apportionment act, it is held, cannot be contested by an injunction, as equity will not interfere to protect purely political rights. (Ill.) 148.

### *Suffrage.*

The right of women to vote for school commissioner in New York is denied by a decision that such school commissioner must be classed with town and county officers for whom only constitutional electors can vote. (N. Y.) 781. The constitutional qualifications of voters are held applicable to voters for road commissioners so as to invalidate a statute requiring the voters to be freeholders, whether men or women. (N. J.) 480.

A constitutional provision in Kansas, disfranchising those who have voluntarily borne arms against the government, unless their disabilities have been removed in the specified manner, is held to be neither an *ex post facto* law nor a bill of attainder, but to be valid. (Kan.) 486.

### *Ballot law.*

The Michigan ballot law is considered in a case which holds the provision for an oath of inability to read English as a condition of assistance on that ground is not unconstitutional and is mandatory. (Mich.) 825.

### *Residence.*

That residence cannot be gained by life in prison is held in the case of one committed to

prison on his own application in order to get a home and work. (N. Y.) 399.

### *Governor.*

A vacancy in the governor's chair is held to exist under the New Hampshire constitution in case of the governor's disability resulting from illness, and the court by mandamus orders the president of the senate to assume the duties of the office. (N. H.) 613.

### *Public money.*

The appropriation of public money is decided to be in the nature of a donation, the auditor to have no discretion in respect to the drawing his warrant therefor. (Neb.) 774.

### *Contempt.*

The judicial nature of a commitment for contempt is emphatically declared in a Kansas case, holding it unconstitutional to confer such power on county attorneys. (Kan.) 110.

### *Jurisdiction.*

Several interesting questions as to jurisdiction of suits to annul marriages are raised in a case which holds that jurisdiction to annul a marriage on the ground of a prior marriage, in the absence of fraud, duress, mistake, or lunacy, is purely statutory; and that the assumption of such jurisdiction by a court in another state is not sufficient evidence of its existence, even in the case of a court of general jurisdiction. (Mass.) 806.

### *Judges.*

The disqualification of a judge, by reason of prior connection with the case as attorney, is discussed in a Florida case, which holds that it is entirely independent of any present interest in the case, or any fee or reward therefrom. A connection merely nominal, as a member of a firm in whose name an action was begun, is held a disqualification. (Fla.) 114.

The rule denying the liability of a judicial officer for acts done in his judicial capacity is applied to the wrongful exclusion of a spectator from a court-room. (Me.) 506.

The question of jurisdiction to appoint a receiver of property outside the state in which the court sits is raised in respect to a receiver

appointed by a federal court in Louisiana for the railroad in Texas, of a corporation created by act of congress, and the jurisdiction is denied. The court also decides that in such a case or in case of collusive appointment of a receiver, he is merely an agent of a company which is responsible for his negligence. (Tex.) 52.

*Foreign receiver.*

The recognition of a foreign receiver is illustrated in another iron hall case by a Michigan decision. (Mich.) 739.

Such recognition is also illustrated by the dismissal of a writ of error taken by an officer of the company in disregard of an injunction from the court which appointed the receiver in the other state. (Colo.) 388.

*Extradition.*

The lawfulness of the detention of a person surrendered by a foreign nation as an act of comity when not required to do by treaty is presented in a California case, in which it is held that his rights under the treaty, which enumerated other crimes, are not violated, and also that setting aside of the indictment and his consequent discharge does not exempt him from arrest on a subsequent complaint for the same crime. (Cal.) 598.

*Eminent domain.*

Several constitutional provisions are involved in the North Dakota case which denies validity to a statute for a drain commission. The provision to be made is held applicable to taking by a municipality, and an order on the drainage fund is not regarded as payment, while a provision for county bonds to be repaid by assessments on the property owners is held in violation of the provision against loaning the credit of the county. (N. Dak.) 388. See also *infra* as to highways.

*Municipal corporations.*

A municipal corporation required by statute to establish and maintain a free bathing beach is not liable for the unsafe condition of the bottom, or for its failure to mark the relative depth of water,—especially where it has not thrown open the beach to the public. (D. C.) 691.

The rule that municipal corporations are not liable for failure to enforce police regulations is applied to the neglect of police to suppress the nuisance of coasting on the streets. (Del.) 588.

The validity of an incorporation of a large territory which consists mostly of wild lands and rural property is denied in a Minnesota case, which holds that land "adjacent" to a platted tract under the statute must be such as is somewhat suburban in character, and have some community of interest with the platted portion in the maintenance of a village government. (Minn.) 755.

An attempt by ordinance to give a city building inspector final authority to decide as to the right of a citizen to build upon his property is held unconstitutional. (S. Dak.) 621.

The right of a municipality to supply electricity for municipal and private purposes is sustained in Pennsylvania. (Pa.) 217.

*Casting vote.*

A peculiar instance of a casting vote appears in a Connecticut case in which the mayor was 25 L. R. A.

held to have the casting vote for each of two official newspapers, where four votes had been cast for each of three newspapers by the twelve aldermen, each of whom was allowed to vote for but one. (Conn.) 694.

*Protection of employes.*

The constitutionality of statutes in the exercise of the police power to protect employes is upheld in respect to an act for the protection of motormen and similar employes on cable, electric, or steam cars. (Minn.) 769.

*Protection of children.*

The power of the state to protect the health and morals of children is upheld as declared in N. Y. Penal Code, § 293, prohibiting the exhibition in stage dances, etc., of a female child under fourteen years of age. (N. Y.) 794.

*Absolute liability of railroads.*

A statute making railroad companies liable for property destroyed by fire is held constitutional and not limited to insurable property, although it gives the companies an insurable interest in property for which they may be charged. (Mo.) 175.

Nor is the company entitled to any part of the insurance which the owner procures for himself. (Mo.) 161.

*Right to carry on business.*

The restriction of fire insurance business entirely to corporations is held constitutional in Pennsylvania. (Pa.) 250.

*Tolls of mills.*

The regulation by statute of tolls by public water mills is held in Maine to be constitutional. (Me.) 504.

*Vaccination.*

The power of a school board to exclude children who have not been vaccinated is upheld in a Pennsylvania case. (Pa.) 152.

*Taxation.*

The power of the legislature to commission a township board of education to levy a tax for a claim unsupported by any legal or moral obligation is denied as unconstitutional, and a recital of disputed facts in the statute held not conclusive on the courts. (Ohio) 770.

The constitutionality of a tax on a succession by will or descent to a decedent's estate is upheld in Maine with the declaration that such succession is entirely subject to the law of the state, which can modify the right or take it away entirely. (Me.) 682.

The attempt to charge a contingent estate with a collateral inheritance tax is unsuccessful in a New York case which holds that even a vested remainder cannot be taxed so long as its value is contingent. (N. Y.) 695.

State taxation of interstate commerce is discussed in a case which holds an express company liable to tax on the business done within the state although it also does interstate business for which it cannot be taxed. (Fla.) 120.

The law of interstate commerce as applied to a license tax on putting up lightning rods is held not to prevent the tax because only such rods are put up as are sold and brought from another state. (N. C.) 810.

A state tax imposed on corporations is held valid notwithstanding the corporation may be created for the carrying on of interstate commerce. (N. J.) 184.



*Highways.*

Ejectment against a railroad company for constructing a road in a street is denied in a California case which also declares that such a road does not constitute an additional burden. (Cal.) 554.

Poles and wires of a telegraph or telephone company are regarded as an additional burden on a rural highway in a New York case which holds that the public easement includes only

moving vehicles or bodies and not the permanent appropriation of any part of the highway. (N. Y.) 640.

This is in conflict with the Michigan decision in 24 L. R. A. 721.

The limitation of lawful uses of a street is illustrated by a decision that a standpipe or water tower cannot be lawfully built by a city in a street, although it owns the fee thereof. (Ill.) 535.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

A contract to procure testimony which will win a lawsuit is condemned as against public policy. (Mont.) 87.

The rule as to recognition of a contract valid where made is not applied to uphold an order signed by a married woman out of the state for goods, where the law of her domicile does not permit her to contract debts. (N. C.) 188.

A sale to a nonresident intended merely to avoid an insolvent law is held to be subject to such law in a New Hampshire case, where the transfer was made to avoid Massachusetts law. (N. H.) 821.

An agreement to pay a hundred dollars extra for a mare if she could travel as fast as another one on a test by a certain person within a certain time is held not to involve such test as an indispensable condition, but on failure of the purchaser to have the test made he was held liable on other proof of the speed. (Mich.) 719.

*Bonds.*

A case involving important questions as to recitals in bonds and of estoppel to dispute them decides also that an instrument is not negotiable where it provides for exchange in addition to principal and interest. (N. Dak.) 363.

*Reward.*

The revocation of an offer of reward for a criminal is held to be conclusively presumed after a reasonable time, although the offer was absolute in its terms and never withdrawn. (Me.) 503.

*Hiring teacher.*

The effect of obtaining a certificate to teach after making an unauthorized contract to teach school is presented in a North Dakota case, which holds that the contract being void when made does not become valid on obtaining the certificate, and that there can be no recovery by the teacher for a breach of the contract by discharging him. (N. Dak.) 883.

*Sale of timber.*

A sale of standing timber although in writing, is held in Rhode Island to be a revokable license which is revoked by conveyance of the land to another. (R. I.) 159.

*Adoption of child.*

The effect of part performance to invalidate an oral contract is illustrated in case of a contract to adopt a child as an heir, where the relation was assumed and continued during the life of the adopting parents. (Neb.) 207.

*Banking.*

Surrendering a check held for collection and taking in payment the drawee's check on another bank is held to require the utmost 25 L. R. A.

diligence in obtaining payment of the latter. (Md.) 200.

A check on a New York bank sent in payment of a collection is held not to constitute an assignment *pro tanto* of a general deposit. (Tenn.) 523.

Deposit with a bank after business hours of a post-dated check upon itself for collection is held to make the bank liable if there are funds applicable to the check when it opens on the day of the date of the check, though at the close of the day the account is overdrawn. (D. C.) 761.

Where the sender of a draft for collection orders a remittance in New York exchange, it is held to defeat any claim of trust in the proceeds, after the collecting bank fails. (Tenn.) 523.

An overdraft on the faith of which a bank cancels drafts held for collection, but which is paid to an assignee of the bank after its failure, raises the question of the right of the sender of the paper for collection to the money paid to the assignee. The court denies that the payment constitutes a trust fund or belongs to the sender of the draft for collection. *Id.*

A special deposit or trust fund, which will not pass to a receiver of the bank, is made where money is left with the bank to be paid to a third person on his presentation of a deed and abstract showing good title to land. (S. Dak.) 309.

A somewhat unusual case growing out of the insolvency of a national bank decides that the closing of the bank by an examiner after the usual exchange of securities with other banks at a clearing house and the payment thereafter to the clearing house by the other banks of the drafts and checks on the insolvent bank, which had been left at the clearing house as security for a balance due to it, and the appropriation by the clearing house of the money thus received on its claims, did not constitute an unlawful preference, since the subsequent transactions did not annul the exchange of securities at the clearing house before the bank closed. (C. C. App. 8d C.) 824.

Preference by state law of a deposit by a savings bank in a bank which has become insolvent is held not an unlawful preference under the New York banking act. (N. Y.) 546.

*Carriers.*

A stipulation that a shipper of goods who accompanies them shall be carried at his own risk is held applicable to an injury received by him in unloading, after he had temporarily left the car to get assistance. (S. Dak.) 81.

A person traveling by invitation of another

on the latter's pass, knowing that fact but not having seen the pass or knowing its conditions, is held bound by a condition that the passengers assume all risks. (Me.) 491.

The legality of discrimination by a carrier is affirmed in a New York case where the discrimination consisted merely in offering special rates, too low to be profitable, at certain periods to those only who would stipulate not to ship any goods by a rival vessel; and one who refused to make the stipulation is held to be not entitled to the special rate. (N. Y.) 674.

#### *Stipulation as to telegram.*

Failure to send a message is held not within stipulations against liability unless the message is repeated or claim made within sixty days. (Minn.) 406.

#### *Insurance.*

Insurance taken by a mortgagor in his own name and not assigned is held to inure to the benefit of the mortgagee, where the mortgagor's agreement was to keep the premises insured for the other's benefit. (Kan.) 805.

The rights of a mortgagee to whom an insurance policy is payable with a provision that his interest shall not be invalidated by any act

or neglect of the mortgagor or owner of the property are upheld, notwithstanding a forfeiture of the insurance by the mortgagor. (Neb.) 679.

In a New York case also a similar insurance policy is construed and the rights of a mortgagee held to be unaffected by other insurance taken without his knowledge by a mortgagor in violation of the policy. Loss pending foreclosure is held not to prevent its consummation. (N. Y.) 686.

In rejecting a certificate by a notary, on the ground that there was a nearer notary, an insurance company is held to waive the requirement as to the nearest notary, if it fails to give his name or address. (N. Y.) 198.

The effect of a bill of sale made without a consideration as a change of title or incumbency is considered in a case which denies effect to such instrument and holds the policy valid. (N. Y.) 687.

The improper procurement of the surrender of a life insurance policy by threats of litigation and false statements of its invalidity is considered in a case which holds that the policy must be revived. (Mich.) 637.

### III. CORPORATIONS AND ASSOCIATIONS.

The rule that states may exclude foreign corporations or impose such burdens on them as they choose is so much limited by the law as to interstate commerce that an express statute that contracts of a corporation which has not paid its franchise tax shall be void is denied application to a foreign corporation selling goods by traveling agents. (Mich.) 819.

Extraterritorial effect of general statutes restricting the powers of a corporation is denied in an Illinois case, holding that the New York law prohibiting assignments by insolvent corporations does not affect such an assignment made in Ohio by a New York corporation. (Ill.) 746.

The doing of business by a foreign corporation which will subject to suit in a county is discussed in an Alabama case, which holds that the care and preservation of unemployed property, after the suspension of the operation of a mill, and payment of taxes thereon, is not the doing of business, and that the business must be carried on at the time of the commencement of the suit. (Ala.) 548.

#### *Insurance companies.*

The Alabama statute restricting insurance business by foreign companies is construed in a case in which a Philadelphia association is held within the statute. (Ala.) 288.

The Missouri statute restricting insurance business is applied to a New York Lloyds association. (Mo.) 243.

The Lloyds association is held in Pennsylvania not to constitute a "company," within the meaning of statutes restricting insurance by foreign companies. (Pa.) 247.

#### *Benefit association.*

Membership in a masonic benefit association is held to be forfeited by the loss of membership in a masonic lodge, although there has been no formal expulsion therefrom, in the 25 L. R. A.

case of one who continues to be a saloon keeper in violation of the law of his order. (Mo.) 149.

#### *Railroads.*

The effect of abandoning its purpose to build a railroad over land purchased in fee simple for a right of way is held not to forfeit the land, or make a deed by the railroad company for other purposes void, unless the state has assailed the title. (S. C.) 139.

#### *Library board.*

The power of a library board, authorized to take property by gift, grant, purchase, devise, bequest, or otherwise, for the maintenance of public libraries, museums, etc., is held to extend to receiving a loan of a collection of coins for exhibition. (Minn.) 280.

#### *Building and loan associations.*

The effect of giving notice of withdrawal from a mutual building association is a question of increasing interest in many places, on which a decision of the supreme court of Minnesota is to the effect that a stockholder does not thereby become a general creditor and is not entitled to bring an action and take judgment against the association when there are no funds legally applicable to his claim. (Minn.) 215.

#### *By-laws.*

The question of notice of corporate by-laws is raised in a South Carolina case, which holds that such notice is not chargeable on one who is employed by the general manager of the company, whose power is restricted by by-law. (S. C.) 48.

#### *Promoters.*

The fraud of a promoter of a corporation in obtaining profits on the sale of property to the corporation is considered in an important Connecticut case, reviewing authorities on the subject. (Conn.) 90.

(DOMESTIC RELATIONS; PERSONAL CAPACITY—TORTS; NEGLIGENCE; INJURIES.)

*President.*

The power of the president of a banking corporation to institute and conduct litigation is regarded in a Kansas case as belonging to its office, in the absence of express restriction. (Kan.) 110.

*Partners.*

See *infra*, VIII., as to attachment.  
An interesting question as to the liability of an innocent partner to attachment of his individual property for a firm debt contracted fraudulently by his copartner is decided by the supreme court of Michigan in the negative. (Mich.) 645.

IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.

The presumption of marriage, or legitimacy of issue, is illustrated in a case which expressly holds that in the absence of proof a mere denial will not defeat the presumption, and that it strengthens by the lapse of time. (Pa.) 477.

A somewhat unusual case for a suit for annulment of marriage brought by a third person arises in Maryland, where the plaintiff claims to be the lawful husband of the woman; but it is held that he cannot maintain the suit.

The case also denies that equity has inherent jurisdiction to annul a marriage except in case of fraud or duress. (Md.) 800.

A single blow from husband to wife is held not necessarily cruel and barbarous treatment as cause for a divorce, nor the wife's leaving her house in anger on account of it to be necessarily a desertion. (Pa.) 697.

An unusual application made by a grandmother in Louisiana to compel the sending of

grandchildren by their father to visit her was denied, as beyond the jurisdiction of the court, although it was intimated that extreme cases might justify the court in removing the father of the children from his tutorship. (La.) 798.

The conflict of laws as to the status of married women is involved in a case which denies attachment of the property of a married woman, although the debt was created in another state in which she resided and in which the contract was valid. (Mo.) 178.

The doctrine of necessities as applied to infants' contracts is declared in a Connecticut case to be limited to cases in which the necessities have been actually supplied, and in that case a contract for rooms as lodging for a year is held not binding on the infant any longer than he actually occupies the rooms. (Conn.) 618.

V. FIDUCIARIES AND REPRESENTATIVES.

A train despatcher is held not to be a representative of the master and not a fellow servant of trainmen. (Ark.) 886; (N. Y.) 896.

A train despatcher is held in a Maryland case to be a fellow servant of an engineman on a train, but the train despatcher's negligence, which in this case was in question, was in re-

spect to the sending out of drunken or negligent brakemen and not in giving orders for movement of trains. (Md.) 710.

The rule as to vice-principals is applied to the case of a conductor of a freight train with respect to a brakeman. (C. C. App. 2d C.) 470.

See also, *infra*, VI.

VI. TORTS; NEGLIGENCE; INJURIES.

*Slander.*

The privilege of witnesses is discussed in respect to testimony before a committee of aldermen investigating charges before a board of public works and held to exist in respect to relevant information given in good faith, even if volunteered. (Conn.) 106.

*Negligence; electric wires.*

The interest in questions as to the danger from electric wires calls attention to a case in which permission of an electric light company to use a standard on the roof of a building for telegraph and telephone wires is held to create no duty to men looking after the latter wires with respect to the insulation of the electric light wires over another building to which no wires were attached. (Mass.) 554.

And in another case from the same state it is held that the lack of insulation of wires at joints twelve or fifteen inches from a frame to which the wires are fastened and which it is the duty of linemen to ascend in looking after other wires, raises the question for the jury as to negligence. (Mass.) 552.

*Elevators.*

The degree of care required in operating  
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passenger elevators is discussed in a federal case, which applies the ordinary rule as to carriers. (C. C. App. 6th C.) 83.

*Negligence of railroads.*

See also, *supra*, I., as to absolute liability.

Negligence of a railroad company in injuring children upon the track is discussed at considerable length in a North Carolina case, recognizing a special need of care toward children. (N. C.) 784.

*Lookout.*

The duty to maintain a lookout on a railroad locomotive, as far as consistent with the engineer's management of the train, is affirmed in North Carolina. (N. C.) 287.

The question of proximate cause in its relation to contributory negligence is extensively discussed in this case.

The conductor of one train is held to be the fellow servant of a fireman on another train who is injured by the negligence of the former in leaving a switch open. (C. C. App. 8th C.) 883.

*As to passengers.*

The effect of the Massachusetts statute creating a penal liability for negligence causing

RÉSUMÉ OF DECISIONS  
(PROPERTY RIGHTS; LIENS; WILLS.)

the death of a passenger is considered in a case which holds that conditions on the back of a railroad ticket cannot release it, and that an employé of the company having a monthly ticket is a passenger while traveling on his own business or pleasure. (Mass.) 157.

On the question of a right to recover for injuries in jumping from a moving train, it is held that one who jumps merely because he is afraid of arrest if found thereon, and who was not a passenger, is chargeable with negligence. (Neb.) 79.

*To railroad employes.*

Liability of a railroad company to an engineer for injuries from collision with an animal due to the failure to keep such fence as the statute requires is upheld, and the collision regarded as the proximate cause of the injury, although the engine, except two small wheels, remains on the track for some distance until it strikes a switch. (Mo.) 820.

An important case in the law of master and servant settles the question in New York to the effect that a train despatcher is not a fellow servant of a trainman, who is injured by the former's negligent orders. (N. Y.) 886.

The same is held in Arkansas, 886. See also *supra*, V.

*Mining employes.*

Statutory regulations for the protection of miners have been made in various states, and the Ohio statute making it the duty of the miner to see that the roof of the mine is propped is construed in a case which denies his right to evade the statute by a custom that another employé should prop the mine. (Ohio) 845.

*Street railways.*

The question of negligence as between a person driving on the track of a cable road and the driver of the car is considered in a Missouri case which holds that it is not necessarily negligent for the car to follow the buggy after it is seen without stopping, but

that the negligence of each party is for the jury. (Mo.) 508.

Negligence of an electric railway company in respect to the places at which passengers alight, is the question in a Michigan case where passengers had been allowed to get off on both sides of the cars, on one side of which the ground was rough and uneven. (Mich.) 744.

The law of negligence is applied to an accident on an electric street railway, whereby a school child is struck and killed, and the court holds that the failure of the child to look or listen is not negligence as matter of law, and that greater care is required in running electric cars past a crossing frequented by school children. (Or.) 668.

*Volunteer.*

The rule that a person assisting the servants of another to facilitate his own business or that of his employer is not their fellow servant or a volunteer is applied in a Maine case, where the servants of a contractor were removing earth from a car for the consignee and engaged in unloading the car by request of the railroad crew. (Me.) 658.

*Servants of charities.*

The exemption of charitable institutions from liability for torts or negligence of managers or employes, which, against some opposition, seems to be establishing itself in the courts, is supported by a recent Michigan decision as to a hospital for the insane. (Mich.) 602.

*Party wall.*

The damages to a building caused by the falling of a party wall, which was being carried up as originally intended for a neighboring building, is held not to be chargeable against the person for whom the work was being done in the absence of negligence on his part, and the negligence of an independent contractor is held not chargeable to him. (N. Y.) 667.

VII. PROPERTY RIGHTS; LIENS; WILLS.

*Homestead.*

A somewhat peculiar case as to the abandonment of a homestead in certain rooms in a building on the homestead lot is decided in Texas against the claim that there could be an abandonment of the homestead in such rooms. (Tex.) 155.

*Dower.*

Dower is denied in land purchased with the husband's money in the name of a third person for the husband's benefit. (N. Y.) 625.

*Inheritance by murderer.*

Reversing its former decision on a rehearing, the supreme court of Nebraska holds that an heir may inherit from an ancestor whom he murders. (Neb.) 664.

*Receivership.*

See also *supra*.

A sheriff's right to the possession of property is held to continue on appointment of a receiver. (Wash.) 854.

*Pledge.*

The validity of an attempt to make a pledge

is considered in a Louisiana case, which holds that possession sufficient to constitute a pledge was not shown, although securities were placed in a bank box and given to a clerk to be placed in a bank, he to retain the key and deliver them to the creditor when called for. (La.) 577.

*Trust certificates.*

Regarding certificates of a trust in certain property as similar to stock in a corporation, it is held in New York that a transfer by the owner is not subject to a lien for expenses other than taxable costs of litigation instituted by such owner against the trustees. (N. Y.) 670.

*Petroleum.*

Petroleum is regarded as realty, constituting part of the inheritance and subject to waste. (W. Va.) 223.

*Copyright.*

Copyright in reports of law cases is held not to extend to the opinions of the judges or syllabi prepared by them. (C. C. N. D. N. Y.) 441.

*Trade-mark.*

Priority of discovery or appropriation is declared insufficient to establish a right in a local geographical name as a trade-mark against a rival user of the same locality, if the first user has not so occupied the market as to make the use by another a fraud on customers. (C. C. App. 1st C.) 190.

*Trade-name.*

The trade-name of a milk business in the sale of milk from a ranch of that name is held not to pass on a division of business between the owner of the ranch and a partner who had no interest in the real estate after the latter ceased to buy milk from that ranch, and the use of the name for milk from other places was held to be a fraud. (Cal.) 193.

*Way of necessity.*

A right of way from necessity is denied to and to which access can be had by sea, without crossing other land of the grantor. (Me.) 502.

*Flowage right.*

The right of flowage of a water company is held in a Maine case to include right to ice formed on its pond as against a claim of the owner of the land. (Me.) 499.

*River overflow.*

An important case as to the right to build levees along a river bank denies the right so far as it would cast surplus water in time of ordinary floods on the opposite shore, or injuriously affect the rights of a railroad company which has a bridge over the stream. (C. C. D. Ind.) 527.

*Bed of lakes.*

A somewhat important change in the doc-

trine of the supreme court of Michigan as to the rights of shore owners on small inland lakes is made in a recent case, deciding that where the lake would not all be included within the sections and sub-divisions of the shore owners if their lines were extended, those lines will be disregarded and the principles applicable to riparian ownership will govern, so that the rights will depend upon frontage and the form, length, and breadth of the body of water. (Mich.) 815.

*Chattel mortgage.*

The question whether or not chattel mortgages constitute an assignment for creditors is decided in the negative by a North Dakota case. (N. Dak.) 877.

*Merger of legacies.*

A somewhat peculiar case as to liability for the payment of legacies is one in which a devisee, personally charged with payment as each legatee becomes of age, died before all were due and the land descended to the legatees but his estate was held liable and his property first charged with the payment. (Ohio) 768.

*Wills.*

On the question of due execution of a will signed for the testator by another, it is held that there is some evidence of the fact that it was signed in his presence as the statute requires, where there is proof that he stated to the witnesses whom he called to attest it that it was his will and that he had it written. (Mo.) 701.

*Bequest for masses.*

A bequest to a church to be used in masses is held invalid. (Ala.) 860.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES

A stranger to a contract is denied the right to enforce it, where no consideration moves from him and there is no duty or obligation to him on the part of the promisee. (Minn.) 257.

*Joinder.*

The question as to joinder of causes of action in modern practice is fully discussed in a Connecticut case. (Conn.) 858.

*Election.*

The election of remedies is considered in a somewhat difficult case in respect to an attachment and execution in an action of trover, where plaintiff subsequently brought replevin for the property against one who obtained it from one of the former defendants by replevin in another state in an action still pending. (Mass.) 42.

*Reference.*

The right to compulsory reference because of a long account in a counterclaim, where plaintiff's claim is disputed, is denied by the majority of the court, as an infringement of the right to trial by jury (N. Y.) 67.

*Reply.*

A reply attacking a release on the ground of fraud is upheld in an action of law in Missouri, by a bare majority of the court, the others holding that the instrument should have been canceled in equity. (Mo.) 514.

*Attachment.*

Attachment of a partnership on the ground of nonresidence is allowed in Ohio, where the members of the firm are nonresidents, although the firm does business in the state and the statute allows a partnership to be sued in its firm name and served by leaving a copy at its place of business. (Ohio) 649.

*Prohibition.*

What is said by the court to be the first instance in the state of Vermont of a petition for a writ of prohibition is in a case where a single cause of action had been split up into separate suits before a justice of the peace to prevent an appeal, and the writ is allowed. (Vt.) 605.

*Physical examination.*

The New York statute authorizing physical examination of an injured party who sues for damages, which has been held to be beyond the power of the court in that state independent of statute, is construed to authorize such examination only as a part of the examination of a party before trial as a witness. (N. Y.) 402.

*Injunction.*

The necessity of something more than the unconstitutionality of an act by state officers to justify an injunction is illustrated in an Oregon case in which an injunction is refused

against the location of a state institution elsewhere than at the capital. (Or.) 863.

An injunction to protect political rights is held beyond chancery jurisdiction in a case which refuses to enjoin election notices under an unconstitutional law. (Ill.) 143.

Injunction of a digest for infringement of copyright in syllabi of reports cannot be granted against the whole book, when only a very few paragraphs infringe. (O. C. N. D. N. Y.) 441.

The power of the courts to enjoin a strike by employes of a receiver is extensively considered in a federal case which denies the power to prevent them from quitting work, but upholds the power to prevent combining to quit with the purpose and intent of crippling the property or embarrassing the operation of the road. (U. S. C. C. App.) 414.

#### *Damages.*

An unusual test of the rule of damages for wrongfully but in good faith cutting timber from another's land is furnished where the owner recaptures a part of the logs after they had acquired enhanced value by transportation. But this enhanced value is held to belong to him and not subject to recoupment against the damages for the other part of the logs. (N. C.) 813.

The measure of damages for wrongfully removing standing timber is held to be the value of the timber made therefrom at its place of disposal, without any allowance for expenditure in removing it, where a mortgagee in possession wrongfully wasted the premises. (Vt.) 593.

Damages for mental anguish on account of failure to send a telegram are not allowed in Minnesota. (Minn.) 406.

#### *Restitution.*

The rule that requires restoration in order to rescind a contract for fraud is denied application to defeat an action for the balance due on a policy of insurance, where a fraudulent compromise has been obtained. (Ohio) 37.

#### *Limitation of actions.*

On a very full review of conflicting authorities, a Wyoming case decides that the great weight of authority denies the power of one person jointly and severally liable on a promissory note to interrupt the running of the statute in favor of the others by making a payment thereon. (Wyo.) 608.

#### *Laches.*

Twelve years' acquiescence in the control of a street by park commissioners is held to defeat an objection by a railroad company to the authority of such commissioners in preventing obstructions. (Ill.) 800.

#### *Service of process.*

An exception to the rule giving privilege from service of process while coming from another state as a witness is made in respect to the plaintiff in an attachment suit who is sued for malicious prosecution of that suit. (Md.) 721.

In an action on a judgment of another state, absence of service of process may be shown to defeat it, notwithstanding a recital of such services. (Pa.) 699.

### IX. CRIMINAL LAW AND PRACTICE.

An ordinance prohibiting unmarried minors to enter bars, unless as agents or servants, is upheld as not unreasonable or inconsistent with statutes prohibiting sales to such persons. (N. C.) 283.

#### *Documentary evidence.*

The use of documentary evidence as affected by the constitutional right of an accused to confront the witnesses against him is discussed in a North Carolina case, in which a marriage certificate made at the very time of the marriage was held admissible. (N. C.) 449.

#### *Forgery.*

Signing the names of others to a note, adding over one's own signature a statement of authority to sign for the others, is held not 25 L. R. A.

to constitute forgery, though the claim of authority is false. (La.) 591.

#### *Solicitation.*

The effect of solicitation as an attempt to commit a crime is considered at length in a Washington case, which denies that it constitutes such crime. (Wash.) 434.

#### *Instigation.*

Suggesting a scheme for larceny with the approval of the owner of the property prevents conviction for conspiracy to steal the property. (Colo.) 841.

But acting with thieves for the purpose of detecting and punishing them is held not to prevent their conviction of larceny. (Pa.) 849.

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### ACTION OR SUIT.

1. Replevin of a horse is not defeated on the ground that plaintiff has elected another remedy by a prior attachment of the property in an action of trover and judgment against one of the defendants therein, after which the horse was taken in execution, but, before satisfaction of the judgment, was retaken by one of the defendants in a replevin action which is still pending in another state, but to which the present defendant is not a party. *Miller v. Hyde* (Mass.) 42

2. A cause of action for breach of contract to pay for a machine, and one for tort for forcibly preventing the seiler from regaining possession of the machine, may properly be joined in one complaint which seeks merely to recover the purchase price of the machine. *Craft Refrigerating Mach. Co. v. Quinnpisac Brew. Co.* (Conn.) 856

3. A stranger to a contract between others, in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, —cannot recover upon it. *Jefferson v. Asch* (Minn.) 257

4. Remaindermen under a will devising lands to testator's daughter for life, with power to dispose of them by will amongst her sisters as she may think proper, and in case of her dying without a will the lands to revert to her sisters in equal proportions, take a vested interest, and cannot be made parties, by representation by the life tenant, to any judicial proceeding involving their interest in the land. *Williamson v. Jones* (W. Va.) 222

5. A corporation, instead of its stockholders, should sue for the avails of a secret agreement between a promoter and one from whom the corporation purchases property. *Yale Gas Stove Co. v. Wilcox* (Conn.) 90

6. A foreign corporation which is not doing business in the county at the time of the commencement of the suit cannot be sued there, 25 L. R. A.

even on a contract made or cause of action arising in the county while the corporation was doing business there, under Ala. Const. art. 14, providing that a foreign corporation having a known place of business and authorized agents in the state may be sued in any county "where it does business." *Sullivan v. Sullivan Timber Co.* (Ala.) 543

7. A foreign corporation is not doing business in a county so as to subject it to suit there, merely because it has an agent there who pays taxes on and has possession of an unemployed railroad and machinery, which were mere adjuncts or appurtenances to a mill which the corporation had formerly operated in that county, the operation of which has been suspended. *Id.*

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**APPEAL AND ERROR.**

1. An appeal, and not a writ of error, is the proper mode of review in an action for a penalty under a municipal ordinance, where the act is not made criminal by the general law of the state. *Sioux Falls v. Kirby* (S. D.) 621

2. A party cannot on appeal insist on error committed at his own instance, or contrary to his express stipulations upon which the lower court was induced to act. *Chicago & N. W. R. Co. v. West Chicago Park Comrs.* (Ill.) 800

3. Statutes and decisions of another state not put in evidence at the trial cannot be used for the first time at the argument of a case on report to the supreme judicial court of Massachusetts. *Kelley v. Kelley* (Mass.) 806

4. In the absence of a special exception signed and sealed by the judge, an objection that there is no evidence to support an instruction will not be considered on appeal. *Norfolk & W. R. Co. v. Hoover* (Md.) 710

5. Exceptions filed within the time allowed, which the opposite party asks to have disallowed, may be amended in the discretion of the presiding justice, with consent of the excepting party, although the time for filing exceptions has passed. *Hector v. Boston Electric-Light Co.* (Mass.) 554

6. A fee allowed to the master by the trial court will not be reduced by the appellate court, in the absence of evidence showing it to be clearly excessive. *Linn v. Chambersburg* (Pa.) 217

7. An unwarranted statement by counsel in argument as to the effect of evidence in the case will not cause reversal, if it was made with reference to an immaterial issue in the case. *Noble v. Mitchell* (Ala.) 238

8. The omission to allege or prove an offer to return benefits received under an agreement for a release is not prejudicial error on appeal, where the point was not made in the trial court and the benefits were accounted for in the judgment. *Girard v. St. Louis Car-Wheel Co.* (Mo.) 514

9. There can be no reversal of an order dismissing the suit because of plaintiff's refusal to comply with the direction of the court to elect upon which cause of action stated in his complaint he will proceed, although the direction is erroneous, since until reversed the direction is binding and as capable of enforcement as any other order, which may be by dismissal of the suit for disobedience. *Craft Refrigerating Mach. Co. v. Quinnipiac Brew. Co.* (Conn.) 856

10. Failure to state the law on an issue is not ground for reversal if no instruction on that question is requested. *Texas & P. R. Co. v. Gay* (Tex.) 52

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either the letter or the spirit of the Nebraska constitution. *State, Sayre, v. Moore* (Neb.) 774

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1. A fund that exists potentially, although it is not yet due, is subject to an equitable assignment of a portion of it, which will be operative as soon as the fund is acquired. *Warren v. Columbus First Nat. Bank* (Ill.) 746

2. A part of a debt or chose in action may be assigned in equity, creating a trust in favor of the assignee and an equitable lien upon the fund. 21

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A resolution of the Masonic Order denying membership to saloon keepers applies to existing members if they continue thereafter in that business. *Ellerbe v. Faust* (Mo.) 149

**ATTACHMENT.** See also **CONFLICT OF LAWS**, 7; **COURTS**, 5.

1. Attachment against the property of a partnership on the ground of nonresidence may be had, where the members of the firm reside out of the state, although the firm carries on business in the state, and the statute allows a partnership to be sued in the firm name and service to be made by leaving a copy of the summons at its usual place of business. *Byers v. Schlups* (Ohio) 649

2. Individual property of an innocent partner is not subject to attachment for a partnership debt fraudulently contracted by his copartner, under a general provision of the statute authorizing attachment for fraud of the debtor, where another provision expressly says that in a case for attachment against partners or joint creditors the writ shall issue against the property and effects of those brought within the statute. *Jafray v. Jennings* (Mich.) 645

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As affected by insolvency proceedings in other state. 821

**ATTAINDER.**

The provision of a state constitution disfranchising all persons who have voluntarily borne arms against the government of the United States or aided or abetted an attempted overthrow of the government, unless the disability has been removed by service and honorable discharge in the army, or by the legislature, is not invalid as a bill of attainder, in violation of U. S. Const. art. 1, § 10. *Boyd v. Mills* (Kan.) 496

**NOTES AND BRIEFS.**

Attainder; what is. 497

**ATTEMPT.** See ADULTERY.**ATTORNEYS.**

An attorney's lien for services rendered his client cannot be successfully asserted against money appropriated to such client by an act of the legislature, while such money is in the custody or under the control of the state treasurer. *State, Sayre, v. Moore* (Neb.) 774

**NOTES AND BRIEFS.**

Attorneys; lien of. 774

**AUDITOR.** See MANDAMUS.**BAILMENT.**

1. A library board of a city, which has statutory power to receive property by gift, grant, purchase, devise, bequest, "or otherwise," for the purpose of maintaining public libraries, art galleries, and museums, has power to receive a collection of coins as a loan from the owner, and become liable therefor as bailee. *Smith v. Minneapolis Library Bd.* (Minn.) 280

2. A resolution by the board of directors of a corporation which has become a bailee of property, to the effect that it will not be responsible in any manner for the safety of the property, will not, even if it is brought to the notice of the owner, relieve the corporation from liability for loss in case of its gross negligence. *Id.*

**BANKS.** See also CHECKS.

1. A check by one bank upon another, sent in payment of the collection of a draft, is not an equitable assignment of any portion of a general deposit on which it is drawn. *Akin v. Jones* (Tenn.) 523

2. A bank which receives a post-dated check upon itself for collection, under a promise to hold the proceeds subject to the check of the depositor, is liable to the latter where, when the bank opens on the day of the date of such check, the drawer has funds sufficient to discharge the debt, although at the closing hour on such day the account of the drawer is overdrawn. *Averell v. Washington Second Nat. Bank* (D. C. App.) 761

3. One who goes into a bank after business hours, and finds in a room used for the transaction of business after usual hours the paying teller of such bank, who is the only officer with whom he is acquainted, and deposits with such teller for collection a post-dated check upon such bank, upon the teller's promise to hold the proceeds subject to his check, the transaction being substantially in the presence of the cashier, though he is separated by a wire partition, is entitled to hold the bank liable, especially where such teller has, to the knowledge of the cashier, occasionally acted as receiving teller, and the depositor is not aware of any limitations upon his authority. *Id.*

4. The preference under state law of the debt of an insolvent national bank for a lawful deposit by a savings bank is not such a preference as is prohibited by U. S. Rev. Stat. §§ 5236, 5242, requiring a ratable distribution 25 L. R. A.

among creditors, and prohibiting preferences in contemplation of or after committing an act of insolvency. *Elmira Sav. Bank v. Davis* (N. Y.) 546

5. The equities and rights arising from express agreement, or implied from the nature of dealings between a national bank and a clearing house association or the other members thereof prior to the closing of the bank, must be preserved and enforced in settling its affairs by a receiver. *Yardley v. Philler* (U. C. App. 8d C.) 824

6. The appropriation on its own claims, by a clearing-house, after the closing of a national bank by an examiner, of money paid by other banks on a call by the clearing-house to take up drafts and checks on the insolvent bank, which they had surrendered to its clerk in due course of business, in an exchange at the clearing-house before the bank suspended, and which had been left there as security for a balance due from it to the clearing-house,—is not an unlawful preference, as the subsequent transactions do not rescind the exchange of securities made while the bank was doing business; and gives no right of action to the receiver of the bank against the clearing-house committee for the amount of the drafts and checks on other banks which it surrendered on the exchange. *Id.*

7. Sending a draft to a bank for collection, with instructions to remit in New York exchange, is equivalent to an agreement that the money collected may be used by the collecting bank, and precludes the claim that such proceeds are held in trust, where the bank fails before it has paid the collection. *Akin v. Jones* (Tenn.) 523

8. Payment to an assignee of an insolvent bank of overdrafts allowed by the bank, on the faith of which it had canceled drafts held by it for collection, cannot be regarded as payments of such previously canceled drafts so as to give the sender of them a right to such proceeds as a trust fund. *Id.*

9. Money deposited in a bank for payment to another person on his presentation of a warranty deed, with abstract showing good title to the land, for which the depositor takes a receipt reciting the purpose for which the money is left, constitutes a trust fund, and not assets of the bank which can pass to a receiver of the bank, although the bank on receipt of the money gave credit to the depositor, without his knowledge or consent, and mingled the money with that of the bank. *Kimmel v. Dickson* (S. D.) 809

**NOTES AND BRIEFS.****See also CLEARING-HOUSE BUSINESS.**

Banks; accepting something besides money from the bank as a discharge of drawer of check. 200

Exceptions to the prohibition of preferences by insolvent national banks; priority by reason of trust character of deposit; transfers by insolvent national banks. 546

Rights as to collections. 523

Trust in deposit. 810

Deposit of check on other depositor. 761

**BATHING RESORT.** See also MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.

1. A municipality upon which a statutory duty has been imposed of establishing and maintaining a bathing beach is not responsible for its safety and the safe use of it by those likely to have recourse to it, in the same manner as streets and highways, or even as parks and grounds kept for entertainment and amusement without profit, are to be rendered safe. *McGraw v. District of Columbia* (D. C. App.) 691

2. If a municipality required by statute to establish and maintain a free bathing beach is liable for its unsafe condition after the beach is opened, the detail of a policeman to preserve the peace and good order at such beach before the work of construction is completed, where boys and young men are in the habit of congregating and have congregated for many years, is not an opening of the beach to the public and an invitation to the public to use it. *Id.*

3. A municipal corporation required by statute to establish and maintain a free bathing beach, if liable for the condition of such beach, cannot be held responsible until it has completed the work of construction and thrown the beach open to the public for the uses contemplated. *Id.*

4. A municipality required by statute to establish and maintain a free bathing beach upon the margin of a river is not bound to warn the public against change in the bed of the stream, or to mark in any way the depth or relative depth of the water, so as to guard the ignorant bather from venturing too far. *Id.*

**BENEVOLENT SOCIETIES.** See also CONTEMPT, 2; INSURANCE, 11, NOTES AND BRIEFS; RECEIVERS, 4, 5.

1. The termination of membership in a Masonic lodge, which is in substance and effect an expulsion, although not so in form, forfeits membership in a Masonic mutual benefit association which not only provides that expulsion from the lodge shall work a forfeiture of membership in the association, but also makes it a requisite for membership that the applicant be a Mason in good standing. *El-lerbe v. Faust* (Mo.) 149

2. The title to the 20 per cent of the assessments levied by the Order of Iron Hall, which is retained by the local branches, as well as to the 80 per cent which is transmitted to the supreme sitting, is, under the laws of the order, in the supreme sitting. *Baldwin v. Hosmer* (Mich.) 789

3. Local branches of a secret benefit order cannot, when called upon to pay over assessments which they have collected under the laws of the order, and which by such laws belong to the supreme sitting, question the validity of the incorporation of the supreme sitting. *Id.*

**BILL OF ATTAINDER.** See AT-TAINDER.  
25 L. R. A.**BILLS AND NOTES.**

A provision for the payment of exchange in addition to principal and interest destroys the negotiability of an instrument. *Flagg v. Barnes County School Dist. No. 70* (N. D.) 363

**BONA FIDE PURCHASER.** See BONDS.**BONDS.** See also ESTOPPEL, 1.

1. The decision of a county clerk, whose duty it is to pass upon the question of title to a school site for which bonds are given, before registering and certifying the bonds, is final on that point, as against the district, in favor of a bona fide purchaser for value. *Flagg v. Barnes County School Dist. No. 70* (N. D.) 363

2. The consideration of bonds cannot be denied, as against a bona fide purchaser, where they were issued to pay claims which had been audited by a committee acting by authority of a statute. *Id.*

**NOTES AND BRIEFS**

Bonds; recitals in; negotiability of; bona fide purchasers. 364

**BUILDING AND LOAN ASSOCIATIONS.**

1. A nonborrowing member of a mutual building association cannot be allowed to bring an action to take judgment against the association, when there is no money in the treasury legally applicable to the payment of his claim, although he has complied with the prescribed conditions of withdrawal. *Hein-bokel v. National Savings Loan & B. Assn.* (Minn.) 215

2. A stockholder does not become a general creditor of a mutual building association by giving notice of withdrawal. *Id.*

**NOTES AND BRIEFS.**

Building and loan associations; rights of withdrawing members. 215

**BUILDINGS.** See also CONSTITUTIONAL LAW, 13.**NOTES AND BRIEFS.**

Buildings; restriction by ordinance. 621

**BY-LAWS.** See CORPORATIONS, 1, NOTES AND BRIEFS.**CABLE CAR.** See STREET RAILWAYS, 1.**CAPITAL.** See CONSTITUTIONAL LAW, 1.**CARRIERS.** See also ELEVATORS, 1; TRIAL, 8.

1. To constitute one a passenger on a train, the knowledge or consent of the carrier, or its agent in charge of the train, is essential, unless such person is rightfully on the train. *Woolsey v. Chicago, B. & Q. R. Co.* (Neb.) 79

2. A person riding on the locomotive of a freight train without the conductor's knowledge or consent, by agreement with the fire-

man to shovel coal for the privilege of riding, is not a passenger. *Id.*

3. A person injured by the slipping of a gang plank while attempting to cross it in entering a steamer to take passage is to be regarded as a passenger. *Rogers v. Kennebec Steamboat Co. (Me.)* 491

4. A railroad employee having a monthly ticket given him, which is good for more rides than are necessary in attending to his work, with the express privilege of using them for his own private interest or pleasure, is not, when passing over the road entirely for his own business or pleasure, an employé, but is a passenger, within Mass. Pub. Stat. chap. 112, § 212, creating a liability for injury to a passenger. *Doyle v. Fitchburg R. Co. (Mass.)* 157

5. Conditions on the back of a ticket cannot release the railroad from liability for the penalty given by Mass. Pub. Stat. chap. 112, § 212, to the widow and children and next of kin of a passenger injured by the gross negligence or carelessness of the servants of the company. *Id.*

6. A condition in a free pass, that the passenger will assume all risks of personal injury, is not against public policy. *Rogers v. Kennebec Steamboat Co. (Me.)* 491

7. A person traveling with a friend by invitation, knowing that they are going on a pass held by the latter, although not seeing the pass or knowing its contents, is bound by a condition thereon that passengers traveling upon it assume all risks of injury. *Id.*

8. A shipper while unloading his stock is within an exemption clause of the contract of transportation, by which he assumes the risk of personal injury, though the car has arrived at its destination, and the shipper has left the car for a short time, prior to the injury, and proceeded to a hotel, to get lanterns and assistants to aid him in unloading the car. *Meuer v. Chicago, M. & St. P. R. Co. (S. D.)* 81

9. A special contract for transporting a carload of livestock and emigrant movables, in which it is stipulated that the shipper shall be entitled to passage upon the same train to care for, feed, and water his stock, and load and unload the same, at his "own risk of personal injury from whatever cause,"—exonerates the railroad company from all liability for any injury to him while a passenger, not caused by the gross negligence, fraud, or willful wrong of the company or its servants. *Id.*

10. By the law of South Dakota, a common carrier of property or passengers may limit its liability by an express contract signed by the parties, except as to gross negligence, fraud, or willful wrong of such carrier or its servants. *Id.*

11. It is not negligence as matter of law to attempt to alight from a car at a pleasure resort station established by a street-railway company, on the side opposite to that prepared for the reception of passengers, if those in charge of the car have invited an alighting on such opposite side. *Pools v. Consolidated Street R. Co. (Mich.)* 744

12. That a car has not reached the usual stopping-place when a stop is made and a passenger attempts to alight will not render him guilty of negligence, if there was no warning not to alight, and from the surroundings a passenger might well have understood that the stop was made for that purpose. *Id.*

13. One who jumps from a locomotive on a freight train while it is running at a dangerous speed, because he is told by the fireman that he will be arrested if he is found thereon when the train stops, and who is not a passenger, but is riding on agreement with the fireman to shovel coal for the privilege of riding, is chargeable with negligence which will prevent any recovery for injuries received in jumping off. *Woolsey v. Chicago, B. & Q. R. Co. (Neb.)* 79

14. The purpose of a carrier to suppress competition does not make it unlawful to offer low rates when a rival vessel is loading to those only who will not ship anything by the latter. *Lough v. Outerbridge (N. Y.)* 674

15. Special freight rates for transportation by ship, which are too low to be profitable, and are offered by the carrier only at particular periods when a rival vessel is loading and on the single condition of the shipper's stipulation not to ship by the rival vessel, cannot be claimed by a shipper who refuses to make such stipulation, but he may be lawfully charged the ordinary reasonable rates for shipment during the same period in which the lower rates are given to those who comply with the condition. *Id.*

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## CERTIFICATES. See TRUSTS.

## CHARITIES.

1. An injury to an inmate of a hospital for the insane which is a purely eleemosynary institution, caused by the tortious or negligent acts of its managers or employés, will not create a liability against the institution for damages. *Downs v. Harper Hospital (Mich.)* 603

2. The fact that patients who are able to do so are required to pay for the privileges of a hospital will not of itself destroy its character as a charitable institution, or make it liable to such a patient for negligence or torts of its employés. *Id.*

3. A bequest to a church "to be used in solemn masses for the repose of my soul" is invalid. *Pestorazzi v. St. Joseph Roman Catholic Church (Ala.)* 860

# NOTES AND BRIEFS.

Charities; liability for torts of servants.	603
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**CHECKS.** See also **BANKS**, 1-3, **NOTES AND BRIEFS**; **EVIDENCE**, 20.

1. To hold the drawer of a check liable after a collecting bank has surrendered it to the drawee bank and taken for it the latter's check on a third bank, the utmost diligence to present the substituted check for payment must be exercised by the collecting bank. *Anderson v. Gill* (Md.) 200

2. The fact that the loss would have fallen on the depositor if a check held for collection had not been presented sooner than was necessary, where the bank failed before the time for collecting it expired, does not relieve the collecting bank of liability for the loss, if, having presented the check before such failure and accepted the drawee's check on another bank in payment, it delays presenting the latter until it is worthless because of the failure of its drawer. *Id.*

#### NOTES AND BRIEFS.

Check; as assignment of fund. 528

**CLEARING-HOUSE BUSINESS.** See also **BANKS**, 5, 6.

#### NOTES AND BRIEFS.

Clearing-house business; (a) origin and description; (b) rights and liabilities of clearing-houses; (c) clearing-house loan certificates; (d) clearing-house due bill; (e) presentation and payment through clearing house; (f) return of paper, not good after receiving it through clearing-house; (g) effect of clearing-house rules and customs; (h) agency of clearing-house members; (i) gold clearing-house; (j) country clearing-house of London; (k) miscellaneous. 824

**COASTING.** See **COURTS**, 2; **MUNICIPAL CORPORATIONS**, 3.

**COLLATERAL INHERITANCE TAX.** See **TAXES**.

**COMMERCE.** See also **TAXES**, 2-4.

1. The sale of lightning-rods constituting only a part of the original package in which they were brought from another state is not interstate commerce. *State v. Gorham* (N. C.) 810

2. A license tax on the business of putting up lightning-rods is not a tax on interstate commerce, by a person who puts up no rods except those which he sells and which are brought from another state, although he puts them up without extra charge. *Id.*

3. The doing of business, such as that of an express company, that constitutes interstate commerce, by a person who is also at the same time engaged in business of the same kind that constitutes state or local commerce, cannot be made a bar or exemption of the local or state commerce business from taxation or regulation by state authority. *Osborne v. State* (Fla.) 120

4. A statute expressly providing that all contracts of a corporation which has not paid the franchise tax shall be void cannot apply to sales of foreign corporations, through itinerant

agents, of commodities manufactured outside the state. *Coit v. Sutton* (Mich.) 819

#### NOTES AND BRIEFS.

Commerce; license taxes as affecting. 122, 811

**COMPOUNDING CRIME.** See **CONTRACTS**, 4.

**CONFLICT OF LAWS.** See also **CORPORATIONS**, 6.

1. Though the laws of a state do not have extraterritorial force as mere laws, nevertheless the general rule is that things done in one state in pursuance of the laws thereof are valid and binding in other states. *American Waterworks Co. v. Farmers' Loan & T. Co.* (Colo.) 338

2. A contract for the sale of goods, made by an order given by a married woman in North Carolina to a firm in Maryland, and its shipment of the goods in Maryland, is a Maryland, and not a North Carolina, contract. *Armstrong v. Best* (N. C.) 188

3. A contract for the purchase of goods, made in another state where it is valid, by a married woman resident in North Carolina, where the common-law disability of married women still obtains, and their promises under the policy of the state are void, and no power exists to proceed to judgment against them *in personam*,—will not be enforced in the latter state. *Id.*

4. An attachment of the property of a married woman, which is not allowed by state law in the case of its own citizens, will not be allowed to a nonresident creditor, although the debt was created in another state where the married woman resided and where the contract creating it was valid. *Ruhe v. Buck* (Mo.) 178

5. The spirit of comity does not require that a nonresident shall be allowed a remedy which is by the policy of the state law denied to its own citizens. *Id.*

6. A special contract between a railroad company and a shipper, for transporting a carload of livestock and emigrant movables to a point in another state, is to be interpreted according to the law of the state in which the contract was made. *Meuer v. Chicago, M. & St. P. R. Co.* (S. D.) 81

7. A sale to a resident by a nonresident, of notes against another nonresident, at a discount and with a guaranty against loss or expense in collection, which is made to avoid the insolvent law of the state where the other parties reside, will not give the transferee as an attaching creditor a position superior to that of his nonresident assignor, but his rights will be subject to such insolvent law. *Crispen v. Rogers* (N. H.) 821

8. A statute of a foreign country, providing that a cause of action for personal injuries shall be absolutely extinguished in one year, will not operate as a defense to a suit in the United States, where the injured person left such country before such statute became operative by the expiration of the year. *Canadian P. R. Co. v. Johnston* (C. C. App. 2d C.) 470



## NOTES AND BRIEFS.

Conflict of laws; enforceability of contracts of married women outside of state in which they are legally made:—contracts in relation to real estate situated where the action is brought; outside of state of domicile; the remedy applicable. 178

As to interstate transportation. 81

As to insolvency and attachment in other state. 821

**CONSPIRACY.** See also INJUNCTION, 9.

1. Persons cannot be convicted of conspiracy to commit larceny, if they merely adopt a scheme which is suggested to them by a detective and which has received the approval of the owner of the property. *Connor v. People* (Colo.) 841

2. A strike is not unlawful if it is merely a combination among employes having for its object their orderly withdrawal in large numbers or in a body from their employer's service, to accomplish some lawful purpose. *Arthur v. Oakes* (C. C. App. 7th C.) 414

3. Illegal combinations are not sanctioned in any degree by the Act of Congress of June 29, 1886, legalizing the incorporation of national trades unions. *Id.*

4. Employes of the receiver of a railroad may lawfully confer together upon the subject of a proposed reduction of wages, and, if not restrained by their contract, may withdraw in a body from the receiver's service because of such reduction, although they expect that such action will inconvenience the receiver and the public. *Id.*

**CONSTITUTIONAL LAW.**

As to impairing obligation of contracts, see CONTRACTS.

See also ATTAINDER; GOVERNOR; RAILROADS, 9; TAXES, 7, 8.

**Amendments.**

1. The declaration in a state constitution, that a certain city is the seat of government and shall so remain "until changed by law," does not withdraw this provision from the possibility of amendment, although the section itself provides for change by statute approved by the people. *Litermore v. Waite* (Cal.) 812

2. An amendment of the state constitution by changing the seat of government to another city on condition of a certain donation of land and money and an approval by certain officers of the site donated is not such an amendment as the legislature is authorized to submit to the vote of the people, since it would not upon adoption by the people become an effective part of the constitution without subsequent acts and the approval thereof by certain officers and the exercise of discretion by the commission. *Id.*

3. Publication of a proposed amendment two weeks only before election, instead of three months as required by Mont. Const. art. 19, § 9, is fatal to the amendment, as the provision is that the secretary of state "shall" cause the publishing for three months, and it

is also declared in another section that the provisions of the constitution are mandatory and prohibitory, unless by express words declared to be otherwise. *State, Woods, v. Tooker* (Mont.) 860

**Ex post facto.**

4. The disfranchisement of certain classes of persons by a constitutional provision is not a punishment for crime, and therefore does not make such provision an *ex post facto* law. *Boyd v. Mills* (Kan.) 486

**Due process.**

5. A railroad company is not deprived of its property without due process of law, or contrary to the law of the land, by a statute making such company liable for all fires caused and communicated from locomotives. *Matthews v. St. Louis & S. F. R. Co.* (Mo.) 161

**Equal protection.**

6. The equal protection of laws is not denied to railroad companies by a statute making them liable for fires set by engines without regard to negligence. *Id.*

7. Confining a statute for the protection of employes to street cars propelled by cable, steam, or electricity, does not make the act unconstitutional as an attempt at purely arbitrary classification. *State v. Hoskins* (Minn.) 759

**Police power.**

8. No natural right is contravened by making a railroad company liable without regard to negligence for fires set by locomotive engines, where experience has demonstrated the danger of fires from such sources. *Matthews v. St. Louis & S. F. R. Co.* (Mo.) 161

9. A statute compelling reasonable protection for the employes on electric, cable, or steam cars, except those on the rear platform, between November 1 and April 1 of each year, is within the police power. *State v. Hoskins* (Minn.) 759

**Regulation of business.**

10. The constitutional rights of citizens to engage in business are not violated by restricting insurance business to corporations. *Com. v. Vrooman* (Pa.) 250

11. A statute limiting the amount of toll which may be taken by a water-mill which does grinding for the public is not unconstitutional. *State v. Edwards* (Me.) 504

12. A contract to pay greater toll for grinding at a public mill than that fixed by statute is invalid and constitutes no defense for taking excessive tolls. *Id.*

**Property rights.**

13. An ordinance making the right of the owner of property to improve and use it dependent upon the decision of a city building inspector in respect to a permit, from which there is no appeal, is an unconstitutional interference with the rights of citizens. *Sioux Falls v. Kirby* (S. D.) 621

14. The right to transmit property at death free from a succession tax is not within the constitutional right of acquiring, possessing, and protecting property. *State v. Hamlin* (Me.) 632

## NOTES AND BRIEFS.

See also REFERENCE; TAXES.

Constitutionality of statute making railroad companies absolutely responsible for damages by fires set by them or for stock killed by them, irrespective of negligence:—fires; killing stock. 161

As to statutes to secure safety and comfort of employés. 759

Right to carry on business. 243, 250

Amendments of constitution. — 318

Police power; protection of health and morals of children. 795

## CONTEMPT.

1. A statute attempting to confer on county attorneys the power to commit witnesses for contempt on account of a refusal to be sworn or testify on an examination as to an alleged offense is unconstitutional, as the power is judicial in its nature. *Re Sims* (Kan.) 110

2. Contempt proceedings are not appropriate for the trial of issues involving the title to a fund raised by assessments upon the members of a benefit society, which is in the possession of the local branch from whose members it came, or to determine the validity of a lien alleged to have been acquired by garnishment proceedings against it. *Baldwin v. Hosmer* (Mich.) 789

## NOTES AND BRIEFS.

Contempt; judicial character of power to punish for. 110

## CONTRACTS. See also ACTION OR SUIT, 8.

1. Failure of the purchaser of a mare to have a test of her speed as compared with that of another one owned by him, made by the person and within the time agreed upon, because the mares were not in proper condition for the test, or to have the test made afterwards, will not relieve him from liability to pay an extra \$100 in case she is as fast as the other, on other proof of this fact. *Deyo v. Hammond* (Mich.) 719

2. An oral contract to adopt a child and make her an heir is made valid by part performance, where it has been carried out by assumption and continuance of the parental relation for ten years and until the death of the adopting parents. *Kofka v. Rosicky* (Neb.) 207

## Legality.

3. A contract to procure for a consideration testimony that will win a lawsuit is void as against public policy and as tending to impede the administration of justice. *Quirk v. Muller* (Mont.) 87

4. A contract the consideration of which, in whole or in part, is the suppression of a criminal prosecution, is without any legal efficacy either as a cause of action or as a defense to an action not founded on or arising out of the agreement. *Springfield F. & M. Ins. Co. v. Hull* (Ohio) 37

5. Neither party can have the aid of a

court to enforce rights under a contract which is opposed to public policy. *Yale Gas Store Co. v. Wilcox* (Conn.) 91

6. The illegality of an agreement by a corporation for the purchase of property, by which, to avoid the statutes and to defraud the public, a secret contract was made for the purchase of patents, will not defeat the right of the corporation to recover from a promoter of the corporation the avails of a secret agreement between him and the seller of the property. *Id.*

7. A contract duly executed between the proper officers of a school district and another person, by the terms of which said person is employed as a teacher in a public school in said district, is void under the North Dakota statute, where such person at the time of making the contract holds no certificate of authority to teach in the county where the district is located. *Hosmer v. Ransom County Sheldon School Dist. No. 2* (N. D.) 383

## Rescission.

8. The rule that a party who would rescind a contract must restore what he has received under it does not apply to contracts founded on an illegal consideration and which are void for that reason. *Springfield F. & M. Ins. Co. v. Hull* (Ohio) 37

9. The rule as to restoration on rescission of a contract is satisfied if the judgment sought will substantially restore the one party to the situation he was in when the agreement was made; as, when money paid by him is less than he justly owed the other party, and the same is credited and the action brought for the balance. *Id.*

## Impairing obligation.

10. A statute making a railroad company liable for damages caused by fire from a locomotive does not impair the obligation of a contract in its charter, which merely authorizes the use of steam or of animal power or mechanical power in operating the road. *Matthews v. St. Louis & S. F. R. Co.* (Mo.) 161

11. A contract between a street-railway company and a city to run cars of the best modern style and construction is not impaired by a statute making additional requirements in respect to the cars for the protection of employés. *State v. Hoskins* (Minn.) 759

## NOTES AND BRIEFS.

See also CONFLICT OF LAWS.

Contractual relations between school teacher and district. 393

Condition as to test. 719

Conditions of rescission; restitution. 38

## COPYRIGHT. See also EVIDENCE, 5, 6; INJUNCTION, 8, 4.

1. The compiler of a digest has no monopoly of the opinions, decisions, and syllabi prepared by the courts and judges, even though he has previously published them in copyrighted pamphlets. *West Pub. Co. v. Lawyers' Co-Op. Pub. Co.* (C. C. N. D. N. Y.) 441

2. A valid copyright may be had by one reporting judicial decisions, for his original work

published in connection with the opinions and syllabi prepared by the judge. *Id.*

3. Copyrighted headnotes suitable for use in a digest, prepared by a publisher of a series of reports and a digest, cannot be used by a subsequent compiler of a digest, either directly or by way of suggestion, to lighten his labors, except as a guide to verify the accuracy of his work or detect errors, omissions, or other faults. *Id.*

4. *Mala fides* cannot be imputed to the compiler of an annual digest of judicial decisions, in using copyrighted reports published during the year for the purpose of making such digest. *Id.*

#### NOTES AND BRIEFS.

Copyright; infringement of. 444

**CORPORATIONS.** See also ACTION OR SUIT, 5-7; CONSTITUTIONAL LAW, 10; CONTRACTS, 6; INSURANCE, 2; TAXES, 3-5.

1. Notice of the by-laws of a corporation restricting the right of any officer to make contracts of employment to a period less than one year is not chargeable to one who makes a contract for services to the corporation with a general manager of the company, who has been given absolute charge of its business at the place of contract. *Moyer v. East Shore Terminal Co.* (S. C.) 48

2. No offer of rescission is necessary to obtain an accounting by a corporation from a promoter who by his fraud has secretly received profits on property sold to the corporation. *Yale Gas-Stove Co. v. Wilcox* (Conn.) 91

3. One who organizes a corporation to purchase letters patent at a certain price, while he already has a secret agreement with the owner whereby he is to obtain from the latter a part of the avails of the sale, but who induces subscriptions to the stock by stating that he is putting his money into the enterprise upon precisely the same basis as the other stockholders, may be compelled to account to the corporation for the profits retained by him under his secret agreement. *Id.*

4. The mere insolvency of a corporation does not *eo instanti* deprive its directors and officers of power to dispose of the corporate property in good faith as payment or security of corporate debts, although the effect may be to give some creditors a preference over others. *Warren v. Columbus First Nat. Bank* (Ill.) 746

#### Foreign corporations.

See also COMMERCIAL, 4.

5. The charter alone of a foreign corporation, and not the general legislation of the state in which it was created, will have effect to limit its powers outside of that state. *Id.*

6. The New York statute prohibiting assignments or transfers by insolvent corporations has no extraterritorial force, and does not affect the validity of an assignment by an insolvent corporation, executed in Ohio, as a transfer of a fund in Illinois. *Id.*

7. A corporation is subject to the laws of the state or sovereignty under and by virtue of which it has been created; and these laws have a paramount influence over its corporate

powers, where it undertakes to exercise them. *American Waterworks Co. v. Farmers' Loan & T. Co.* (Colo.) 388

8. An officer of a foreign corporation cannot use its name to prosecute a writ of error against the objection of a receiver who has been appointed in the state where it was created, with an injunction upon the officers from continuing the business or using the name of the corporation for any purpose. *Id.*

#### NOTES AND BRIEFS.

Corporations; effect of corporate by-law as notice:—in general; as to member of corporation; as to lien on stock; as to the public generally. 48

Duties and liability of promoters to the corporation and its members:—duty of the promoter; sales by promoter to corporation; commissions; profits on options and profits on property bought for corporation; liability to corporation; liability to subscribers; duty to bondholders; character of promoter's liability; effect of promoter's fraud on corporation's right against subscriber; feigned subscription, waiver of fraud; how suit should be brought. 90

Franchise tax on. 135

Rights of foreign companies. 243

Foreign, right to exclude. 819

#### COSTS AND FEES.

Directing that all of a receiver's fees and expenses should be taxed as costs against the unsuccessful party to a suit, without fixing his compensation and in advance of a hearing on different items of his account, is improper. *Cutter v. Pollock* (N. D.) 877

#### COUNTIES. See also APPROPRIATIONS; DRAINS AND SEWERS.

The loan of the credit of a county, prohibited by N. D. Const. § 186, is provided for by a statute authorizing county bonds to cover the cost of drains in the county, and that assessments shall be made to create a sinking fund to reimburse the county. *Martin v. Tyler* (N. D.) 888

#### COURTS. See also JUDGMENT, 3; OFFICERS.

1. A finding of the legislature, recited in a statute, respecting disputed facts on which a claim is asserted against a board of education, will not estop the board from contesting the facts in court. *Marion Twp. Bd. of Edu. v. State, Lindsey* (Ohio) 770

2. The jurisdiction of the municipal court of the city of Wilmington, Delaware, in cases of public nuisance, extends to a case of coasting on the public streets, which is intrinsically a common nuisance, although not expressly declared to be so by any ordinance. *Wilmington v. Vandegrift* (Del.) 583

3. The right of an adjoining land owner to make a new bank for a navigable river which forms the boundary between two States, or by artificial structures to turn the water upon the lands upon the opposite side of the

river, is not a local question on which a federal court is bound by state decisions, but depends upon general principles of law. *Cairo, V. & O. R. Co. v. Brevoort* (C. O. D. Ind.) 527

4. A circuit court of the United States in Louisiana has no jurisdiction over property in Texas such as confers upon it power to appoint a receiver of a railroad in Texas which is the property of a corporation created by congress. *Texas & P. R. Co. v. Gay* (Tex.) 52

5. A sheriff's right to the possession of property under attachment is not lost by the subsequent appointment of a receiver. *State, Hunt, v. Chehalis County Super. Ct.* (Wash.) 854  
**Judges.**

6. The question of the disqualification of a judge by reason of a former relation of attorney and client is entirely distinct and independent of any question of present interest in the case, and of the payment of any fee or reward therein. *State, Ambler, v. Hocker* (Fla.) 114

7. A judge who, previous to his commission, has been an attorney in a case, is disqualified to adjudicate not only all matters arising in that identical case, but also all supplemental matters or proceedings had or taken to enforce, or to resist the enforcement of, any judgment or decree rendered in such case. *Id.*

8. A judge who, previous to his commission, was a solicitor of record for complainant in a chancery cause brought for the purpose of having receivers appointed for certain property, is disqualified from trying a claim interposed by said receivers to said property, when the same is levied upon under execution in favor of third parties. *Id.*

9. A judge who, previous to his commission, was an attorney of record in an attachment suit at the time of the levy of the writ of attachment upon certain property, is disqualified to try a claim interposed to said property, when the same is afterwards levied upon under an execution issued in the same suit. *Id.*

10. A member of a law firm which began a suit, using the name of such firm as attorneys for the plaintiff, is disqualified as a judge for trying a claim interposed to property levied upon by virtue of an execution issued in such main case, although the management of such suit may have been exclusively under the direction of the other member of such firm, and not within the knowledge of such judge. *Id.*

#### NOTES AND BRIEFS.

Courts; disqualification of judge by prior connection with the case:—(I.) statutory disqualification of judge from having been counsel in the case; (a) generally; (b) causes not identical; (c) parties not identical; (d) formal orders; (II.) disqualification, without regard to statute, from having been of counsel in the case; (III.) disqualification from having tried the case before. 114

**CRIMINAL LAW.** See also **ADULTERY**; **EVIDENCE**, 7, 9, 28.

1. A conviction of larceny will not be prevented by the fact that one of the supposed 25 L. R. A.

confederates in the plan had informed the police and the intended victim, and was acting with them for the purpose of detecting and punishing the guilty parties, if the latter had no knowledge of it and performed all the acts necessary to consummate the crime. *Cow. v. Hollister* (Pa.) 849

2. Active participation in planning a felonious taking of money, followed by an actual taking by a part of the confederates in pursuance of the plan, will warrant a conviction of larceny, although the accused was not present when the crime was actually committed. *Id.*

3. A fine of from \$50 to \$100 for each day that street cars are run in violation of law is not excessive, although a large aggregate of fines may be made by repeatedly committing the offense. *State v. Hoskins* (Minn.) 759

#### NOTES AND BRIEFS.

Criminal law; instigation or consent to crime for the purpose of detecting criminal as a defense to prosecution:—burglary; robbery; larceny; stealing slave; trading with slave; offering bribe; counterfeiting; receiving stolen goods; false pretenses; putting away forged instruments; obstructing railway track; conspiracy; selling obscene prints and lottery tickets; selling liquor; offenses against the mails. 841

Criminality of solicitation to crime which is not consummated:—(I.) how far punishable as assault; (II.) how far punishable as attempt; (III.) how far punishable as solicitation; charging solicitation slanderous; solicitation a crime in itself; solicitation to murder; solicitation to fight a duel; arson; larceny; assault; sexual crimes; avoidance of legal process; bribery; interference with witnesses; interference with jury. 434

**CUSTODY OF LAW.** See **COURTS**, 5.

**CUSTOM.** See **MASTER AND SERVANT**, 15.

**DAMAGES.** See also **SET-OFF**.

1. Damages for mental suffering cannot be recovered for failure to transmit and deliver a telegram. *Francis v. Western U. Tele. Co.* (Minn.) 406

2. The sum of \$8,000 is an excessive allowance for injuries resulting in the death, six or seven months later, of an unskilled laborer twenty-three years old, who, without any family to support, had saved nothing from his earnings,—especially when \$5,000 is the statutory limit of recovery for death resulting from injuries immediately. *O'Donnell v. Maine O. R. Co.* (Me.) 658

3. In trespass for cutting timber, against one who acted in the honest but mistaken belief that the trees were his, the measure of damages is their value in the woods from which they were taken, together with the injury incident to their removal. *Gaskins v. Davis* (N. C.) 813

4. The value of the lumber at the place of disposal, without any allowance for expenditure in wrongfully cutting and removing standing timber from the premises, is the measure of damages against a mortgagee in

possession for thus wrongfully wasting the premises after he had received all that was due him on his mortgage by conversion of personal property. *Whiting v. Adams* (Vt.) 598

#### NOTES AND BRIEFS.

Damages for mental anguish. 406

**DANCING.** See INFANTS, 1.

**DEATH.** See DAMAGES, 2; PRINCIPAL AND AGENT.

**DEFINITION.** See INSURANCE, 3.

### DESCENT AND DISTRIBUTION.

The murder of an intestate by one to whom the property would descend under the plain terms of the statute will not prevent the murderer from taking the inheritance. *Shellenberger v. Ransom* (Neb.) 564

### DISCOVERY AND INSPECTION.

An order for the physical examination of the plaintiff in an action for personal injuries, under N. Y. Laws 1893, chap. 721, amending N. Y. Code Civ. Proc. § 878, can be made only in connection with, or as a part of, an order for the examination of the party before trial and in conformity to the general provisions for such examinations; and the physical examination by surgeons cannot be authorized as an independent proceeding. *Lyon v. Manhattan R. Co.* (N. Y.) 403

#### NOTES AND BRIEFS.

Discovery; by physical examination before trial. 402

**DISFRANCHISEMENT.** See ATTAINDER.

**DISTRICT ATTORNEY.** See CONTEMPT, 1.

**DIVORCE.** See HUSBAND AND WIFE, 4, 5, NOTES AND BRIEFS.

### DOMICIL.

The constitutional provision against gaining a residence while confined in a public prison applies to a person committed to such prison, even if the commitment was irregular or illegal and was made upon his own application, notwithstanding the fact that he had no family and no home, and made the application for commitment to get a home and work in the prison. *Peoples v. Cady* (N. Y.) 399

### DOWER.

A woman cannot under the New York statutes enforce dower rights in land purchased with her husband's money and conveyed to a third person who has contracted in writing to permit the husband to receive all the benefit of and have full control over the property. *Phelps v. Phelps* (N. Y.) 635

#### NOTES AND BRIEFS.

Dower; in what property. 626  
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**DRAINS AND SEWERS.** See also COUNTIES; EMINENT DOMAIN, 4.

Creating a drain commission and providing for county bonds to pay for drains within a county, under special legislative authority, does not violate a constitutional provision that "the fiscal affairs" of the county shall be transacted by county commissioners. *Martin v. Tylor* (N. D.) 838

**DURESS.** See INSURANCE, 23, 24.

### EASEMENTS.

A way of access by water to land bordering on the sea is sufficient to prevent a right of way from necessity across land of the grantor which encloses it on the land side. *Kingsley v. Gouldsboro Land Improv. Co.* (Me.) 503

#### NOTES AND BRIEFS.

Easement; right of way by necessity. 503

### EJECTMENT.

An ouster which will sustain ejectment by the owner of the soil of a highway is not made by constructing a railroad thereon by permission of the municipal authorities. *Montgomery v. Santa Ana & W. R. Co.* (Cal.) 654

**ELECTION DISTRICTS.** See INJUNCTION, 2.

**ELECTIONS.** See MUNICIPAL CORPORATIONS, 4; VOTERS AND ELECTIONS.

**ELECTRICAL USES AND APPLIANCES.** See also EVIDENCE, 19; TRIAL, 8, 4.

1. Reasonable care to keep electric wires in a safe condition is due by an electric-light company to persons expressly or impliedly licensed to approach them in performing their duties with reference to other electric wires attached to structures of the electric-light company. *Ilingsworth v. Boston Electric-Light Co.* (Mass.) 553

2. The lack of reasonable care to keep electric-light wires insulated is not excused by reason of the fact that mere contact with such wires is not dangerous unless other conditions exist, in view of the circumstances likely to occur which may render the contact dangerous. *Id.*

3. An electric-light company allowing its standard for the support of wires on the roof of a building to be used by a telegraph and telephone company for its wires also does not thereby assume any duty to employees of the latter company in respect to the safe insulation of the electric-light wires over the roof of an adjoining building to which no wires of any kind are attached, and on which they have no right to go by reason of permission to use the standard on the former building. *Hector v. Boston Electric-Light Co.* (Mass.) 554

4. The liability of electric-light companies for injuries received from posts, wires, or other apparatus, is not affected by Mass. Stat. 1883, chap. 221, granting to such companies the

right to lay and maintain wires subject to municipal regulations. *Hector v. Boston Electric Light Co.* (Mass.) 554

**ELECTRIC RAILWAYS.** See **STREET RAILWAYS**, 8.

## ELEVATORS.

1. Passenger elevators are within the rule governing other carriers of passengers, which requires the highest degree of care. *Mitchell v. Markor* (C. C. App. 6th C.) 33

2. Reasonable opportunity must be given a passenger on entering an elevator to obtain a balance before a rapid and sudden start of the elevator is made. *Id.*

### NOTES AND BRIEFS.

Elevators; liability for injury to elevator passenger:—passenger elevators; freight elevators used by outside parties as passenger elevators. 33

## EMINENT DOMAIN.

1. A municipal corporation taking private property for public use is within the provision of N. D. Const. art. 1, § 14, requiring compensation to be "first made to or paid into court for the owner." *Martin v. Tyler* (N. D.) 839

2. The owner is not entitled to have compensation for property taken by a municipal corporation ascertained by a jury, under N. D. Const. art. 1, § 14, which mentions a jury only in the clause concerning the appropriation of property to the use of any corporation other than municipal. *Id.*

3. The provision that a warrant for damages in case of an unknown owner shall be deposited with the county auditor for his use violates a constitutional provision that compensation shall be first made to or paid into court for the owner. *Id.*

4. An order drawn by drain commissioners upon a drainage fund is not such a payment as will satisfy the constitutional provision that payment shall be first made on taking private property for public use. *Id.*

5. A railroad for transportation of passengers and freight on a street does not impose a new burden or servitude upon the owner of the soil, although he may be entitled to damages for injury to his right of access, or light and air. *Montgomery v. Santa Ana & W. R. Co.* (Cal.) 654

6. The public easement in a rural highway of which the fee is in the adjoining owner does not include the permanent and exclusive appropriation of any part of the highway by poles and wires of a telegraph and telephone company. *Eels v. American Teleph. & Teleg. Co.* (N. Y.) 640

7. The right of a water company in lands flowed by it under the exercise of eminent domain is something more than a mere easement, and includes the right of exclusive occupation, with all attendant riparian rights, for such time as the land is held under the charter. *Wright v. Woodcock* (Me.) 499

8. A deed by a railroad company of land purchased by it in fee simple for a right of way is not void until so declared in proceedings by 35 L. R. A.

the state, although the company has abandoned its purpose of using the land for a railroad. *Chamberlain v. Northeastern R. Co.* (S. C.) 139

9. Land is taken by purchase, and not by condemnation, when in pursuance of an agreement with the owner a decree is obtained for payment to him, and denying the alleged rights of other persons who have given notice not to pay him. *Id.*

### NOTES AND BRIEFS.

See also **RAILROADS**.

Eminent domain; easement of, not an appropriation; additional burden of poles and wires. 640

Additional burden of a railroad in street. 654

Constitutionality of provisions; compensation first made. 339

**EQUITY.** See also **HUSBAND AND WIFE**, 1, 2, **NOTES AND BRIEFS**.

1. The use as a tradename by a milk-dealer, of the name of a well-known ranch, cannot be protected in equity, where the milk which he sells is not from that ranch, even if it is of a superior quality. *Millbras v. Taylor* (Cal.) 193

2. Chancery has no jurisdiction to protect purely political rights, such as those in respect to public elections. *Fletcher v. Tuttle* (Ill.) 143

**ESCHEAT.** See **EMINENT DOMAIN**, 8.

**ESTOPPEL.** See also **BENEVOLENT SOCIETIES**, 8; **INSURANCE**, 11.

1. A recital or certificate in bonds as to facts which the person making it had authority to determine is conclusive in case of non-negotiable bonds, as well as those which are negotiable. *Flagg v. Barnes County School Dist. No. 70* (N. D.) 368

2. After twelve years' acquiescence, in common with the city and the general public, in the control of a street by park commissioners, a railroad company will not, in a proceeding by them to prevent its placing tracks in the street, be heard to question their authority on the ground that the consent of the city and abutting owners to their control was not technically regular. *Chicago & N. W. R. Co. v. West Chicago Park Comrs.* (Ill.) 800

3. One who causes his land to be sold for a purpose of his own, under a judicial proceeding which afterwards turns out to be void, and receives and retains the proceeds of sale, is estopped from questioning its validity, where he stands by and permits the purchaser to expend large sums of money in developing oil on the property. *Williamson v. Jones* (W. Va.) 223

4. No estoppel against showing that a receiver was really the agent of a railroad company because collusively appointed is created, so as to prevent charging the railroad company with his negligence, by making a contract of employment with him as receiver. *Texas & P. R. Co. v. Gay* (Tex.) 53

5. The plaintiff in an action of replevin is not estopped by a former attachment or levy,

where the other party has not changed his position or course of conduct relying thereon. *Miller v. Hyde* (Mass.) 42

#### NOTES AND BRIEFS.

Estoppel; by acquiescence. 300  
*In pais*; to whom applies. 223

**EVIDENCE.** See also **CONTRACTS**, 2.

#### Judicial notice.

1. Courts will not take judicial notice of the law of another state, but such law must be alleged and proved like any other fact in the case. *Meuer v. Chicago, M. & St. P. R. Co.* (S. D.) 81

#### Presumptions and burden of proof.

See also *infra*, 21-24, as to weight.

2. There is no presumption that the statutes or local laws or usages of another state are like those of the forum. *Kelley v. Kelley* (Mass.) 806

But see next case.

3. In the absence of proof, the law of another state governing a contract will be presumed to be the same as the law of the forum, and such contract will be interpreted accordingly. *Meuer v. Chicago, M. & St. P. R. Co.* (S. D.) 81

4. One seeking to enjoin a municipality from incurring further indebtedness on the ground that it would exceed the constitutional limit has the burden of showing that such would be the fact. *Linn v. Chambersburg* (Pa.) 217

5. Proof that a digest containing 88,000 paragraphs separate and distinct from each other contains 808 paragraphs which infringe the copyrights of another raises no presumption that the remainder of the work is an infringement. *West Pub. Co. v. Lawyers' Co-Op. Pub. Co.* (O. C. N. D. N. Y.) 441

6. Complainant in a suit for infringement of a copyright of a digest is not relieved of the burden of proving the infringement, by the fact that he proves part of his case and convinces the court that it will be difficult to prove the rest. *Id.*

#### Documentary.

7. The constitutional right of an accused to confront the witnesses against him does not exclude, in a criminal prosecution, the use of a certificate of marriage made at the very time of the marriage by the rabbi who performed the marriage ceremony. *State v. Behrman* (N. C.) 449

8. A writing on the back of a picture sent by a man to a woman, in which he calls himself her husband, is competent as an acknowledgment by him of their relations. *Id.*

9. A paper purporting to be an original certificate of marriage by a rabbi in a foreign country, verified by the signature and seal of the official minister, is admissible as *res gestæ* to prove the marriage, in a criminal prosecution, where one of the parties testifies that it was given to her at the time of the marriage. *Id.*

10. An alleged marriage contract which a woman testifies was signed by her and her al-

leged husband at the time of the marriage is admissible, not simply as corroborative, but as substantive, testimony of the marriage. *Id.*

11. The report of a committee of aldermen is admissible to show that the committee did in fact investigate matters not specifically committed to it, in order to show that a witness who is charged with slander in statements made to the committee was making relevant statements. *Blakeslee v. Carroll* (Conn.) 106

#### Opinions; explanations.

12. The opinion of a witness that trees, shrubs, plants, and vines are by their inherent nature not susceptible to insurance is not admissible, since the judge and jury are as competent in respect to that question as any witness. *Matthews v. St. Louis & S. W. R. Co.* (Mo.) 161

13. A person may be competent to testify as to the value of coins, although he has not bought and sold such articles up to the day of trial. *Smith v. Minneapolis Library Board* (Minn.) 280

14. All who claim to know the provisions of the unwritten laws of a foreign country are competent to explain them, under a statute allowing such laws to be proved as a fact by oral evidence. *State v. Behrman* (N. C.) 449

#### Relevancy.

15. Declarations by a testator after the execution of his will are not admissible to show due execution. *Walton v. Kendrick* (Mo.) 701

16. Common reputation in a family as to who are members of the family is admissible, when no superior evidence is attainable, or in connection with superior evidence to prove pedigree, legitimacy, and marriage. *Re Pickens's Estate* (Pa.) 477

17. Evidence of the general reputation for intemperance of a railroad brakeman is admissible on the question of the negligence of the master in employing or retaining him. *Norfolk & W. R. Co. v. Hoover* (Md.) 710

18. Evidence that, both before and after the occurrence of a fire which caused the injuries forming the basis of the suit, other fires had been started by sparks from defendant's engines at different places along the road, is admissible as tending to show that the fire in question was so caused. *Campbell v. Missouri P. R. Co.* (Mo.) 176

19. Evidence that a bill was rendered to and paid by the owner of electric wires attached to the frames of an electric light company, for a part of the expense of repairing a roof to which one of the frames is fastened, is admissible in an action by an employé of such owner against the light company for injuries caused by the bad condition of the light wires, as tending to show an agreement for a joint use of the frame, within the rule which requires of one owner care as to the condition of wires which employés of the other may be required to approach. *Illingsworth v. Boston Electric Light Co.* (Mass.) 552

20. Testimony that if a post-dated check had been presented during business hours it would not have been received as a deposit is not admissible upon the question whether or not, when presented after business hours, the bank

agreed to apply to its payment any funds standing to the drawer's credit when it became due, and hold them subject to the check of the holder. *Averell v. Washington Second Nat. Bank* (D. C. App.) 761

#### Weight.

21. The presumption in favor of marriage and the legitimacy of the offspring is strengthened by lapse of time, and after ninety years from the birth of issue cannot be overcome except by strong, direct, and satisfactory proof. *Re Pickens's Estate* (Pa.) 477

22. In the absence of evidence the mere denial of marriage will not defeat the presumption of the legitimacy of issue, or throw upon such issue the burden of proof of the marriage of the parents. *Id.*

23. The testimony of one who pretended to act with others in the commission of a crime, for the purpose of detecting and punishing them, is alone sufficient to sustain a conviction. *Com. v. Hollister* (Pa.) 349

24. Some evidence that a testator's will was signed in his presence as well as by his direction, so as to comply with the statute in a case where the testator does not affix his own signature, is furnished by proof that he stated to the witnesses whom he asked to attest it that it was his will and that he had it written, while it appears that he was fully acquainted with all the formalities required by the statute. *Walton v. Kendrick* (Mo.) 701

#### NOTES AND BRIEFS.

Evidence; proof of foreign laws:—(I.) in general; (II.) the unwritten or common law, *lex non scripta*; (III.) the written law, *lex scripta*; (a) of sister states; (b) of foreign countries; (IV.) modifications of common law; (V.) construction of written laws; (VI.) proof of practice under statutes; (VII.) state statutes; (VIII.) the English doctrine. 449

Of pedigree. 478

Of declarations of testator; of execution of will. 701

#### EXECUTORS AND ADMINISTRATORS.

1. Legacies are not extinguished by merger or otherwise, on account of the descent to the legatees of land which was devised to an ancestor, with a direction that he pay the legacies; but his personal estate must be used to pay the legacies like other debts of his estate. *Case v. Hall* (Ohio) 766

2. The death of one who, by acceptance of a devise, became personally liable to pay legacies as each legatee became of age, leaves his estate liable as an entirety for the payment of the legacies thereafter coming due. *Id.*

**EXEMPTION.** See INSURANCE, 10.

**EX POST FACTO.** See CONSTITUTIONAL LAW, 4.

**EXPRESS COMPANY.** See COMMERCE, 8; LICENSE.

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#### EXTRADITION.

1. The discharge of a person who has been surrendered by a foreign nation in extradition proceedings, on setting aside the indictment against him, does not prevent his arrest on a subsequent complaint for the same offense. *Re Foss* (Cal.) 593

2. The surrender as an act of comity, by a foreign nation, of a fugitive whose crime is not one for which a treaty requires his surrender, does not violate any right secured to him by the treaty, or entitle him to his discharge on habeas corpus. *Id.*

3. The existence of a treaty which provides for extradition for certain crimes does not deprive either nation of the power and right to exercise its own discretion to surrender criminals in cases not coming within the terms of the treaty. *Id.*

#### NOTES AND BRIEFS.

Extradition; effect upon prisoner's rights of necessity of amendment of charge upon which he was extradited:—in general; Canadian cases; the English rule. 693

#### FACTORS.

A factor's lien cannot attach to goods which never came into his actual possession, but were delivered or consigned by the owner directly to the purchasers, even if the factor's contract provided that the goods should be consigned to him for sale. *Warren v. Columbus First Nat. Bank* (Ill.) 746

#### NOTES AND BRIEFS.

Factors; lien of. 747

**FENCES.** See MASTER AND SERVANT, 6; RAILROADS, NOTES AND BRIEFS; TRIAL, 9.

**FINE.** See CRIMINAL LAW, 3.

**FIRES.** See CONSTITUTIONAL LAW, 5, 6, 8; EVIDENCE, 18; RAILROADS, 6-10.

**FOREIGN LAWS.** See EVIDENCE, NOTES AND BRIEFS.

**FORFEITURE.** See INSURANCE, 11-13.

#### FORGERY.

Signing the names of other persons to a note, with an *addendum* over the signer's own name stating that he is authorized to sign for the others, does not constitute forgery, although the claim of authority is entirely false. *State v. Taylor* (La.) 691

**FRAUD.** See CORPORATIONS, 3.

#### GARNISHMENT.

1. An insurance company may be garnished for the amount due after a loss, where payment is not conditional on anything which remains to be done. *Chipman v. Carroll* (Kan.) 305

2. Funds which have been garnished will not be directed to be turned over to an ancillary receiver until the rights of the plaintiffs in the



marriage proceedings have been disposed of. *Baldwin v. Hooper* (Mich.) 789

**GAS.** See MINES, NOTES AND BRIEFS.

## GOVERNOR.

Illness of the governor of the state, which disables him from performing the duties of his office, constitutes a vacancy during which the president of the senate shall exercise the powers of the office, under N. H. Const. art. 49, making such provision "whenever the chair of the governor shall become vacant by reason of his death, absence from the state, or otherwise." *Barnard v. Taggart* (N. H.) 618

### NOTES AND BRIEFS.

Governor; how far sickness constitutes a vacancy in office authorizing performance of the duties of the office by another. 618

**HEALTH.** See SCHOOLS, 3.

**HEIRS.** See DESCENT AND DISTRIBUTION.

**HIGHWAYS.** See also EJECTMENT; EMINENT DOMAIN, 5, 6; ESTOPPEL, 2; MUNICIPAL CORPORATIONS, 3; STREET RAILWAYS, 3.

1. Limiting the class of voters for road commissioners to resident freeholders, or extending it to include women and nonresidents, is not permitted where the constitution limits the class of voters for elective officers to male citizens. *State, Allison, v. Blake* (N. J. Sup.) 480

2. A standpipe or water-tower placed in a street is an unlawful use thereof, although the fee belongs to the city which erects the tower. *Barrows v. Sycamore* (Ill.) 535

3. Special injury is necessary to give a private right of action for the unlawful placing of a standpipe or water-tower in a street. *Id.*

### NOTES AND BRIEFS.

See also EMINENT DOMAIN.

Highways; lawfulness of use of; obstructions. 535, 539

**HOMESTEAD.** See also INSURANCE, 16.

Rooms in a house which stands on a homestead lot cannot be subjected to forced sale, on the ground that the homestead as to them has been abandoned, under the Texas constitution and laws, by which the exemption is placed on the lots, and not upon the improvements. *Ford v. Foregard* (Tex.) 155

**HOMICIDE.** See DESCENT AND DISTRIBUTION.

**HOSPITAL.** See CHARITIES, 1.

**HUSBAND AND WIFE.** See also CONFLICT OF LAWS, 3, 4; EVIDENCE, 7-10; JUDGMENT, 3.

1. A court of chancery has no authority to annul a marriage independently of statutory authority, on the ground merely that one of 25 L. R. A.

the parties was incapable of marrying because of a prior existing marriage. *Kelley v. Kelley* (Mass.) 806

2. A court of equity has no inherent jurisdiction to annul a marriage, in the absence of fraud or duress. *Ridgely v. Ridgely* (Md.) 800

3. The annulment of an invalid marriage cannot be decreed upon the application of a third party, on the ground that he is the lawful husband of the woman by a prior marriage which is still in force. *Id.*

4. Willful and malicious desertion constituting cause for divorce is not shown by the facts that the wife, if a passion roused by a single blow by her husband, leaves the house without intending to remain away permanently, and on reflection returns to find the home barred against her, and then seeks by violence to enter, for which she is prosecuted by the husband, and thereafter does not return. *Hardie v. Hardie* (Pa.) 697

5. A single blow given in anger by husband to wife is not necessarily cruel and barbarous treatment constituting cause for divorce. *Id.*

### NOTES AND BRIEFS.

Husband and wife; jurisdiction of chancery to decree nullity or dissolution of marriage:—in general; dicta; character of proceeding. 800

## ICE.

Ice formed on water flowing land which has been taken in condemnation proceedings by a water-supply company belongs to the water company, and not to the owner of the fee. *Wright v. Woodcock* (Me.) 499

### NOTES AND BRIEFS.

Ice; rights in. 499

**INCOMPETENT PERSONS.** See CHARITIES, 1.

**INDEPENDENT CONTRACTOR.** See MASTER AND SERVANT, 3.

**INFANTS.** See also INTOXICATING LIQUORS; NEGLIGENCE, 1; RAILROADS, 4; STREET RAILWAYS, 2, 3; TRIAL, 7.

1. The prohibition by N. Y. Pen. Code, § 293, of the exhibition, as a dancer or in theatrical performances, of a girl under fourteen, applies to all public exhibitions or shows, and not merely to exhibitions which offend against morals or decency or endanger life or limb. *People v. Ewer* (N. Y.) 794

2. A statute prohibiting the employment or exhibition of girls under fourteen years of age as dancers or in theatrical exhibitions is not invalid as taking away from parents the right to employ their children in any lawful occupation; but is an exercise of the power of the State as *parens patrie*, to protect the physical, mental, and moral welfare of children. *Id.*

3. An application by a grandmother to compel the sending of her grandchildren to

visit her, where by reason of disagreement between her and their father—her son in law—he has refused to send them, but is willing she should come to visit them, is outside the jurisdiction of a court, even if there might be cases of downright wrong and inhumanity which would demand judicial intervention to the extent of dismissing the father from his trust as tutor. *Re Reiss's Succession* (La.) 798

4. A minor leasing rooms for a year while attending college is bound, on the ground that the lodging is a necessary, only to pay for the time he continues to occupy them, and may terminate the lease at any time. *Gregory v. Lee* (Conn.) 618

#### NOTES AND BRIEFS.

See also RAILROADS.

Infants; power to appoint agents. 209

Contracts for necessities; lease of lodgings. 618

Protection of health and morals of. 795

#### INJUNCTION.

1. An injunction against using state moneys to build a state institution, such as a branch insane asylum, elsewhere than at the seat of government, cannot be granted merely on the ground that the constitution requires its location at the capital, where it does not appear that the cost to the state will be any greater at one place than the other. *State, Taylor v. Penoyer* (Or.) 862

2. An injunction cannot be granted to prevent the giving of election notices, or the certifying of nominees for districts created by an apportionment act, on the ground that such act is unconstitutional, since the rights involved are purely political and enforceable only at law. *Fletcher v. Tritle* (Ill.) 148

3. The publication of a digest of judicial decisions will not be enjoined on proof that less than 1 per cent of the number of paragraphs therein infringe the copyrights of another publisher, as such infringing paragraphs can readily be separated from the remainder of the book. *West Pub. Co. v. Lawyers' Co-Op. Pub. Co.* (C. C. N. D. N. Y.) 441

4. The doctrine of confusion of goods is not applicable to a suit to enjoin the publication of a digest of judicial decisions as an infringement of a copyright, where there is no connection between the pirated paragraphs and those which are the result of original and honest labor. *Id.*

#### Against employees.

5. Trade unions are not prohibited by an injunction against illegal combinations of workmen. *Arthur v. Oakes* (O. C. App. 7th C.) 414

6. Injunction is a proper remedy to restrain threatened acts of employes of a railroad receiver, which would inflict irreparable loss upon the property and seriously prejudice the interests of the public involved in the regular continuous operation of the road. *Id.*

7. Equity will not enjoin employes of a receiver of a railroad from quitting his service, although the effect of such action will be to

cripple the property or prevent or hinder the operation of the road. *Id.*

8. Employes of the receiver of a railroad may be enjoined from combining and conspiring to quit his service, with the object and intent of crippling the property in his custody, or embarrassing the operation of the railroad. *Id.*

9. Equity will enjoin any combination or conspiracy among the employes of the receiver of a railroad, which has for its object and intent the physical injury of the property in the receiver's possession, or actual interference with the regular continuous operation by him of the railroad. *Id.*

10. Employes of a receiver of a railroad may be enjoined from disabling rolling-stock or other property in the receiver's possession, from interfering with its possession or obstructing its management, and from using force, intimidation, threats, or other wrongful methods against the receiver, his agents, or employes, or persons seeking employment. *Id.*

#### NOTES AND BRIEFS.

Injunction; to protect political rights. 143

Against interference with railroad receivers; against strikes. 415

Against violation of law or unconstitutional act. 862

INSANE PERSONS. See CHARITIES, 1.

INSOLVENCY. See also BANKS, 4-9.

1. An insolvent debtor may pay or secure one creditor in preference to another, in the absence of statutory restrictions. *Outler v. Pollock* (N. D.) 377

2. A statute prohibiting preferences in an assignment for the benefit of creditors is not violated by the execution of chattel mortgages covering substantially all of the debtor's property to secure only a portion of his creditors, even if the debtor knew that the consequence would be to prevent his continuing business, and the mortgagees at once took possession and commenced foreclosure. *Id.*

#### NOTES AND BRIEFS.

Insolvency; what constitutes an assignment; chattel mortgage. 377

Order or draft in contemplation of. 747

INSURANCE. See also EVIDENCE, 12; GARNISHMENT, 1.

#### Companies and agents.

1. Persons seeking to transact insurance business may be subjected by the state to reasonable regulations. *State v. Stone* (Mo.) 243

2. The legislature may lawfully confine insurance business to corporations. *Com. v. Vrooman* (Pa.) 250

3. Persons writing insurance with individual liability of each for a certain part of the whole undertaking are not a "company" within the meaning of Pa. Act May 1, 1876, § 47, declaring it to be a misdemeanor to act as an agent for a foreign insurance company without a certificate of authority from the state. *Com v. Reinahl* (Pa.) 247

4. Provisions of a statute imposing a penalty upon one who acts as insurance agent for a principal who has not acquired a certificate of permission to transact business should not be disregarded, so far as they are made to apply to agents of individuals, because the statutes requiring a certificate and regulating the procedure for procuring it apply only to "companies," if such statutes are made by subsequent ones applicable to individuals and all their essential provisions can be complied with by individuals. *State v. Stone* (Mo.) 243

5. A statute making one acting for an unlicensed foreign company, corporation, association, or partnership transacting insurance business in the state, personally liable for the amount of the policy, and imposing a penalty upon him, is separable and valid so far as it applies to the agents of corporations. *Noble v. Mitchell* (Ala.) 238

6. Compliance with the terms of the policy as to proofs of loss and time for bringing suit is not necessary to authorize recovery under a statute making an agent acting for an unlicensed foreign company personally liable for the amount of loss. *Id.*

7. The fact that insurance solicitors placed a risk through brokers in another state without knowing what company took it will not relieve them from liability under the provisions of a statute authorizing recovery of the loss from persons who act as agents of unlicensed foreign companies. *Id.*

#### Title and incumbrances.

8. A mere paper transfer called a bill of sale, without consideration and without delivery of possession of the property, does not constitute a change of title or an incumbrance within the meaning of an insurance policy containing conditions as to title and incumbrances, even if it was intended to defraud creditors. *Forward v. Continental Ins. Co.* (N. Y.) 687

9. Knowledge of an agent with power to solicit insurance, collect premiums, and deliver policies, of the existence of a bill of sale of property insured, takes such instrument out of the operation of a condition as to title and incumbrances in a policy which at his discretion he fills up and delivers. *Id.*

#### Wager policy.

10. A life insurance policy payable to the son of the insured is not a wager policy, where the first premium was paid by the insured and the others by the son, who had general charge of the business of the insured and forwarded them in her behalf. *Heinlein v. Imperial L. Ins. Co.* (Mich.) 627

#### Assessments; forfeiture.

11. Payments of assessments in a benefit association after forfeiture of membership, but in ignorance of that fact, do not estop the member from denying his liability to pay subsequent assessments. *Ellerbe v. Faust* (Mo.) 149

12. A life insurance policy is not forfeited by failure to pay an assessment which became due after the surrender of the policy had been improperly procured by the company. *Heinlein v. Imperial L. Ins. Co.* (Mich.) 627

13. Instructions by an insurance company  
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that premiums must be paid at the office, and that due notice will be given of the day when due, will prevent forfeiture for nonpayment unless notice has been given. *Id.*

#### Rights in proceeds.

14. A railroad company is not entitled to any part of the insurance contracted for and collected by the owner of property destroyed by a fire communicated from a railroad locomotive, although the railroad company is given by statute an insurable interest in such property, with the right to insure it for its own protection. *Matthews v. St. Louis & S. F. R. Co.* (Mo.) 161

#### Mortgagee's rights.

15. A mortgagee has an equitable lien on the proceeds of an insurance policy taken by the mortgagor in his own name, and not assigned to the mortgagee or in any way made payable to him, where there is an agreement between them that the mortgagor shall keep the premises insured for the mortgagee's benefit. *Chipman v. Carroll* (Kan.) 805

16. Insurance money is not exempt, on the ground that the insured property constituted a homestead, from an equitable lien of a mortgagee for whose benefit the mortgagor is bound to insure the property, but takes the insurance, instead, in his own name. *Id.*

17. A conveyance of property which avoids insurance as to the owner does not defeat the rights of a mortgagee, under a provision that his interest shall not be invalidated by any act or neglect of the mortgagor or owner. *Phoenix Ins. Co. v. Omaha Loan & T. Co.* (Neb.) 879

18. The failure of a mortgagee to give notice to the insurer of a conveyance of the property, as required by the policy, will not defeat his right to the insurance, in the absence of any provision that the policy shall be void for that cause. *Id.*

19. A mortgagee to whom an insurance policy is payable does not lose the right to collect the insurance by a transfer of the mortgage, with a guaranty of its payment and without assigning the policy, although the assignee of the mortgage may be a proper party plaintiff. *Id.*

20. A provision that a mortgagee's interest in a policy of insurance shall not be "invalidated" by any act of the owner means that it shall not be injuriously impaired or affected thereby, and prevents the reduction of his recovery on account of other insurance taken without his knowledge, by reason of a provision that the insurer shall be liable only in the proportion that the sum insured by the policy bears to the whole amount of insurance issued to or held by any party or parties having an insurable interest. *Eddy v. London Assur. Corp.* (N. Y.) 686

21. Invalid insurance taken by the owner of property in violation of a policy cannot be reckoned in determining the recovery of a mortgagee, where the policy provides that his interest shall not be invalidated by any act of the owner, although it provides generally that the insurer shall be liable only for its proportion of the loss according to the whole amount

of insurance on the property, whether valid or not. *Eddy v. London Assur. Corp.* (N. Y.) 686

22. A mortgagee may properly proceed to judgment and sale in a foreclosure suit which was pending when a loss by fire occurred, unless payment of his mortgage debt is made, under a policy stipulating that his interest in the insurance shall not be invalidated by foreclosure, although it also provides for subrogation of the insurer to his rights under the mortgage, with a proviso that it shall not impair his right to recover the full amount of his claim. *Id.*

#### Surrender by duress.

23. A life insurance policy surrendered on return of the premiums paid will be revived where the surrender was procured during the illness of the insured, by false assertions that it was a wager policy and threats of litigation unless it were surrendered. *Heinlein v. Imperial L. Ins. Co.* (Mich.) 637

24. Where a person is induced by threats of a groundless prosecution to accept a less sum than is justly owing to him on a policy of fire insurance, in satisfaction of his claim, and to surrender the same, he may maintain an action on the policy for the balance due, without returning or tendering back the money so received. *Springfield F. & M. Ins. Co. v. Hull* (Ohio) 87

#### Procedure to recover.

25. The stipulations of a policy, which relate to the procedure merely, after the occurrence of a loss, are to be reasonably, and not rigidly, construed. *Paltrovitch v. Phanix Ins. Co.* (N. Y.) 198

26. By rejecting a certificate of a notary respecting a loss, on the ground that there is a nearer notary whose certificate should be given, but without giving his name or address, an insurance company may be regarded as not desiring a further certificate, and as waiving a condition requiring the certificate of the nearest notary,—especially where the certificate furnished is kept twenty-three days without objection. *Id.*

#### NOTES AND BRIEFS.

Insurance; effect of expulsion from society to destroy right to insurance connected therewith:—suits on benefit certificate; damages. 149

Restrictions on insurance by unincorporated associations or individuals; Lloyds associations. 288

Rights of mortgagee to benefit of insurance taken in name of mortgagor:—rights of mortgagee in absence of contract; where there is a contract or covenant to insure; who may maintain an action for the proceeds. 305

Right to take life insurance for benefit of stranger; in general; speculative policies; existence of insurable interest; payment of premiums; the Texas doctrine. 637

Rights given by the attachment of a mortgage slip to an insurance policy:—in general; rights of mortgagee; rights of mortgagor and his grantees; the subrogation clause; the pro-rating clause. 679

By agents of foreign companies. 248, 249  
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Certificate of notary or magistrate as to loss. 139

Rights of mortgagee after forfeiture of mortgagor's right. 679, 686

Change of title by bill of sale without delivery of possession. 637

#### INTOXICATION. See also NEGLIGENCE, 2.

An ordinance forbidding unmarried minors to enter any bar room unless as agent or servant is not void, unreasonable, or inconsistent with a statute which makes it unlawful to sell or give intoxicating liquors to such persons. *State v. Austin* (N. C.) 233

#### JOINT CREDITORS AND DEBTORS. See LIMITATION OF ACTIONS, 1.

JUDGE. See COURTS, 6-10, NOTES AND BRIEFS; OFFICERS.

#### JUDGMENT.

1. A judgment on a mortgage does not, before any sale or conveyance, extinguish the debt so as to prevent the mortgagee from claiming the proceeds of insurance on the mortgaged property. *Chipman v. Carroll* (Kan.) 306

2. Proceeding upon some erroneous legal theory applied to the facts will not, under N. Y. Code Civ. Proc. § 1207, defeat plaintiff's right to such relief as the facts may warrant if it is consistent with the complaint and embraced within the issue. *Cassagne v. Morris* (N. Y.) 670

3. The assumption of a court of general jurisdiction in another state, of the exercise of jurisdiction to annul a marriage on the ground of a prior existing marriage of one of the parties, and a dismissal of the complaint for failure to prosecute the suit, with a judgment for alimony and costs in favor of the defendant, which jurisdiction must depend on statute,—is not sufficient to create a presumption that such jurisdiction existed. *Kelley v. Kelley* (Mass.) 806

4. Absence of service of process in the original suit may be shown in defense of a suit upon a judgment procured in another state, although service is recited as a fact in the record upon which the judgment is based. *Price v. Scherif* (Pa.) 688

#### NOTES AND BRIEFS.

Judgment; of other state; contesting jurisdiction. 699

As to what conclusive. 300

JURISDICTION. See HUSBAND AND WIFE, NOTES AND BRIEFS.

JURY. See REFERENCE, NOTES AND BRIEFS.

LABOR ORGANIZATIONS. See INJUNCTION, 5.

LAKE. See WATERS, 3, NOTES AND BRIEFS.

LARCENY. See CRIMINAL LAW, 1, 2.

**LAW OF PLACE.** See CONFLICT OF LAWS.

**LAW REPORTS.** See COPYRIGHT.

**LEGACIES.** See EXECUTORS AND ADMINISTRATORS; WILLS.

**LEGISLATURE.** See COURTS, 1.

**LEVEL.** See WATERS, 1.

**LIBEL AND SLANDER.**

1. The mere fact that words uttered by a witness were not in response to questions does not avoid the privilege, if they were spoken in respect to pertinent and relevant matters, although statements officiously volunteered might be evidence of express malice. *Blakeslee v. Carroll* (Conn.) 106

2. Testimony under oath before a committee of aldermen investigating charges against the city board of public works is not absolutely privileged. *Id.*

3. A citizen is privileged in going before a committee of aldermen investigating charges against city officials, and in good faith giving such information as he may have touching the matter under investigation. *Id.*

4. Pertinent and relevant testimony of a witness before a committee of aldermen having power to compel testimony is within a conditional privilege of the witness, although the committee, appointed to investigate certain charges against the board of public works, had extended the scope of its investigation to other charges against the board, and the evidence was given in respect to these. *Id.*

#### NOTES AND BRIEFS.

Libel and slander; privilege of witnesses as to statements. 106

**LIBRARY.** See BAILMENT, 1.

**LICENSE.** See also COMMERCE, 2.

A license fee of \$200 for doing express business in a city of 15,000 inhabitants is not shown to be prohibitory or destructive of the business of express companies, even if it be that any judicial action could be based on such a showing. *Osborne v. State* (Fla.) 120

**LIENS.** See ATTORNEYS; FACTORS.

**LIGHTNING RODS.** See COMMERCE, 1, 2.

**LIMITATION OF ACTIONS.** See also CONFLICT OF LAWS, 8.

1. A partial payment by one of two parties jointly and severally liable upon a promissory note will not suspend the running of the statute in favor of the other. *Cowhick v. Shingle Wyo.* 608

2. Fraudulent concealment of a cause of action takes the case out of the bar of the statute of limitations, unless plaintiff's failure to discover the facts is due to his negligence. *Texas & P. R. Co. v. Gay* (Tex.) 52

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#### NOTES AND BRIEFS.

Limitation of action; suspension of suit by payment by one party. 608

**LLOYDS.** See INSURANCE, 3, NOTES AND BRIEFS.

**LOGS.** See TROVER, 2.

**LOOKOUT.** See RAILROADS, 1.

**MANDAMUS.**

It is not the duty of the auditor to examine and adjust an appropriation by the legislature in the nature of a gift or donation to a designated county for the expenses of a murder trial, under Neb. Const. art. 9, § 9, making it the duty of the legislature to provide by law that all claims upon the treasurer shall be examined and adjusted by the auditor and approved by the secretary of state before any warrant for the amount allowed shall be drawn; but his only duty is the ministerial one of issuing a warrant for such appropriation; and mandamus lies to compel its issuance. *State, Sayre, v. Moore* (Neb.) 774

**MARRIAGE.** See HUSBAND AND WIFE, NOTES AND BRIEFS.

**MASONS.** See ASSOCIATIONS; BENEVOLENT SOCIETIES, 1.

**MASSES.** See CHARITIES, 3; WILLS, NOTES AND BRIEFS.

**MASTER AND SERVANT.** See also CHARITIES, 1, 2; CONSTITUTIONAL LAW, 7, 9; PROXIMATE CAUSE; TRIAL, 9, 10.

1. For negligence in respect to acts which the duty of the master to the servant requires to be performed, the master is liable if injury results to the employé, without regard to the rank or title of the agent whom he has entrusted with its performance. *Hankins v. New York, L. E. & W. R. Co.* (N. Y.) 396

2. The master's knowledge of the bad reputation for intemperance of a person employed as brakeman on a train is not necessary to render him liable for injuries caused by the brakeman's unfitness, if he was negligent in not knowing of such reputation. *Norfolk & W. R. Co. v. Hoover* (Md.) 710

3. The work of raising a party-wall is neither dangerous nor extraordinary in itself, so as to make the person for whom it is done liable for negligence of an independent contractor in doing the work. *Neyus v. Becker* (N. Y.) 687

4. Employés of a contractor engaged in taking earth away from cars for a consignee, who, to facilitate the work, dump the earth from the car on request of the railroad crew, are not volunteers so as to preclude recovery from the railroad company for injury by the tipping over of a car, due to defects therein and to improper loading. *O'Donnell v. Maine C. R. Co.* (Me.) 658

5. One assisting the servants of another to facilitate his own business or that of another is not their fellow servant. *Id.*

**Railroad employes.**

6. A railroad company is liable to an employé for failure to keep its fence in repair as required by statute, if he is injured, without his fault, in consequence thereof by collision of a train on which he is employed, with an animal upon the track. *Dickson v. Omaha & St. L. R. Co.* (Mo.) 820

7. The negligence of the conductor of a construction train in leaving open a switch which a rule of the company makes it his duty to attend to in person is the negligence of a fellow servant of a fireman on a passenger train who is injured in consequence of the open switch. *St. Louis, I. M. & S. R. Co. v. Needham* (C. C. App. 8th C.) 888

8. A railroad engineer is not negligent in remaining on his engine after the front pair of small wheels under the engine is derailed and he has reversed his engine and put on air brakes, even if this is not the safest and most prudent course. *Dickson v. Omaha & St. L. R. Co.* (Mo.) 820

9. Disobedience by an engineer of a rule requiring a train to be kept under control and prepared to stop in case the track is obstructed does not affect the liability of the company for his death caused by a collision with an animal on the track, where the road was not fenced as required by law, if the most diligent care and careful control of the engine could not have prevented the collision after the danger appeared. *Id.*

10. The duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master which cannot be delegated to a servant so as to bring negligence in respect to it within the rule as to fellow servants. *St. Louis, I. M. & S. R. Co. v. Needham* (C. C. App. 8th C.) 888

11. A train dispatcher who controls and directs the movements of trains is not the fellow servant of a fireman on a passenger train employed by the same company. *Little Rock & M. R. Co. v. Barry* (Ark.) 886

12. A train dispatcher in sending special telegraph orders for the movement of trains, which are entirely controlled by such orders because they are behind time, is not a fellow servant of the fireman on one of such trains, but is, in respect to such duty, acting as the master, as his *alter ego*. *Hankins v. New York, L. E. & W. R. Co.* (N. Y.) 896

18. A train dispatcher with power to employ and discharge flagmen and brakemen, and having general charge of the trainmen of one division and movement of trains thereon, but without power to employ engine-men and firemen,—is the fellow servant of an engine-man who is injured in consequence of the train dispatcher's negligence in sending incompetent or unfit brakemen with the train. *Norfolk & W. R. Co. v. Hoover* (Md.) 710

14. The conductor of a freight train, having exclusive control thereof in relation to other employes acting under him on the train directing its movements, occupies the position of a vice-principal toward a brakeman injured by such conductor's suddenly ordering the train to start while the brakeman is in a posi-

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tion of danger. *Canadian P. R. Co. v. Johnston* (C. C. App. 2d C.) 470

**Mining employes.**

15. A custom which imposes on another employé the work of posting and propping the roof of a coal mine cannot exonerate a miner from the duty imposed on him by statute to do this, in order to shift the risk undertaken by himself over on his employer. *Consolidated Coal & Min. Co. v. Floyd* (Ohio) 848

16. An experienced miner knowing the danger of working in a room insufficiently propped, who continues to work therein without complaint after knowing the incompetency of a persons employed to prop it, assumes the risk. *Id.*

17. A coal mine, being a place in which conditions are constantly changing, is not a place furnished by the master for employes, within the spirit of those decisions which deny the right of the master to delegate to a servant the duty of providing a safe place for his employes. *Id.*

**NOTES AND BRIEFS.****See also CHARITIES; CONSTITUTIONAL LAW; RAILROADS.**

Master and servant; train dispatcher and telegraph operator as fellow servant of trainmen:—(I.) general doctrine; (II.) special principles against the relation; (III.) train dispatcher; (a) not a fellow servant; (b) a fellow servant; (IV.) telegraph operator; (a) not a fellow servant; (b) a fellow servant. 896

Liability of master for injuries caused to one servant by the incompetency of a fellow servant:—(1) employment generally; (2) retention in employ; (3) incompetency through use of liquor; (4) pleading incompetency; (5) evidence; (a) generally; (b) specific acts; (c) notice to company; (d) burden of proof. 719

Statutory regulations for the protection and safety of workmen in mines:—(I.) props; (II.) cage and signals; (III.) shafts and fences; (IV.) escape and ventilation shafts; (V.) miscellaneous. 843

Relation of servant riding on train. 157

Who are fellow servants. 896

Volunteers injured by servants; aiding servants to facilitate own business. 659

Vice-principal a fellow servant. 470, 834

**MAXIMS. See also STATUTES, NOTES AND BRIEFS.**

1. Damnum absque injuria. *Barrocas v. Sycamore* (Ill.) 535

2. Expressio unius est exclusio alterius. *Re Foss* (Cal.) 588

3. He who comes into equity must come with clean hands. *Yale Gas-Stove Co. v. Wilcox* (Conn.) 91

4. Index animi sermo. *Shellenberger v. Ransom* (Neb.) 564

5. Sic utere tuo ut non alienum laedas. *Smith v. Norfolk & S. R. Co.* (N. C.) 287  
*Matthews v. St. Louis & S. F. R. Co.* (Mo.) 161

**MERGER. See EXECUTORS AND ADMINISTRATORS, 1.**

**MILLS.** See CONSTITUTIONAL LAW, 11, 12.

**MINES.** See also MASTER AND SERVANT, 15-17.

Petroleum or mineral oil in place is a part of the realty and of the inheritance. *Williamson v. Jones* (W. Va.) 222

#### NOTES AND BRIEFS.

Mines; nature of property in mineral oil or gas;—natural gas; petroleum; right to drill through coal of another owner; nature of interest in leases. 222

**MORTGAGE.** See also INSOLVENCY, 2; INSURANCE, 15-22; JUDGMENT, 1.

#### NOTES AND BRIEFS.

See also INSURANCE.

Mortgage; rights under common-law mortgage; mortgage in possession; conversion of timber by mortgagee. 599

**MUNICIPAL CORPORATIONS.** See also BATHING RESORT; CONSTITUTIONAL LAW, 13; EMINENT DOMAIN, 1, 2; EVIDENCE, 4; PARLIAMENTARY LAW.

1. Territory containing nearly 35 square miles, the greater part of which consists of wild lands and about 150 cultivated farms, including several postoffices, 8 railroad stations, and 17 platted tracts which are in no way connected, and some of which are entirely uninhabited, while the most populous has only about 20 families, cannot become an incorporated village under a statute authorizing the incorporation of a platted tract and "lands adjacent." *State, Childs, v. Minnetonka* (Minn.) 755

2. "Lands adjacent" to a district platted into lots and blocks, which may be included in an incorporated village under Minn. Laws 1885, chap. 145, can include only those lands which lie so near the center or nucleus of population on the platted lands as to be somewhat suburban in their character and to have some community of interest with the platted portion in the maintenance of a village government, and cannot include large tracts of rural territory, which have no natural connection with any village and no adaptability to village purposes. *Id.*

3. The neglect of the city police to abate and suppress such a nuisance as coasting upon the public streets of a city does not make the city liable for damage done to a traveler on the street by one engaged in coasting. *Wilmington v. Vandegrift* (Del.) 588

4. A municipality may manufacture and supply electricity for municipal purposes and for the use and benefit of such of its inhabitants as wish to use and are willing to pay for it at reasonable rates. *Linn v. Chambersburg* (Pa.) 217

#### NOTES AND BRIEFS.

See also BUILDINGS.

Municipal corporations; physical characteristics necessary to municipal organization. 755

Liability for coasting on street. 589

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Liability as to bathing resort. 691

Power to operate electric-light plant. 220

**NATIONAL BANK.** See BANKS, 4-6.

**NATURAL GAS.** See MINES, NOTES AND BRIEFS.

**NEGLIGENCE.** See also MASTER AND SERVANT, 8; RAILROADS, 4, 5; STREET RAILWAYS, 1; TRIAL, 7, 8.

1. The negligence of a parent in permitting an infant to wander upon a railroad track will not be imputed to it so as to preclude a recovery by it for an injury there received. *Bot-toms v. Seaboard & R. R. Co.* (N. C.) 784

2. One who has voluntarily disabled himself by reason of intoxication is held to the same degree of care and prudence for his safety that is required of a sober person. *Smith v. Norfolk & S. R. Co.* (N. C.) 287

3. The rule of contributory negligence is simply a means of determining whether the plaintiff's negligence is a remote or proximate cause of the injury. *Id.*

4. If the injury could have been prevented by the exercise of reasonable care and prudence on the part of the defendant after plaintiff's negligence occurred, contributory negligence is not a defense. *Id.*

#### NOTES AND BRIEFS.

See also RAILROADS; STREET RAILWAYS.

Negligence; as to unsafe premises; as to trespassers. 554

**NEWSPAPERS.** See PARLIAMENTARY LAW.

**NOTARY.** See INSURANCE, 26.

**NOTICE.** See CORPORATIONS, 1, NOTES AND BRIEFS; INSURANCE, 18, 19.

**NUISANCES.** See COURTS, 2.

**OFFER.** See REWARD.

**OFFICERS.** See also GOVERNOR, NOTES AND BRIEFS.

A justice is not personally liable for ordering the exclusion of spectators from his courtroom, and the actual removal of a person by an officer under his direction, where he acts in the mistaken belief that the case is one which he is justified in conducting with closed doors. *Williamson v. Lacy* (Me.) 506

**OIL.** See MINES, NOTES AND BRIEFS; WASTE.

**PARENT AND CHILD.** See also CONTRACTS, 2; INFANTS.

#### NOTES AND BRIEFS.

Parent and child; contract of adoption. 207

**PARK COMMISSIONERS.** See ESTOPPEL, 2.

**PARLIAMENTARY LAW.**

A tie vote on which the mayor may give a casting vote for each of two official newspapers to be chosen is presented by a vote of twelve aldermen and in which three newspapers receive four votes each, where the charter provides that two shall be chosen, but that each alderman shall vote for one only, and a general charter provision gives the mayor a casting vote in case of a tie. *Wooster v. Mullins* (Conn.) 694

**NOTES AND BRIEFS.**

Parliamentary law; as to casting vote. 694

**PARTNERSHIP.** See ATTACHMENT, NOTES AND BRIEFS.

**PARTY-WALL.**

Carrying up a party-wall for a three story building, as contemplated by the contract under which it was built, although the other party has erected a building only two stories high, does not make the owner of the new building an insurer against injuries which may result to his neighbor's property, or render him liable for a falling of the wall without any negligence on his part. *Negus v. Becker* (N.Y.) 687

**NOTES AND BRIEFS.**

Party-wall; liability for damages caused by raising. 668

**PASS.** See CARRIERS, 6, 7.

**PAYMENT.** See EMINENT DOMAIN, 4.

**PENALTY.** See INSURANCE, 4.

**PHYSICAL EXAMINATION.** See DISCOVERY AND INSPECTION, NOTES AND BRIEFS.

**PLEADING.** See also JUDGMENT, 2.

1. The mere conclusion of the pleader that a standpipe or water-tower is liable to blow over or burst is not a sufficient averment of special damages. *Barrows v. Sycamore* (Ill.) 585

2. An allegation that a standpipe obstructs the light to a building is a sufficient allegation of special injury to the owner. *Id.*

3. A single count is sufficient in an action in which the relief sought is merely the recovery of the purchase price of a machine, although two causes of action are relied upon to sustain the recovery,—one for breach of contract in failing to pay the purchase price, and the other in tort for forcibly preventing the seller from regaining possession of the machine. *Craft Refrigerating Mach. Co. v. Quinpiac Brew. Co.* (Conn.) 856

4. A reply to the plea of a release, that it was obtained by fraud, may be sufficient in an action at law without resorting to equity to cancel the document. *Girard v. St. Louis Car-Wheel Co.* (Mo.) 514

5. A recovery for injury by fire set out by a locomotive, without proof of negligence, will 25 L. R. A.

not be prevented where the statute authorizes such recovery, by the mere fact that negligence is alleged in the petition. *Campbell v. Missouri P. R. Co.* (Mo.) 175

**NOTES AND BRIEFS.**

Pleadings; sufficiency on demurrer. 383

**PLEDGE AND COLLATERAL SECURITY.**

1. Delivery of the property pledged to the creditor, or to a third person to hold possession for the creditor, is indispensable to perfect a contract of pledge; and when delivered to the third person he must of course know of the trust and accept the obligation it imposes. *Re Lanau's Succession* (La.) 577

2. The possession of securities sufficient to create a pledge is not shown by placing them in a bank box which, with the key, is given to the debtor's clerk for the purpose of depositing the box in a bank and delivering possession thereof to the creditor in pursuance of a promise of a pledge, although the creditor is notified of this deposit and of the clerk's instructions to deliver the securities when called for, where they remain in the bank uncalled for until the death of the debtor. *Id.*

**NOTES AND BRIEFS.**

How far pledge may be effectual, of which the pledgor's agent is made depositary. 577

**POLITICAL RIGHTS.** See also EQUITY, 2.

**NOTES AND BRIEFS.**

Political rights; chancery jurisdiction to protect. 143

**PRESUMPTION.** See EVIDENCE.

**PRINCIPAL AND AGENT.** See also INSURANCE, 4-7, 9.

The death of the employer terminates the right of his clerk to deliver securities under instructions to deliver them to a creditor as a pledge. *Re Lanau's Succession* (La.) 577

**PRISON.** See DOMICIL.

**PROHIBITION.**

1. An agreement of counsel that a justice of the peace is an aged man not to be affected to his disadvantage by the result of the proceeding will not prevent a writ of prohibition against unlawful proceedings in his court from issuing against him as well as the party and his counsel. *Bullard v. Thorpe* (Vt.) 605

2. A writ of prohibition will issue against actions brought before a justice of the peace by splitting up an entire cause of action so as to make the amount claimed in each too small to permit an appeal, where relief has been denied by the justice, leaving no other remedy. *Id.*

**PROMOTERS.** See CORPORATIONS, 2, 4, NOTES AND BRIEFS.



## PROXIMATE CAUSE.

Collision of a train with an animal on the track, which derails the front pair of small wheels under the engine, is the proximate cause of injury to the engineer, who, after reversing his engine and applying an air brake, goes out on the running board to the steam chest and is killed by the derailing of the engine as it strikes a switch less than 1,000 feet from the point of collision. *Dickson v. Omaha & St. L. R. Co.* (Mo.) 820

**QUO WARRANTO.** See TRIAL, 1.

## RAILROADS.

As Carriers, see CARRIERS.

See also CONSTITUTIONAL LAW, 5, 6, 8; CONTRACTS, 10; EMINENT DOMAIN, 5, 8; INJUNCTION, 6-10; INSURANCE, 14; MASTER AND SERVANT, 6-18; NEGLIGENCE, 1; PLEADING, 5; RECEIVERS, 2, 8.

1. The duty of the engineer of a railroad train to keep a vigilant lookout on the track in order to discover and avoid any obstructions that may be encountered thereon is enforceable in favor of helpless persons upon the track between crossings, when it can be exercised consistently with giving the attention to the engine necessary to its safe and proper management. *Smith v. Norfolk & S. R. Co.* (N. C.) 287

2. Failure by an engineer to exercise ordinary care to discover persons on the track in time to avoid injuring them is not such willful and wanton negligence as to exclude the defense of contributory negligence in case a person so situated is injured. *Id.*

3. Failure of an engineer to stop a train, which is due merely to its lack of proper equipment, where he was guilty of no negligence after discovering the danger, will not preclude the defense of contributory negligence, where an intoxicated person is on the track and struck by the train. *Id.*

4. A child twenty-two months old cannot be charged with negligence for straying upon a railroad track. *Bottoms v. Seaboard & R. R. Co.* (N. C.) 784

5. A railroad company is liable for injuring a child of tender years upon its track, if, consistent with the attention demanded by the engine, its danger could have been discovered in time to avoid the injury by stopping the train. *Id.*

### Fires.

See also CONSTITUTIONAL LAW, 6, 8.

6. Absolute liability, and not merely a prima facie liability, is created for fires set by locomotives, under Mo. Rev. Stat. 1889, § 2615, declaring that each railroad corporation "shall be responsible" in such cases. *Matthews v. St. Louis & S. F. R. Co.* (Mo.) 161

7. Allowing weeds to grow on one's premises cannot be held to be contributory negligence which will defeat the liability of a railroad company for a fire communicated from a locomotive,—especially under a statute which makes the railroad company an insurer against fires thus caused. *Id.*

8. Including in damages for condemnation

an allowance for the danger of fire by operation of a railroad will not prevent the owner of property from recovering for its loss by subsequent fire communicated from the railroad locomotives, as the original damages were compensation for the depreciation to the value of the property. *Id.*

9. There is no constitutional objection against making a railroad company absolutely liable for the injury caused by fire set out by its locomotives along the line of its road. *Campbell v. Missouri P. R. Co.* (Mo.) 176

10. A statute making railroad companies responsible "to every person or corporation whose property may be injured or destroyed" by fire set out by their locomotives will not be limited by construction to embrace only insurable property, although the companies are given by the statute an insurable interest in the property for the destruction of which they may be liable. *Id.*

### Waters.

11. A railroad company in bridging a stream must provide a sufficient water way for the passage of the water, including the supersubundant water which flows into and down the stream in times of ordinary floods. *Cairo, V. & O. R. Co. v. Brevoort* (O. C. D. Ind.) 527

12. The easement of a railroad company under a deed conveying the same estate which could have been acquired under condemnation proceedings prevents the construction by the owner of the fee of levees on a river bank, which would change the natural condition of a river over which the road runs, in time of ordinary floods, thereby causing injury to the railroad approach and track, or rendering the company liable for injuries to other persons by water impeded by the bridge. *Id.*

## NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Validity of sale of real estate by railroad corporation. 189

Duty to maintain lookout on railroad trains:—failure to maintain lookout at crossings; lookout for persons on track; general; party on track in city; trespassers; employé on track; injuries to passenger; stock; the law in Tennessee. 287

Obligation of railroad company to employes as to fencing track; statutory duty to fence; liability in absence of statute. 820

Care required of railroad companies to prevent injuring small children upon the track:—(I.) duty of railroads to fence against children; (II.) duty to discover child on track; (III.) lookout for children; (IV.) negligence after discovery; (V.) failure to give signal; (VI.) speed; (VII.) city; (VIII.) foot caught; (IX.) sudden appearance of child; (X.) projecting timber or car; (XI.) gross negligence. 784

**RECEIVERS.** See also BANKS, 9; CONSPIRACY, 4; CORPORATIONS, 8; COSTS AND FEES; COURTS, 4, 5; ESTOPPEL, 4; GARNISHMENT, 2; INJUNCTION, 5-10.

1. A statute declaring that no receiver shall be appointed on petition of the owner of the property is but a legislative declaration of the

rule of equity. *Texas & P. R. Co. v. Gay* (Tex.) 52

2. A person appointed receiver of a railroad by a court without jurisdiction, if permitted by the railroad company to take possession and operate the road, is merely the agent of the company, which is liable for his negligence. *Id.*

3. A railroad receiver appointed by collusion of the parties to the suit is no more than an agent or superintendent of the railroad company, for whose acts the company is liable, although the law would not have made the company liable for his acts if he had been lawfully appointed. *Id.*

4. An ancillary receiver may be appointed by the Michigan chancery court to aid the receiver appointed for a benefit society by the courts of the state of its residence, in collecting assessments located in Michigan and which belong to the order. *Baldwin v. Hosmer* (Mich.) 739

5. Local branches of a foreign benefit society which has become insolvent cannot refuse to turn over assessments in their hands to an ancillary receiver appointed to aid the foreign receiver in collecting in the assets, to be by him transmitted to the foreign receiver for distribution in the discretion of the court, if such disposition appears to be proper and consistent with affording due protection to the citizens of the state. *Id.*

#### NOTES AND BRIEFS.

Receiver; right to property in hands of sheriff. 354

**REFERENCE.** See also APPEAL AND ERROR, 6.

Long accounts in a counterclaim in an action on contract, where plaintiff's claim is disputed, will not justify compulsory reference, under the provision of the New York constitution for "trial by jury in all cases in which it has heretofore been used in the colony of New York," since the practice in the Colony permitted a set-off only with plea of payment, which admitted plaintiff's claim, and the provision in the colonial act of Dec. 31, 1768, for reference of an action involving a "long account either on one side or the other," was applicable to a counterclaim only when plaintiff's cause of action was not disputed. *Stock v. Colorado Fuel & I. Co.* (N. Y.) 67

#### NOTES AND BRIEFS.

Reference; compulsory reference as denial of the constitutional right to trial by jury:—(I.) the United States Constitution; (II.) where the right existed prior to the state constitution; (III.) state statute no infringement of constitutional right; (IV.) equitable account; (V.) constitution violated; (VI.) action at law; (VII.) state constitution. 67

**RELEASE.** See PLEADING, 4.

**REMAINDER.** See ACTION OR SUIT, 4; TAXES, 10.  
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**REPLEVIN.** See also ACTION OR SUIT, 1; ESTOPPEL, 5.

#### NOTES AND BRIEFS.

Replevin; barred by prior judgment in trover. 43

**RES GESTÆ.** See EVIDENCE, 9.

**RESUME.** For resumé of contents of book. see p. 865

#### REWARD.

An offer of reward for the detection of a criminal, although unlimited as to time and never withdrawn, is merely a proposal which if not accepted by performance within a reasonable time is conclusively presumed by law to be revoked. *Mitchell v. Abbott* (Me.) 503

#### NOTES AND BRIEFS.

Reward; offer of. 504

**ROOMS.** See HOMESTEAD.

**SALE.** See CONTRACTS, 1; TIMBER.

**SCHOOLS.** See also CONTRACTS, 7.

1. A school commissioner whose authority is not confined to one school district, but extends to many of them, with power of superintendence and control, is to be classed with the town and county officers within a constitutional provision as to the election of officers restricting the franchise to male citizens. *Re Gage* (N. Y.) 731

2. The subsequent procurement of a certificate by a teacher who was not legally authorized to teach at the time of making a contract will not make the contract valid so as to entitle him to recover for breach of it by discharge. *Hosmer v. Ransom County Sheldon School Dist. No. 2* (N. D.) 333

3. A school board has power to adopt reasonable health regulations for the benefit of pupils and the general public. *Duffield v. Williamsport School Dist.* (Pa.) 153

4. A school board has the right to exclude from the schools those who do not comply with a regulation of the city authorities and the school board requiring a certificate of vaccination as a condition of attendance. *Id.*

#### NOTES AND BRIEFS.

Schools; competency of teacher. 333

Right to vote in school elections. 731

**SET-OFF.** See also REFERENCE.

The enhanced value given to logs cut wrongfully, but in good faith, by their removal to a place where the true owner recaptures them, belongs to him, and cannot be recouped against the damages assessed against the trespasser in an action for other logs cut with them, but not recaptured. *Gaskins v. Davis* (N. C.) 813

**SOLICITATION.** See ADULTERY; CRIMINAL LAW, NOTES AND BRIEFS.

#### SPECIFIC PERFORMANCE

1. Specific performance is a matter of discretion in the court, which withholds or grants relief according to the circumstances of each

particular case, where the general rules and principles governing the court do not furnish any exact measure of justice between the parties. *Kofka v. Rosicky* (Neb.) 207

2. Specific performance of a parol contract will be enforced by a court of equity where one party has wholly, and the other partly, performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has wholly performed it. *Id.*

#### NOTES AND BRIEFS.

Specific performance; discretion as to granting; certainty of contract. 207

**STANDPIPE.** See HIGHWAYS, 2, 3.

**STATE INSTITUTIONS.** See INJUNCTION, 1.

**STATUTES.** See also INJUNCTION, 2.

1. Statutes should be so construed as to give effect to the intention of the legislature; and if a statute is plain and unambiguous there is no room for construction or interpretation. *Shollenberger v. Ransom* (Neb.) 564

2. A penal statute should not be construed strictly for the mere purpose of defeating it, when its intent is plain. *State v. Stone* (Mo.) 243

3. The known judicial construction of a statute by courts of another state is deemed to be adopted by the legislature when it adopts such statute. *Matthews v. St. Louis & S. P. R. Co.* (Mo.) 161

4. The title "An act to provide for constructing and maintaining drains" is sufficient to cover provisions for appointment of a commission, with specified powers, to provide for levying assessments for the cost of the drains, and the issuance of county bonds to meet expenses, and create a sinking fund to pay the bonds. *Martin v. Tyler* (N. D.) 838

5. The failure of a provision for compensation, in a statute creating a drain commission and providing for construction of drains, is fatal to the entire statute, where it appears that the remainder would be incapable of enforcement. *Id.*

6. A statute requiring voters to be sworn as to their inability to read English before allowing a person to mark their ballots for them is mandatory, and not merely directory, in respect to the oath. *Ellis, Reynolds, v. May* (Mich.) 325

#### NOTES AND BRIEFS.

Statutes; how far statutes will be regarded as having abrogated the maxim that one cannot profit by his own wrong:—divorce statutes; statutes of limitation; statutes against foreign corporations; statute compelling railroad company to carry baggage free; statutes avoiding auction sales when duty unpaid; statute of frauds; (a) rule of construction; (b) prevention of reduction to writing; (c) fraudulent omission of part of the agreement; (d) preventing a will; (e) the rule at law; statute providing for discharge in bankruptcy; statute imposing liability for negligence; statutes giving dower; estoppel generally; Nebraska decisions. 564

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**STREET RAILWAYS.** See also CONSTITUTIONAL LAW, 7, 9; CONTRACTS, 11; CRIMINAL LAW, 8; TRIAL, 5-7.

1. It is not necessarily negligent for a cable car to follow after a buggy which is seen upon the track, when running slowly enough so that it can be stopped in time to avoid a collision. *Hicks v. Citizens' R. Co.* (Mo.) 508

2. The presumption that a person seen on a street-car track will leave it before a street car reaches him cannot be indulged in when a child of tender years is seen on the track. *Wallace v. City & S. R. Co.* (Or.) 663

3. The law demands greater vigilance and care in running an electric street-car over a public street-crossing which is much frequented by children going to and returning from school, at a time when they may reasonably be expected to be using the crossing, than is demanded at other places. *Id.*

#### NOTES AND BRIEFS.

Street railways; duty imposed on street-railroad companies to avoid injuring children on the track:—(I.) care required of employes; (a) lookout; (b) speed; (II.) negligence defined; (a) lookout; (b) speed; (III.) negligence a question for the jury; (a) lookout; (b) speed. 663

Injuries by street-car collision with vehicles or horses:—horses or vehicles caught in dangerous places; injuries at street crossings; crossing the track at places other than streets; injury received in turning out; lookout; right of way. 508

**STRIKE.** See CONSPIRACY, 2; INJUNCTION, 7, 8, NOTES AND BRIEFS.

**SUCCESSION TAX.** See CONSTITUTIONAL LAW, 14.

**TAXES.** See also CONSTITUTIONAL LAW, 14.

1. A statute commissioning a township board of education to levy a tax to pay a claim for which no legal or moral obligation exists is unconstitutional. *Marion Twp. Bd. of Edu. v. State, Lindsey* (Ohio) 770

2. A state cannot tax or regulate interstate commerce, or make the payment of a tax or the taking out of a license a condition precedent to carrying interstate or foreign commerce. *Osborne v. State* (Fla.) 120

3. The Federal Constitution will not invalidate a state tax imposed upon domestic corporations generally because it incidentally affects one that, under state authority, is engaging in interstate commerce. *State, Lumberville Delaware Bridge Co. v. State Bd. of Assessors* (N. J. Sup.) 184

4. A yearly license fee may be exacted by the state from which the right is derived, without reference to the nature of the business a corporation may be authorized to carry on, and is constitutional, even as against a domestic corporation created for the purpose of engaging in commerce with an adjoining state. *Id.*

5. The right of corporate existence is, in its nature, indivisible; and the fee therefor must necessarily be an entirety, no matter

where the property of the company is situated or how its capital is invested or employed. *State, Lumberville Delaware Bridge Co. v. State Bd. of Assessors* (N. J. Sup.) 184

#### Succession tax.

6. A tax upon the right or privilege of taking property by will or descent under the law of the state is an excise or duty, and not a tax on property. *State v. Hamlin* (Me.) 682

7. A succession duty or tax on the transmission of decedents' estates is not within the scope of Me. Const. art. 9, §§ 7, 8, providing for the valuation of property and that it shall be "apportioned and assessed equally, according to the value thereof," as these sections contemplate only the general, constantly occurring assessment upon the same property, and do not include occasional exceptional and special subjects and modes of taxation. *Id.*

8. The constitutional requirement of uniformity is satisfied by a tax on the transmission of property by will or descent to strangers and collaterals, when it is uniform in its rate as to the entire class affected, although other classes or persons are exempted from the tax. *Id.*

9. The statute in force at a person's death governs the decision as to a collateral inheritance tax on his estate. *Re Roosevelt's Estate* (N. Y.) 695

10. A contingency affecting the value of a vested remainder under a will so long as it continues will prevent the charge of a collateral inheritance tax upon the remainder. *Id.*

11. Life annuities contingent on survivorship are not subject to a collateral inheritance tax until they vest by the termination of the life on which they are contingent. *Id.*

12. Each beneficiary is entitled to receive \$500 free from tax, under a statute providing that all property which shall pass by will or the interstate laws, and any grantee under a conveyance to take effect after death of the grantor, shall be liable to a tax upon its value above \$500. *State v. Hamlin* (Me.) 682

#### NOTES AND BRIEFS.

Taxes; validity of statute ordering. 772

On franchise of corporations engaged in interstate commerce. 135

Succession tax on contingent estate. 696

#### TELEGRAPHS. See also EMINENT DOMAIN, 6.

The liability of a telegraph company for failure to send a message is not defeated by stipulations against liability beyond the sum paid for sending unless the message is repeated, or against liability in any case unless claim is presented within sixty days after filing the message for transmission, as such conditions are either inapplicable or unreasonable as applied to such a case. *Francis v. Western U. Telog. Co.* (Minn.) 406

#### TELEPHONES. See also EMINENT DOMAIN, 6.

#### TEST. See CONTRACTS, 1.

#### THEATRES. See INFANTS, 1. 25 L. R. A.

#### TIMBER. See also DAMAGES, 3, 4.

The sale of standing timber by a written instrument not acknowledged or recorded as a deed amounts only to an executory contract or revokable license, which is revoked by a subsequent conveyance of the land to another person. *Fisk v. Capwell* (R. I.) 159

#### TOLLS. See CONSTITUTIONAL LAW, 11, 12.

#### TRADEMARK.

1. Uninterrupted and innocent use without question for five years of the local geographical name "Blackstone," as the name of cigars, will not be judicially interfered with as an infringement in favor of one who may have first used the name for cigars, but whose use of it on cigars offered for sale has been intermittent with long lapses. *Levy v. Waitt* (C. C. App. 1st C.) 190

2. As against innocent parties who have through a period of years built up an extensive business in goods bearing a certain name, the fundamental basis of a right of action for violation of a trademark in the use of such name is a prior appropriation of the particular mark by occupying the market so that the public has been or will be defrauded by allowing another to use it; and the mere fact of a prior discovery or selection of the name is insufficient. *Id.*

#### TRADENAME. See also EQUITY, 1.

A contract by the owner of a ranch called "Millbrae," on division of business with a partner in the milk business who had no interest in the real estate, to furnish the latter a supply of milk from that ranch daily for at least one year, does not convey the exclusive right to the use of the name "Millbrae" in the milk business, so as to prevent the owner of the ranch from using the name after the other party has ceased to buy milk from that ranch. *Millbras Co. v. Taylor* (Cal.) 193

#### NOTES AND BRIEFS.

Tradename; protection of; sale of; infringement. 193

#### TRADE UNION. See CONSPIRACY, 3; INFUNCTION, 5.

#### TRAIN DISPATCHER. See MASTER AND SERVANT, 11-13.

#### TRIAL. See also CARRIERS, 11; REFERENCE, NOTES AND BRIEFS.

1. The relator in a quo warranto case to test title to an office has the opening and closing. *Ellis, Reynolds, v. May* (Mich.) 325

2. On a motion for a nonsuit, every intentment and every fair and legitimate inference which can arise from the evidence must be made in favor of the plaintiff, and the court must assume those facts as true which the jury could properly find under the evidence. *Wallace v. City & S. R. Co.* (Or.) 663

#### Questions of law or fact.

8. The question of negligence in leaving

uninsulated joints of electric-light wires within 12 or 15 inches of a frame up which persons are required to go in performance of duties with respect to other electric wires is a question for the jury. *Illingworth v. Boston Electric Light Co.* (Mass.) 552

4. The negligence of a lineman in going up a frame to which are attached electric-light wires, as well as those which he is looking after, is a question for the jury, where his piers catch on a wire, and in endeavoring to free them his hand comes in contact with uninsulated joints of electric-light wires within 12 or 15 inches of the frame. *Id.*

5. Whether a cable car was run closer to a buggy on the track than was prudent, and whether there was negligence in failing to stop it to allow the buggy to leave the track, are questions for the jury. *Hicks v. Citizens' R. Co.* (Mo.) 505

6. Whether a person driving on a street-car track could have left it more expeditiously than he did, and by so doing have avoided an injury received from the car, is a question for the jury. *Id.*

7. It is for the jury to judge whether the failure of a school child to look or listen before attempting to cross a street-car track shows a want of that degree of care which could reasonably have been expected of such a child. *Wallace v. City & S. R. Co.* (Or.) 663

8. Whether or not the unevenness of the ground at a point used by passengers in alighting from a car is such as to constitute negligence on the part of the carrier is a question for the jury. *Pools v. Consolidated Street R. Co.* (Mich.) 744

#### Instructions.

9. An instruction that a railroad engineer assumed the danger of a defective fence, if it was known to him "as well as to the company," is misleading, if there was no proof of his actual knowledge, since it might imply an obligation on his part to inspect and ascertain such defects. *Dickson v. Omaha & St. L. R. Co.* (Mo.) 820

10. An instruction that the master is liable for negligence in employing unfit trainmen, if an injury results from the incompetence of a brakeman, is erroneous as it is not limited to a case of negligence in the employment of the brakeman. *Norfolk & W. R. Co. v. Hoover* (Md.) 710

11. An instruction that the jury may consider, in estimating plaintiff's damages resulting from an injury, the past and prospective expenses of his sickness, is erroneous where the amount of the past expenses is not shown. *Little Rock & M. R. Co. v. Barry.* (Ark.) 886

12. A defendant is entitled to have its theory of the case presented to the jury in specific instructions, if such theory is supported by evidence and the instructions are properly requested. *Pools v. Consolidated Street R. Co.* (Mich.) 744

#### TROVER.

1. The title to the property is not transferred by the entry of judgment in favor of the plaintiff in trover, but remains in him until he

has received actual satisfaction. *Miller v. Hyde* (Mass.) 42

2. The true owner is entitled to regain possession of a log cut and removed from his land by a good-faith trespasser, either by recapture or by any other remedy provided by law, and whatever additional value may have been imparted to it by transporting it to a better market, or by any improvement in its condition, short of actual alteration of species. *Gaskins v. Davis* (N. C.) 818

#### TRUSTS. See also BANKS, 7-9.

Certificates representing a pro rata interest in trust property, whether the trust is a technical statutory one or not, on which there is a blank form for transfer and a provision for issuing a new certificate to an assignee, are not, on a bona fide sale thereof, subject to any lien for expenses of litigation, beyond taxable costs, incurred by the trustees in successfully defending a suit by the owner, who has paid the judgment for costs before making transfer. *Cassagne v. Marvin* (N. Y.) 670

#### NOTES AND BRIEFS.

Trust; right to transfer certificates of. 671

#### VACCINATION. See also SCHOOLS, 4.

#### NOTES AND BRIEFS.

Vaccination; by compulsion. 152

#### VILLAGES. See MUNICIPAL CORPORATIONS, 1, 2.

#### VOLUNTEERS. See MASTER AND SERVANT, 4.

#### VOTERS AND ELECTIONS. See also ATTAINDER; CONSTITUTIONAL LAW, 4; EQUITY, 2; HIGHWAYS, 1; INJUNCTION, 2; SCHOOLS, 1; STATUTES, 6.

1. All persons who are within the class designated by the constitution are entitled to vote for all officers elective by the people, whether the offices to be filled be created by the constitution or by legislation; and such class of voters cannot be diminished or enlarged by the legislature. *State, Allison, v. Blake* (N. J. Sup.) 480

2. It is not an unreasonable restriction of the right to vote to require an oath that a voter is unable to read English, before allowing another to mark his ballot on the ground of such inability. *Ellis, Reynolds, v. May* (Mich.) 825

3. Unidentified illegal votes should be taken away from the total vote proportionately according to the entire vote returned for each candidate. *Id.*

4. Deputy United States marshals have no right to mark ballots, or to see them marked, or to know for whom the electors are voting at a congressional election in a city having a secret ballot. *Id.*

5. The use, by mistake, of small ballots printed on colored paper, furnished to local officers in a separate package, instead of using the regular ballots printed on white paper, will not prevent the counting of the ballots cast, where the election was otherwise regular

and all the voters of the township in which the mistake was made, without distinction of party, used the colored ballots. *Boyd v. Mills* (Kan.) 486

#### NOTES AND BRIEFS.

Voters and elections; how far the right to vote is absolute:—constitutional right of suffrage; (a) as affected by acts of congress; (b) registration; (c) tax or property qualifications; (d) soldiers voting; (e) test oaths and disqualification for crime; (f) ballots and primaries; (g) other statutory conditions, restrictions, and qualifications. 480

Disfranchisement; conditions of voting. 487

Inhabitants of public institutions. 899

Statute as to marking ballots. 825

#### WASTE.

The unlawful removal of petroleum from the ground constitutes waste, which may be enjoined in a proper action. *Williams v. Jones* (W. Va.) 222

**WATERS.** See also EMINENT DOMAIN, 7; ICE; RAILROADS, 11, 12.

1. A riparian proprietor has no right to erect a levee or artificial bank along the margin of a stream, which will cause superabundant water in times of ordinary floods to flow upon the lands of the opposite riparian proprietor. *Cairo, V. & C. R. Co. v. Brevoort* (C. C. D. Ind.) 527

2. The flow of a river when swollen beyond the low-water mark of the dry seasons by the ordinary rains which fall in wet seasons, or by the melting of snows, does not constitute surface water which may be turned by embankments. *Id.*

3. The relative rights of shore owners on a small inland lake navigable for steamers, which is so large that the lines of the sections or subdivisions of the tracts held by such owners will, if extended, not include the whole of the lake, are to be determined without reference to the extension of such lines, but by the principles governing the rights of riparian proprietors, depending upon their frontage and the form, length, and breadth of the lake. *Grand Rapids Ice & C. Co. v. South Grand Rapids Ice & C. Co.* (Mich.) 815

#### NOTES AND BRIEFS.

Waters; what is surface water:—distinguished from watercourse; (a) what is a water-

course; (b) how far channel necessary or sufficient; (c) source of supply; (d) source and channel; (e) permanence of flow; (f) water which has joined a watercourse; distinguished from basins or marshes; definition of surface water; question for the jury; water overflowing river banks; (a) the right to build levees; (b) cases holding flood water to be surface water. 527

Relative rights in case of flowage. 499

Riparian rights in inland lakes. 815

**WILLS.** See also EVIDENCE, 24; EXECUTORS AND ADMINISTRATORS, 1.

The acceptance of a devise which is accompanied with a direction to pay legacies makes the devisee personally liable therefor. *Case v. Hall* (Ohio) 766

#### NOTES AND BRIEFS.

Wills; proof of execution; signature by other person. 702

Charge of legacy on devisee. 767

Validity of bequests for masses; secret trusts to use for masses. 360

**WITNESSES.** See also LIBEL AND SLANDER; WRIT AND PROCESS, NOTES AND BRIEFS.

Evidence of statements of a witness for the state made to third persons in the absence of defendant is not admissible to corroborate his evidence against defendant's mere denial of its truthfulness. *Connor v. People* (Colo.) 241

**WOMEN.** See SCHOOLS, 1.

**WRIT AND PROCESS.** See also JUDGMENT, 4.

A plaintiff in an attachment suit who comes from another state to testify therein is not privileged from service of summons while there, in an action for maliciously bringing the attachment suit. *Mullen v. Sanborn* (Md.) 721

#### NOTES AND BRIEFS.

Writ and process; rights and privileges of nonresident witnesses from suit:—(I.) reason of the privilege; (II.) nature of the privilege; (III.) the extent and limit of the privilege; (IV.) parties as witnesses; (V.) witnesses in general; (VI.) the effect of fraud and deceit; (VII.) enforcement of the privilege; (VIII.) the question of waiver; (IX.) the question of deviation; (X.) English doctrine. 721

# L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-  
PLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY  
WAY AFFECTED BY LATER DECISIONS THAT HAVE  
CITED THESE CASES AS PRECEDENTS, WITH  
HOLDINGS OF CITING CASES; ALSO  
REFERENCES TO LATER AN-  
NOTATIONS CITING  
CASES OR NOTES





# L. R. A. CASES AS AUTHORITIES.

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## CASES IN 25 L. R. A.

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25 L. R. A. 33, *MITCHELL v. MARKER*, 10 C. C. A. 306, 22 U. S. App. 325, 62 Fed. 139.

### **Liability for injury to elevator passenger.**

Cited in *Springer v. Ford*, 189 Ill. 434, 52 L. R. A. 931, 82 Am. St. Rep. 464, 59 N. E. 953; *Riland v. Hirshler*, 7 Pa. Super. Ct. 386; *Southern Bldg. & L. Asso. v. Lawson*, 97 Tenn. 371, 56 Am. St. Rep. 804, 37 S. W. 86; *McGrell Buffalo Office Bldg. Co. 90 Hun*, 34, 35 N. Y. Supp. 599; *Luckel v. Century Bldg. Co.* 177 Mo. 628, 76 S. W. 1035,—holding relation between owner of elevator and passenger similar to that between common carrier and passenger; *Gibson v. International Trust Co.* 177 Mass. 103, 52 L. R. A. 929, 58 N. E. 278, discussing question of liability of owner of elevator as common carrier; *Russo v. Morris Bldg. & Land Improv. Asso.* 104 La. 438, 29 So. 46, holding elevator owner liable for injury to passenger thrown off balance by starting of elevator.

Cited in footnotes to *Griffen v. Manice*, 52 L. R. A. 922, which holds only reasonable care required as to safety of machinery and appliances for moving elevator; *Gibson v. International Trust Co.* 52 L. R. A. 928, which denies liability for injury to passenger from involuntary starting by conductor grasping mechanism to prevent falling; *Malloy v. New York Real Estate Asso.* 41 L. R. A. 487, which denies owner's liability for injury to one falling into elevator shaft, insufficient railing for which has been left out of place by third person; *Olson v. Schultz*, 36 L. R. A. 790, which holds lessor liable for defects in elevator which he covenants to keep in repair, without notice of them.

### **When objection to testimony available.**

Cited in *North Chicago Street R. Co. v. St. John*, 29 C. C. A. 635, 57 U. S. App. 366, 85 Fed. 807; *Davis v. United States*, 46 C. C. A. 624, 107 Fed. 757; *Baltimore & O. R. Co. v. Hellenthal*, 31 C. C. A. 417, 60 U. S. App. 156, 88 Fed. 119,—holding objection to evidence not distinctly indicating grounds, of no avail on appeal; *Supreme Council C. K. of A. v. Fidelity & C. Co.* 11 C. C. A. 105, 22 U. S. App. 439, 63 Fed. 57, holding objection to clerical error in declaration as to termination of bond should have pointed out error to render it available on appeal.

25 L. R. A. 37, *SPRINGFIELD, F. & M. INS. CO. v. HULL*, 51 Ohio St. 270, 46 Am. St. Rep. 571, 37 N. E. 1116.

### **Effect of duress.**

Cited in *Hartford F. Ins. Co. v. Kirkpatrick*, 111 Ala. 467, 20 So. 651, holding

threats of imprisonment in order to induce settlement for loss under insurance policy avoid the settlement; *Heaton v. Norton County State Bank*, 59 Kan. 292, 52 Pac. 876, holding that transfer of bank stock by woman under threat to arrest husband is under duress, and void; *Ohio Nat. Bank v. Hopkins*, 8 App. D. C. 155, holding test as to enforceability of demand connected with illegal transaction is whether aid from that transaction is needed to establish case; *McCormick Harvesting Mach. Co. v. Miller*, 54 Neb. 646, 74 N. W. 1061, holding contract to compound crime illegal; *Missouri P. R. Co. v. Goodholm*, 61 Kan. 763, 60 Pac. 1066, holding action for personal injuries may be brought without restoring small amount paid for fraudulent settlement.

Cited in footnotes to *Weber v. Shay*, 37 L. R. A. 230, which holds contract by attorneys to prevent finding of indictment against accused person void; *Titus v. Rochester German Ins. Co.* 28 L. R. A. 478, which holds fraudulent representations inducing compromise through mistake as to legal rights ground for relief; *Jones v. Dannenberg Co.* 52 L. R. A. 271, which holds void, in hands of bona fide purchaser, note given to stop criminal prosecution; *United States Fidelity & G. Co. v. Charles*, 57 L. R. A. 212, which holds void, note to reimburse surety on fidelity bond given on condition of not prosecuting principal; *William Deering & Co. v. Cunningham*, 54 L. R. A. 410, which holds void, contract to withdraw opposition to granting of pardon.

#### **Liability for total loss under statute.**

Cited in *Hubbard v. Winshel*, 6 Ohio N. P. 252, and *Schild v. Phoenix Ins. Co.* 6 Ohio N. P. 135, holding value of buildings destroyed is immaterial where statute fixes liability for total loss; *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 256, 56 L. R. A. 161, 62 N. E. 338, holding act fixing liability for total loss, a part of all fire policies issued since its passage.

#### **Rescission of contract of settlement.**

Cited in *Munzer v. Stern*, 105 Mich. 527, 29 L. R. A. 861, 55 Am. St. Rep. 468, 63 N. W. 513, holding vendor not required to return goods surrendered by fraudulent vendee upon compromise of claim before bringing action to recover remainder; *Missouri P. R. Co. v. Goodholm*, 61 Kan. 763, 60 Pac. 1066, holding person injured in railway collision not obliged to return amount received in fraudulent settlement before bringing action.

Distinguished in *Manhattan L. Ins. Co. v. Burke*, 69 Ohio St. 309, 160 Am. St. Rep. 666, 70 N. E. 74, holding action not maintainable on insurance policy, after settlement effected through fraudulent representations of insurance company, without return or tender of amount received.

25 L. R. A. 42, *MILLER v. HYDE*, 161 Mass. 472, 42 Am. St. Rep. 424, 37 N. E. 760.

#### **Effect of proceedings against wrongdoer on title to property.**

Cited in *Ledbetter v. Embree*, 12 Ind. App. 619, 40 N. E. 928, and *Gilman v. Gilby Twp.* 8 N. D. 632, 73 Am. St. Rep. 791, 80 N. W. 889, holding judgment for conversion does not operate to vest title in goods without payment; *Briggs v. McDonald*, 166 Mass. 41, 43 N. E. 1003, sustaining right of officer, who is obligee in bond of indemnity in attachment to recover thereon without paying judgment for conversion against him; *Aldrich v. Hodges*, 164 Mass. 571, 42 N. E. 107, holding pendency of action by consignor against officer for conversion of goods taken

on execution against one of consignees no defense to another action by the consignees for conversion; *Rogers v. Barnes*, 169 Mass. 185, 38 L. R. A. 148, 47 N. E. 602, holding mortgagor of land can recover full damages for wrongful execution of power of sale by mortgagee even if he cannot redeem from purchaser; *Irving v. Ford*, 179 Mass. 222, 60 N. E. 491, holding freedom acquired by runaway slave left only right of action in owner.

Cited in footnote to *Bolton Mines Co. v. Stokes*, 31 L. R. A. 789, which holds bringing of replevin suit discontinued before judgment no bar to claim for payment from assets of purchaser's estate.

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25 L. R. A. 48, *MOYER v. EAST SHORE TERMINAL CO.* 41 S. C. 300, 44 Am. St. Rep. 709, 19 S. E. 651.

**Effect of by-laws on those dealing with corporation.**

Cited in footnotes to *Wells v. Black*, 37 L. R. A. 619, which holds by-law of savings bank declaring waiver of stockholders' liability, void; *Ackenhausen v. People's Sav. Bank*, 33 L. R. A. 408, which requires by-law to be brought to depositor's notice to relieve savings bank from liability for paying forged order to one presenting pass book; *Clark v. Mutual Reserve Fund Life Assn.* 43 L. R. A. 390, which holds constitution and by-laws of mutual insurance association binding on members, whether known or not; *McLendon v. Sovereign Camp, W. W.* 52 L. R. A. 444, which holds reasonable delay in delivering benefit certificate gives no right to recover on certificate delivered after death of insured.

Cited in notes (49 L. R. A. 473) on time for which contracts of employment may be made on behalf of corporation by its officers, directors, and agents; (32 L. R. A. 481) on liability of members of mutual fire insurance companies.

25 L. R. A. 52, *TEXAS & P. R. CO. v. GAY*, 86 Tex. 571, 26 S. W. 599.

**Jurisdiction of foreign court.**

Cited in *Story v. Jones*, 16 Tex. Civ. App. 61, 40 S. W. 417, refusing to declare null, after twenty-five years, deed made by order of court of another state, of land in this state.

**Jurisdiction over receiver of corporation.**

Cited in *Farmers' Loan & T. Co. v. Northern P. R. Co.* 69 Fed. 878, entertaining jurisdiction in action by railway to remove receiver appointed by state court, on ground of mismanagement and fraud; *Ocean S. S. Co. v. Wilder*, 107 Ga. 224, 33 S. E. 179, holding validity of order appointing receiver for want of jurisdiction in appointment can be called in question in collateral proceeding.

**Authority of receiver appointed by another jurisdiction.**

Cited in *Howard v. Chesapeake & O. R. Co.* 11 App. D. C. 335, holding decree of state court appointing receiver has no effect in District of Columbia; *Trinity & S. R. Co. v. Brown*, 91 Tex. 677, 45 S. W. 793, holding appointment by United States court of receiver over railway in several states and extended to railway operating in district of another state valid.

**Liability for acts of receiver.**

Cited in *San Antonio & A. P. R. Co. v. Adams*, 11 Tex. Civ. App. 200, 32 S. W. 733, holding collusion in appointment of receiver of railway interested in the appointment, must involve the corporation, to make it responsible for acts of re-

ceiver; *Houston & T. C. R. Co. v. Bath*, 17 Tex. Civ. App. 708, 44 S. W. 595, holding purchaser of railway sold under foreclosure while being operated by receiver liable for loss of cotton shipped over road after its sale and before delivery; *Missouri, K. & T. R. Co. v. McFadden Bros.* 89 Tex. 145, 33 S. W. 853, holding that railway company taking charge of its property after discharge of receiver is not by that fact made liable for breach of his contracts or for his torts; *Texas & P. R. Co. v. Gay*, 88 Tex. 115, 30 S. W. 543, holding railway liable for negligently killing fireman while operated by receiver appointed by collusion; *Pool v. Farmers' Loan & T. Co.* 7 Tex. Civ. App. 338, 27 S. W. 744, holding receiver appointed in one state over property in another cannot make certificates preference lien on such property.

Cited in footnote to *Bartlett v. Cicero Light, Heat & P. Co.* 42 L. R. A. 715, which holds fund in hands of corporation on discharge of receiver liable for injuries caused by receiver's negligence.

#### **Statute of limitations.**

Cited in *Prichard v. McCord-Collins Co.* 30 Tex. Civ. App. 583, 71 S. W. 303, holding mistake in naming defendant corporation in original petition may take case out of statute; *Texas & P. R. Co. v. Watson*, 13 Tex. Civ. App. 556, 36 S. W. 290, holding statute of limitations bar to action originally brought against receiver of railway and by amendment brought against railway; *Armstrong v. Elliott*, 20 Tex. Civ. App. 46, 48 S. W. 605, holding defendant must ask for submission to jury the question of bar of statute of limitations.

Cited in footnotes to *Smith v. Blachley*, 53 L. R. A. 849, which holds running of limitation against action to recover back money not prevented by fraud unless investigation prevented by affirmative efforts; *Mereness v. First Nat. Bank*, 51 L. R. A. 410, which holds running of limitations on demand certificate of deposit not interrupted by bank's misrepresentations in denial of liability.

#### **When instruction to jury required.**

Cited in *Texas & P. R. Co. v. Black*, 23 Tex. Civ. App. 123, 57 S. W. 330, holding mere omission in court's charge must be corrected by asking for special instruction.

25 L. R. A. 67, *STECK v. COLORADO FUEL & IRON CO.* 142 N. Y. 236, 58 N. Y. S. R. 765, 37 N. E. 1.

#### **Reference of cases triable to jury.**

Explained in *Crawford v. Canary*, 28 App. Div. 136, 50 N. Y. Supp. 874, holding affidavits may be considered by court to determine whether action referable.

Cited in *Irving v. Irving*, 90 Hun, 423, 35 N. Y. Supp. 744, holding answer can be looked at to determine whether long account involved making it referable; *Importers & T. Nat. Bank v. Werner*, 54 App. Div. 440, 66 N. Y. Supp. 996, refusing compulsory reference where long account is not immediately but only collaterally involved; *Fisher v. Haines*, 62 App. Div. 69, 70 N. Y. Supp. 787, allowing reference where it will be necessary to prove debts, liens, claims, taxes, judgments, and other encumbrances, and earnings of railway; *Allentown Rolling Mills v. Dwyer*, 26 App. Div. 101, 49 N. Y. Supp. 624, holding fact that many items go to make up alleged damages for breach of contract do not necessarily render cause referable; *Haig v. Boyle*, 20 Misc. 155, 45 N. Y. Supp. 816, referring action on promissory note founded on numerous items where answer sets up counterclaim with numerous items also; *Jones v. Lester*, 77 App. Div. 175, 78 N. Y.

Supp. 1000, holding reference of action for accounting as between partners, improper when partnership denied by answer, until fact determined; Sartorius v. Gottlieb, 80 App. Div. 114, 80 N. Y. Supp. 159, holding reference improper where money judgment demanded on account for single purchase and sale of stock, and interest charges advanced by broker; Kennedy v. Horikoshi, 82 App. Div. 416, 81 N. Y. Supp. 827, holding reference improper where complaint based on contract put in issue by answer and counterclaim requiring examination of long account; Malone v. Saints Peter & Paul's Church, 172 N. Y. 282, 64 N. E. 961 (dissenting opinion), majority reversing 69 App. Div. 422, 74 N. Y. Supp. 1005, and holding compulsory reference may be ordered in action by administrator to enforce common-law liability, if apparent trial will involve examination and auditing of long account; Ames v. French, 83 App. Div. 455, 82 N. Y. Supp. 452, holding action on account stated referable, where answer alleged that account was false and fraudulent, and trial would involve examination of long account; Malone v. Saints Peter & Paul's Church, 69 App. Div. 422, 74 N. Y. Supp. 1005, holding action by executor or administrator to enforce common-law cause not referable; Betcher v. Grant County, 9 S. D. 84, 68 N. W. 163, questioning, without deciding, whether anything but pleadings may be examined to determine whether examination of long account involved.

Cited in footnote to *Ex parte Keeler*, 31 L. R. A. 678, which holds summary proceeding for restraining order against carrying on nuisance not violation of right to jury trial.

Criticized in *Guaranty Trust Co. v. Robinson*, 31 Misc. 281, 64 N. Y. Supp. 366, referring action which answer discloses will require examination of long account.

25 L. R. A. 79, *WOOLSEY v. CHICAGO, B. & Q. R. CO.* 39 Neb. 798, 58 N. W. 444.

#### **Liability for injury to passenger.**

Cited in footnotes to *Purple v. Union P. R. Co.* 57 L. R. A. 700, which holds one riding on train prohibited from carrying passengers, a trespasser; *Mendenhall v. Atchison, T. & S. F. R. Co.* 61 L. R. A. 120, which holds one riding on platform of baggage car at direction of brakeman, to whom money paid, not a passenger; *Chattanooga Rapid Transit Co. v. Venable*, 51 L. R. A. 886, which holds night watchman at depot, getting on train to announce readiness to resume duty, a passenger; *Louisville & N. R. Co. v. Weaver*, 50 L. R. A. 381, which holds station agent riding on train without paying fare, several hours after work ended, a passenger; *Brashear v. Houston C. A. & N. R. Co.* 28 L. R. A. 811, which sustains right of recovery of passenger going on platform with intent to get off, when thrown off by sudden increase of speed; *Jones v. New York C. & H. R. R. Co.* 41 L. R. A. 490, which denies right of one attempting to enter car of mixed train at distance from station, to recover for injury from sudden jolting of car in coupling.

#### **Contributory negligence of employee.**

Cited in *Fremont, E. & M. Valley R. Co. v. French*, 48 Neb. 641, 67 N. W. 472, holding question of plaintiff's negligence in stepping from train, when evidence conflicting as to its being stationary, is for jury.

Cited in footnote to *Distler v. Long Island R. Co.* 35 L. R. A. 762, which holds stepping from station platform on slowly moving train not negligence *per se*.

**Directing verdict.**

Cited in *Elliott v. Carter White-Lead Co.* 53 Neb. 461, 73 N. W. 948, sustaining directed verdict, where employee was injured by accidental dropping of lead pig on his foot, due to unforeseen cause; *Shiverick v. R. J. Gunning Co.* 58 Neb. 32, 78 N. W. 460, sustaining directed verdict for obliterating sign painted on surface of party wall not belonging to defendant; *Rogers v. Marriott*, 59 Neb. 776, 82 N. W. 21, sustaining directed verdict for defendant sued on wagering contract.

25 L. R. A. 81, *MEUER v. CHICAGO, M. & ST. P. R. CO.* 5 S. D. 568, 49 Am. St. Rep. 898, 59 N. W. 945.

**Presumption as to laws of another state.**

Cited in *Commercial Bank v. Jackson*, 9 S. D. 607, 70 N. W. 846, Reaffirming on second appeal 7 S. D. 141, 63 N. W. 548, presuming law of another state to be same as that of forum as to liability of married women on their contracts; *Morris v. Hubbard*, 10 S. D. 262, 72 N. W. 894, holding laws of another state presumed to be similar to those of forum as to incompetency of oral evidence of clerk to contradict recitals of an execution; *Woolacott v. Case*, 63 Kan. 36, 64 Pac. 965, holding statutes of another state respecting sale of intoxicating liquors presumed to be same as law of forum.

Cited in footnotes to *First Nat. Bank v. National Broadway Bank*, 42 L. R. A. 140, which denies presumption that statutory restrictions on alienation of interests of *cestui que trust* are law of other state; *Aslanian v. Dostumian*, 47 L. R. A. 495, which denies presumption that law merchant as to protest of draft prevails in Asiatic Turkey.

**Conflict of laws respecting carrier's contracts.**

Cited in *Southern R. Co. v. Harrison*, 119 Ala. 545, 43 L. R. A. 387, 72 Am. St. Rep. 936, 24 So. 552, holding law of state where shipping contract made immaterial, when schedule of freight rates approved by Interstate Commerce Law have been published.

Cited in note (63 L. R. A. 527) on conflict of laws as to carrier's contracts.

**Contracts exempting carrier from liability.**

Cited in *Heumhpheus v. Fremont, E. & M. Valley R. Co.* 8 S. D. 112, 65 N. W. 466, holding fact that person in charge had ridden in car with stock no evidence of waiver of stipulation to ride in caboose only.

Cited in footnotes to *Crary v. Lehigh Valley R. Co.* 59 L. R. A. 815, which requires proof of negligence causing injury to passenger using excursion ticket by which passenger assumes risk of accident; *Ullman v. Chicago & N. W. R. Co.* 56 L. R. A. 246, which sustains carrier's right to secure entire exemption from liability as insurer for loss not due to negligence or misfeasance; *Payne v. Terre Haute & I. R. Co.* 56 L. R. A. 472, which sustains stipulation in pass releasing carrier from liability for negligence; *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which authorizes carrier to stipulate for exemption from liability for wet; *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 557, which holds prohibition against carriers limiting liability inapplicable to contract by domestic corporation in other state for transportation entirely outside of state; *Illinois C. R. Co. v. Beebe*, 43 L. R. A. 210, which denies negligence of stock owner in remaining in stock car on train starting while he is attending to stock.

25 L. R. A. 87, *QUERK v. MULLER*, 14 Mont. 467, 43 Am. St. Rep. 647, 36 Pac. 1077.

**Validity of contracts in relation to testimony.**

Cited in *Young v. Thomson*, 14 Colo. App. 315, 59 Pac. 1030, holding contract to suppress evidence, against public policy.

Distinguished in *Casserleigh v. Wood*, 14 Colo. App. 279, 59 Pac. 1024, holding agreement to furnish evidence already procured, and necessary to establish claim, not against public policy.

25 L. R. A. 90, *YALE GAS STOVE CO. v. WILCOX*, 64 Conn. 101, 42 Am. St. Rep. 159, 29 Atl. 303.

**Liability of promoters.**

Cited in *Hambleton v. Rhind*, 84 Md. 488, 40 L. R. A. 231, 36 Atl. 597; *Woodbury Heights Land Co. v. Loudenslager*, 55 N. J. Eq. 92, 35 Atl. 436; *Goodwin v. Wilbur*, 104 Ill. App. 52,—holding that one who represents prospective purchaser of property, procures subscriptions to proposed corporation, gets up prospectus, does everything to start enterprise, is a promoter bound to reveal facts to intending subscribers; *Seehorn v. Hall*, 130 Mo. 261, 51 Am. St. Rep. 562, 32 S. W. 643, holding person associating with others to purchase property must account to others for any sum he received as commission unknown to them; *Hayward v. Leeson*, 176 Mass. 318, 49 L. R. A. 732, footnote p. 725, 57 N. E. 656, holding promoters of corporation liable to account for net profits received by them where they have had issued to them one third of capital stock without informing intending subscribers; *Forest Land Co. v. Bjorkquist*, 110 Wis. 552, 86 N. W. 183, refusing to enjoin action to enforce judgment for deficiency on foreclosure against stockholders of corporation which had purchased land of one employing agent to sell who had promoted company; *Hutchinson v. Simpson*, 92 App. Div. 424, 87 N. Y. Supp. 369 (dissenting opinion), majority holding stock subscription contract with promoters holding options on property, does not give corporation right of action to compel promoters to account for secret profit; *Yeiser v. United States Board & Paper Co.* 52 L. R. A. 729, footnote p. 724, 46 C. C. A. 576, 107 Fed. 348, sustaining right of corporation to secure cancelation of stock paid for out of secret profits, by subscribers, from sale of property to corporation.

Cited in footnotes to *Milwaukee Cold Storage Co. v. Dexter*, 40 L. R. A. 837, which denies promoter's liability for profit on transferring to corporation land purchased before formation of corporation commenced; *Shields v. Clifton Hill Land Co.* 26 L. R. A. 509, which holds no vested right of creditors to whom corporators had been personally liable violated by validating corporate charter; *Hooper v. Central Trust Co.* 29 L. R. A. 262, which denies enforcement of mortgage received by promoters on corporate property; *St. Johns Mfg. Co. v. Munger*, 29 L. R. A. 63, which holds fraud of promoters in inducing subscription no defense to assessment on stock.

Distinguished in *Tompkins v. Sperry*, 96 Md. 582, 54 Atl. 254, holding neither corporation nor its receiver has right of action against shareholders selling shares under false representations as to value of property.

25 L. R. A. 106, *BLAKESLEE v. CARROLL*, 64 Conn. 223, 29 Atl. 473.

**Privilege of witness.**

Cited in *Dennehy v. O'Connell*, 66 Conn. 181, 33 Atl. 920, holding petition to

board of police commissioners maliciously charging officers with perjury, and requesting their removal, not privileged communication.

Cited in footnotes to *Cooley v. Galyon*, 60 L. R. A. 139, which holds words maliciously spoken by witness in judicial proceeding of stranger, absolutely privileged, if pertinent and responsive; *Kubricht v. State*, 58 L. R. A. 959, which holds clergyman entering on baptismal record, as reputed father of bastard child, name of person known to have been acquitted, guilty of libel; *Shinglemeyer v. Wright*, 50 L. R. A. 129, which holds information given to detectives as to larceny with reason for suspecting certain person as thief privileged.

25 L. R. A. 110, *Re SIMS*, 54 Kan. 1, 45 Am. St. Rep. 261, 37 Pac. 135.

**Contempts.**

Cited in *Re Davis*, 58 Kan. 377, 49 Pac. 160, holding committee of legislature investigating bribery charges cannot imprison witness for refusal to testify; *Cook v. Wyatt*, 60 Kan. 538, 57 Pac. 130, holding sheriff cannot appeal from discharge from illegal imprisonment of witness committed for contempt; *Sharp v. State*, 102 Tenn. 12, 43 L. R. A. 789, 73 Am. St. Rep. 851, 49 S. W. 752, holding pardoning power of governor extends to cases of contempt; *Re Huron*, 58 Kan. 139, 36 L. R. A. 825, 62 Am. St. Rep. 614, 48 Pac. 574 (dissenting opinion), majority holding notary public cannot punish for contempt.

Cited in footnote to *Re Clark*, 28 L. R. A. 242, which upholds right to summarily enforce answer by imprisoning witness.

Distinguished in *Re Siebert*, 61 Kan. 113, 58 Pac. 971, upholding statute permitting clerk of court to issue warrants of arrest and admit to bail during court vacation.

**Delegation of power.**

Cited in *Western U. Teleg. Co. v. Myatt*, 98 Fed. 350, holding statute conferring legislative as well as judicial functions on state court of visitation, unconstitutional; *State ex rel. Godard v. Johnson*, 61 Kan. 812, 49 L. R. A. 666, 60 Pac. 1068, holding all governmental powers cannot be delegated to single tribunal.

25 L. R. A. 114, *STATE ex rel. AMBLER v. HOCKER*, 34 Fla. 25, 15 So. 581.

**Disqualification of one with judicial power.**

Cited in *Findley v. Smith*, 42 W. Va. 305, 26 S. E. 370, limiting extent of power of disqualified judge to mere formal orders necessary to forward to proper tribunal.

Cited in footnotes to *Jamieson v. Wiggin*, 46 L. R. A. 317, which holds one not an attorney not eligible as judge; *First Nat. Bank v. McGuire*, 47 L. R. A. 413, which holds judge disqualified to try case in which plaintiff is corporation of which his wife is a shareholder; *State ex rel. Barnard v. Board of Education*, 40 L. R. A. 317, which holds school director disqualified to try charges against school superintendent towards whom he has personal enmity; *State ex rel. Getchel v. Bradish*, 37 L. R. A. 289, which holds disqualification of one member of town board to sit on rehearing for revocation of license makes revocation invalid.

Cited in note (31 L. R. A. 465) on competency of judge as witness in cause on trial before him.



25 L. R. A. 120, *OSBORNE v. STATE*, 33 Fla. 162, 39 Am. St. Rep. 99, 14 So. 588.

**Taxation of corporate business.**

Cited in *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 712, 53 L. R. A. 931, 43 S. W. 115, holding tax imposed on business of railroad done within state valid; *State v. Rocky Mountain Bell Teleph. Co.* 27 Mont. 402, 71 Pac. 311, upholding validity of state statute imposing license tax upon each telephone used in local or state business.

Cited in footnotes to *State v. State Assessors*, 25 L. R. A. 134, which upholds state tax on domestic corporations generally, although incidentally affecting corporation engaged in interstate commerce; *Littlefield v. State*, 28 L. R. A. 588, which limits power to license sales of milk to regulation, and not raising of revenue.

Cited in notes (57 L. R. A. 63, 92) on taxation of corporate franchises in the United States; (60 L. R. A. 650, 679, 688) on corporate taxation and the commerce clause; (30 L. R. A. 419, 432, 433) on limit of amount of license fees.

Distinguished in *State ex rel. Donovan v. District Court*, 27 Mont. 424, 71 Pac. 401, holding occupation tax on general business of express company invalid, as regulation of interstate commerce.

25 L. R. A. 134, *STATE, LUMBERVILLE DELAWARE BRIDGE CO., PROSECUTORS, v. STATE ASSESSORS*, 55 N. J. L. 529, 26 Atl. 711.

**Corporate taxation.**

Cited in *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 712, 53 L. R. A. 931, 43 S. W. 115, upholding tax laid on business of railroad done within state; *State, Marsden Co., Prosecutor, v. State Assessors*, 61 N. J. L. 463, 39 Atl. 638, holding tax laid on corporation, a license, and not property tax, and unaffected by fact that capital in part invested in patent rights.

Cited in notes (60 L. R. A. 675, 677) on corporate taxation and the commerce clause; (60 L. R. A. 339) on constitutional equality in the United States in relation to corporate taxation; (57 L. R. A. 35, 79, 80) on taxation of corporate franchises in the United States.

25 L. R. A. 139, *CHAMBERLAIN v. NORTH EASTERN R. CO.* 41 S. C. 399, 44 Am. St. Rep. 717, 19 S. E. 743, 996.

**Title to marsh land.**

Cited in *Chisolm v. Caines*, 67 Fed. 290, holding marsh lands in harbor and bays subject to grant by state to private parties.

**Corporate rights to land.**

Cited in footnotes to *Wilson v. Leary*, 38 L. R. A. 240, which holds resulting trust in favor of grantor not created by conveyance in fee to corporation with limited existence; *Gurney v. Minneapolis Union Elevator Co.* 30 L. R. A. 534, which holds erection of public warehouse on railroad land not abandonment of easement; *Morrison v. St. Paul & N. P. R. Co.* 30 L. R. A. 546, which holds lease of railroad for 999 years, not a sale.

25 L. R. A. 143, *FLETCHER v. TUTTLE*, 151 Ill. 41, 42 Am. St. Rep. 220, 37 N. E. 683.

**Equity jurisdiction over political rights.**

Cited in *Morgan v. Nunn*, 84 Fed. 554, refusing to enjoin removal of general clerk in office of internal revenue collector; *Green v. Mills*, 30 L. R. A. 94, footnote p. 90, 16 C. C. A. 523, 25 U. S. App. 383, 69 Fed. 858, refusing to enjoin performance of duties by supervisor of registration because right to vote might be interfered with; *Marshall v. Illinois State Reformatory*, 103 Ill. App. 70, denying jurisdiction of equity to restrain removal of party from office; *Taylor v. Kercheval*, 82 Fed. 500, refusing to restrain United States marshal from removing deputy; *State ex rel. McCaffery v. Aloe*, 152 Mo. 480, 47 L. R. A. 398, footnote p. 393, 54 S. W. 494, holding that person must go to court of law to obtain purely political rights; *Weaver v. Toney*, 107 Ky. 434, 50 L. R. A. 109, footnote p. 105, 54 S. W. 732, refusing mandatory injunction to enforce right to have inspector at polls, appointed by executive committee of political party; *People ex rel. Malley v. Barrett*, 203 Ill. 104, 96 Am. St. Rep. 296, 67 N. E. 742, holding chancery without jurisdiction to enjoin election board from producing, counting, and canvassing ballots pursuant to subpoena of proper tribunal; *Anthony v. Burrow*, 129 Fed. 790, holding equity without jurisdiction to enjoin issuance by state officers charged with duty, of certificate of nomination to candidate for Congress.

Cited in footnotes to *State ex rel. Taylor v. Lord*, 31 L. R. A. 473, which denies power of court to interfere with location by governor of site for public institution; *Denny v. State*, 31 L. R. A. 726, which denies right to create double districts so as to give counties having less than population for one senator or representative a voice in electing more than one; *Davis v. Hambrick*, 51 L. R. A. 671, which holds decision of state central committee between bodies claiming to be executive committee of county conclusive on courts; *Phelps v. Piper*, 33 L. R. A. 53, which holds question as to which faction of political party is true representative, political rather than judicial; *Covington v. Buffett*, 47 L. R. A. 622, which denies court's jurisdiction to determine existence of vacancy in office of senator; *Fesler v. Brayton*, 32 L. R. A. 578, which denies right to injunction against holding election under alleged unconstitutional statute; *State ex rel. Cranmer v. Thorson*, 33 L. R. A. 582, which denies right to enjoin certifying of proposed constitutional amendment.

**Injunction in favor of state.**

Cited in *State ex rel. Taylor v. Lord*, 28 Or. 508, 31 L. R. A. 476, 43 Pac. 471, holding state not exempt from rules of law applicable to individuals in asking injunction against public officers.

25 L. R. A. 149, *ELLERBE v. FAUST*, 119 Mo. 653, 25 S. W. 390.

**Effect of by-laws on benefit society membership.**

Cited in *Loeffler v. Modern Woodmen*, 100 Wis. 84, 75 N. W. 1012, holding member of benefit association bound by by-law which works forfeiture of his business, though adopted after he became member; *Supreme Lodge K. of P. v. Trebbe*, 179 Ill. 355, 70 Am. St. Rep. 120, 53 N. E. 730, holding member of benefit society amenable to suicide by-law adopted after he became member; *Franta v. Bohemian Roman Catholic Central Union*, 164 Mo. 314, 54 L. R. A. 726, 86 Am. St. Rep. 611, 63 S. W. 1100, holding fraternal benefit society may limit its membership to religious order and expel member for not observing rule of church and by-law of

society; *State ex rel. Schrempp v. Grand Lodge*, A. O. U. W. 70 Mo. App. 467, holding benefit society not estopped to expel member for infraction of by-law because he was assessed for death losses after he was known to have infringed law.

Cited in note (46 L. R. A. 620) on charter restrictions on eligibility to become shareholder in corporation.

Distinguished in *Sackberger v. National Grand Lodge I. O. T. L.* 73 Mo. App. 42 (concurring opinion), as to power of benefit association to pass law affecting existing insurance of member without his assent.

#### **Forfeiture of insurance contract.**

Cited in *Behling v. Northwestern Nat. L. Ins. Co.* 117 Wis. 32, 93 N. W. 800, holding self-executing forfeiture clause in insurance contract, because of nonpayment of premium, enforceable.

25 L. R. A. 152, *DUFFIELD v. WILLIAMSPORT SCHOOL DISTRICT*, 162 Pa. 476, 29 Atl. 742.

#### **Compulsory vaccination.**

Cited in *Morris v. Columbus*, 102 Ga. 800, 42 L. R. A. 180, 66 Am. St. Rep. 243, 30 S. E. 850, sustaining compulsory vaccination within city limits when epidemic exists or is apprehended; *Com. v. Pear*, 183 Mass. 246, 66 N. E. 719, upholding constitutionality of statute imposing fine for violation of requirement of board of health that all inhabitants of city be vaccinated; *Bissell v. Davison*, 65 Conn. 192, 29 L. R. A. 254, footnote p. 251, 32 Atl. 348, upholding statute excluding unvaccinated children from public schools; *Blue v. Beach*, 155 Ind. 137, 50 L. R. A. 71, footnote p. 64, 80 Am. St. Rep. 195, 56 N. E. 89, holding local board of health may require vaccination as prerequisite to school attendance during threatened epidemic; *Viemeister v. White*, 88 App. Div. 51, 84 N. Y. Supp. 712, holding regulation excluding unvaccinated children from schools reasonable and constitutional, independent of specific menace of disease; *Glover v. Board of Education*, 14 S. D. 144, 84 N. W. 761, holding suspension of pupil, after reinstatement by court order, because it was then thought epidemic of smallpox threatened, not contempt of court; *Mathews v. Kalamazoo Bd. of Edu.* 127 Mich. 535, 54 L. R. A. 736, footnote p. 736, 86 N. W. 1036, denying right of school district to adopt continuing rule excluding all unvaccinated pupils when contagious disease not epidemic; *Osborn v. Russell*, 64 Kan. 509, 68 Pac. 60, holding statute excluding pupils infected with contagious disease from schools, no authority for exclusion until successfully vaccinated; *Lawbaugh v. Board of Education*, 66 Ill. App. 167, holding vaccination of pupils as qualification for admission to public schools reasonable regulation; *Lyndall v. Board of Public Education*, 25 Pa. Co. Ct. 647, Affirmed in 19 Pa. Super. Ct. 234, holding school directors may exclude teachers as well as pupils who have not been vaccinated; *State ex rel. Freeman v. Zimmerman*, 86 Minn. 358, 58 L. R. A. 80, footnote p. 78, 91 Am. St. Rep. 351, 90 N. W. 783; *Gerhard v. Packer Twp. School District*, 24 Pa. Co. Ct. 340, 9 Pa. Dist. R. 721, denying mandamus to compel admittance, to public school, of child without certificate of vaccination; *Field v. Robinson*, 198 Pa. 638, 48 Atl. 873, refusing mandamus to compel principal to admit unvaccinated pupils to public school; *Nissley v. Hummelstown*, 5 Pa. Dist. R. 734, 18 Pa. Co. Ct. 483, 2 Dauphin Co. Rep. 366, holding valid, requirement of certificate of successful vaccination as condition precedent to admission to public schools; *State ex rel. Cox v. Board of*

Education, 21 Utah, 416, 60 Pac. 1013, holding reasonable option given pupils during epidemic to be vaccinated or stay away from school.

Cited in footnote to *Re Smith*, 28 L. R. A. 820, which denies authority to quarantine, for refusal to be vaccinated, one not shown to have been exposed to smallpox.

Cited in note (26 L. R. A. 728) on special powers and liabilities of municipalities in times of epidemic.

Distinguished in *State ex rel. Adams v. Burdge*, 95 Wis. 402, 37 L. R. A. 161, footnote p. 157, 60 Am. St. Rep. 123, 70 N. W. 347, and *Potts v. Breen*, 167 Ill. 77, 39 L. R. A. 155, footnote p. 152, 59 Am. St. Rep. 262, 47 N. E. 81, Affirming 60 Ill. App. 207, denying reasonableness of rule of state board of health, compelling vaccination as prerequisite to school attendance when epidemic is not prevailing or threatening.

**Right to exclude child from school for parent's abuse of teacher.**

Cited in *Board of Education v. Purse*, 101 Ga. 440, 41 L. R. A. 607, 65 Am. St. Rep. 312, 28 S. E. 896, holding board of education can exclude from school, children of parent abusing teacher in school during school hours.

25 L. R. A. 155, *FORD v. FORSGARD*, 87 Tex. 185, 27 S. W. 57.

**Property exempt as homestead.**

Cited in *Brennan v. Fuller*, 14 Tex. Civ. App. 511, 37 S. W. 641, holding business building, a portion of which occupied by owner as postoffice, a business homestead not subject to liens of his creditors; *Smith v. Guckenheimer*, 42 Fla. 49, 27 So. 900 (dissenting opinion), majority holding homestead exemption does not extend to improvements other than residence and business house of owner, and land on which situated.

25 L. R. A. 157, *DOYLE v. FITCHBURG R. CO.* 162 Mass. 66, 44 Am. St. Rep. 335, 37 N. E. 770.

**Jurisdiction.**

Cited in *Boston & M. R. Co. v. Hurd*, 56 L. R. A. 211, 47 C. C. A. 621, 108 Fed. 122, sustaining jurisdiction of Federal district court over action brought under statute of another state to recover for death by negligence.

**When employee a passenger.**

Cited in *Simmons v. Oregon R. Co.* 41 Or. 164, 69 Pac. 440, holding railway employee traveling gratuitously on his own business during lay-off, is passenger; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 469, 51 L. R. A. 886, 58 S. W. 861, holding railroad employee carried from work as gratuity, a passenger; *Dickinson v. West End Street R. Co.* 177 Mass. 367, 52 L. R. A. 327, 83 Am. St. Rep. 284, 59 N. E. 60, holding street railway employee riding gratuitously while off duty a passenger; *Doyle v. Fitchburg R. Co.* 166 Mass. 494, 33 L. R. A. 846, footnote p. 844, 55 Am. St. Rep. 417, 44 N. E. 611, holding ticket given to employee, conceded to be passenger, not mere gratuity.

Cited in footnotes to *McNulty v. Pennsylvania R. Co.* 38 L. R. A. 376, which holds railroad employee working on bridge a passenger while riding home on train; *Louisville & N. R. Co. v. Weaver*, 50 L. R. A. 381, which holds station agent riding on train without paying fare, several hours after work ended, a passenger.

Cited in note (31 L. R. A. 324) on railroad employees or officers as passengers

**Who are fellow servants.**

Cited in note (50 L. R. A. 462, 467) on what servants are deemed to be in same common employment, apart from statutes, where no questions as to vice principalship arise.

Distinguished in *Louisville & N. R. Co. v. Stuber*, 54 L. R. A. 698, 48 C. C. A. 152, 108 Fed. 937, holding foreman of water supply on railroad traveling from station to station on pass in performance of duties, fellow servant of engineer; *Dishon v. Cincinnati, N. O. & T. P. R. Co.* 126 Fed. 202, holding section hand caught between cars after working hours, fellow servant to employees operating cars.

**Effect of settlement for wrongful act causing death.**

Cited in *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 616, 50 L. R. A. 711, 36 S. E. 881, holding widow's right of action for wrongful act causing death of husband taken away by settlement made by husband before decease.

25 L. R. A. 159, *FISH v. CAPWELL*, 18 R. I. 667, 49 Am. St. Rep. 807, 29 Atl. 840.

**Title to timber and logs.**

Cited in footnotes to *Yockey v. Norn*, 26 L. R. A. 145, which holds title to timber does not pass until delivery on cars under unrecordable instrument requiring payment of balance when loaded on cars; *Macomber v. Detroit, L. & N. R. Co.* 32 L. R. A. 102, which holds title to logs not forfeited by failure to remove within time fixed by contract; *Magnetic Ore Co. v. Marbury Lumber Co.* 27 L. R. A. 434, which holds title of absolute grantee to timber not forfeited by failure to cut and remove within reasonable time.

25 L. R. A. 161, *MATTHEWS v. ST. LOUIS & S. F. R. CO.* 121 Mo. 298, 24 S. W. 591.

**Absolute liability of railroads for loss of property.**

Affirmed in 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243, upholding statute making railroad company absolutely liable for property destroyed by fire.

Cited in *Campbell v. Missouri P. R. Co.* 121 Mo. 345, 25 L. R. A. 176, footnote p. 175, 42 Am. St. Rep. 530, 25 S. W. 936; *Adams v. St. Louis & S. F. R. Co.* 138 Mo. 249, 28 S. W. 496; *Choctaw O. & G. R. Co. v. Alexander*, 7 Okla. 585, 52 Pac. 944; *McFarland v. Missouri K. & T. R. Co.* 94 Mo. App. 340, 68 S. W. 105; *Blackmore v. Missouri P. R. Co.* 162 Mo. 461, 62 S. W. 993; *Walker Bros. v. Missouri P. R. Co.* 68 Mo. App. 471,—upholding statute making railroad absolute insurer of property destroyed by it.

Cited in footnotes to *Leavitt v. Canadian P. R. Co.* 38 L. R. A. 152, which sustains statute limiting railroad's liability for fires to difference between amount of loss and amount of insurance; *McCullem v. Chicago & N. W. R. Co.* 49 L. R. A. 642, which sustains presumption of negligence from issuance of sparks from locomotive sufficient to kindle fire and destroy adjacent property; *Johnson v. Oregon Short Line R. Co.* 53 L. R. A. 744, which holds a railroad company liable for horse killed on unfenced track; *Kirk v. Norfolk & W. R. Co.* 32 L. R. A. 416, which holds necessary use of salt to keep switches free from ice not render company liable for killing of cattle attracted thereby; *Birmingham Mineral R. Co. v. Parsons*, 27 L. R. A. 263, which holds invalid, act imposing absolute liability for stock killed on railroad track.

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**Contributory negligence.**

Cited in *Bowen v. Boston & A. R. Co.* 179 Mass. 527, 61 N. E. 141; *Wall v. Platt*, 169 Mass. 405, 48 N. E. 270; *Boston Excelsior Co. v. Bangor & A. R. Co.* 93 Me. 65, 47 L. R. A. 85, footnote p. 82, 44 Atl. 138; *Adams v. St. Louis & S. F. R. Co.* 138 Mo. 249, 28 S. W. 496; *Walker Bros. v. Missouri P. R. Co.* 68 Mo. App. 471,—holding under statute owner's negligence, short of fraud, no bar to recovery for loss by fire set by locomotive.

Cited in footnotes to *Peter v. Chicago & W. M. R. Co.* 46 L. R. A. 224, which holds contributory negligence no defense to railroad company's absolute liability for fires; *Chicago, R. I. & P. R. Co. v. Zerneck*, 55 L. R. A. 610, which sustains statute making carrier liable for injury to passengers not due to their criminal negligence or violation of express rule.

Cited in note (25 L. R. A. 572) on how far statutes will be regarded as having abrogated maxim that one cannot profit by his own wrong.

**Abatement of damages.**

Cited in *Hartford F. Ins. Co. v. Wabash R. Co.* 74 Mo. App. 113, holding railroad cannot escape liability for loss by fire because owner first receives compensation from insurance company; *Matthews v. Missouri P. R. Co.* 142 Mo. 659, 44 S. W. 802, holding railroad cannot have damages for loss of barn by fire from its locomotive reduced by amount of insurance paid to owner; *Hartford F. Ins. Co. v. Wabash R. Co.* 74 Mo. App. 113, holding railroad liable to insurance company for damage by fire caused by it, where it has settled with owner after notice of insurance company's claim; *Williams v. St. Louis & S. F. R. Co.* 123 Mo. 585, 27 S. W. 387, holding damages for personal injury cannot be abated by partial compensation from collateral source.

**Liability for property not insurable.**

Cited in *Lumbermen's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.* 149 Mo. 173, 50 S. W. 281, and *Adams v. St. Louis & S. F. R. Co.* 138 Mo. 249, 28 S. W. 496, holding damages for loss by fire by locomotive includes property not insurable.

**Liability under insurance contract.**

Cited in *Wabash R. Co. v. Ordelheide*, 88 Mo. App. 592, holding insurance contract in lease enforceable, although loss occasioned by negligence of assured.

25 L. R. A. 175, *CAMPBELL v. MISSOURI P. R. CO.* 121 Mo. 340, 42 Am. St. Rep. 530, 25 S. W. 936.

**Construction of remedial statutes.**

Cited in *Cochran v. Thomas*, 131 Mo. 273, 33 S. W. 6, holding remedial statute should be given such liberal construction as will advance remedy.

Cited in footnote to *Chicago, R. I. & P. R. Co. v. Zerneck*, 55 L. R. A. 610, which sustains statute making carrier liable for injury to passengers not due to their criminal negligence or violation of express rule.

**Liability of railroads for setting fires.**

Cited in *Blackmore v. Missouri P. R. Co.* 162 Mo. 461, 62 S. W. 993; *McFarland v. Missouri, K. & T. R. Co.* 90 Mo. App. 340, 68 S. W. 105; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 19, 41 L. ed. 618, 17 Sup. Ct. Rep. 243; *Walker Bros. v. Missouri P. R. Co.* 68 Mo. App. 471, upholding act making railway absolute insurer of property destroyed by its locomotives; *Lumbermen's*

*Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.* 149 Mo. 173, 50 S. W. 281, holding railroad liable for fire communicated to building not abutting its right of way.

Cited in footnotes to *McCullen v. Chicago & N. W. R. Co.* 49 L. R. A. 642, which sustains presumption of negligence from issuance of sparks from locomotive sufficient to kindle fire and destroy adjacent property; *Peter v. Chicago & W. M. R. Co.* 46 L. R. A. 224, which holds contributory negligence no defense to railroad company's absolute liability for fires.

#### **Admissibility of evidence of other injury.**

Cited in *Matthews v. Missouri P. R. Co.* 142 Mo. 657, 44 S. W. 802, admitting evidence of spark from an engine falling upon tent erected on site of barn subsequent to its destruction by fire; *Dunning v. Maine C. R. Co.* 91 Me. 101, 64 Am. St. Rep. 208, 39 Atl. 352, holding evidence of fires set by other locomotives at other places admissible on question whether any locomotive set the fire in question; *Smart v. Kansas City*, 91 Mo. App. 594, denying admissibility of evidence that other persons injured at point in sidewalk where accident occurred; *Golden v. Chicago, R. I. & P. R. Co.* 84 Mo. App. 66, admitting evidence that particular engine set other fires on same trip; *Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co.* 52 C. C. A. 99, 114 Fed. 137, and *First Nat. Bank v. Lake Erie & W. R. Co.* 174 Ill. 42, 50 N. E. 1023, refusing to admit testimony that fires had been set by other engines when particular engine identified as setting fire in question.

#### **Insurable interest.**

Cited in *Dean v. Charleston & W. Car R. Co.* 55 S. C. 507, 33 S. E. 579, holding evidence that property destroyed by fire could not have been insured by railroad properly excluded.

#### **Recovery notwithstanding allegations.**

Cited in *Fields v. Wabash R. Co.* 80 Mo. App. 606; *Sims v. Chicago & A. R. Co.* 83 Mo. App. 250; *Walker Bros. v. Missouri P. R. Co.* 68 Mo. App. 474; *Hartpence v. Rogers*, 143 Mo. 633, 45 S. W. 650,—holding recovery not prevented because more was alleged in pleadings than was necessary to be proved; *Missouri, K. & T. R. Co. v. Garrison*, 66 Kan. 629, 72 Pac. 225 (dissenting opinion), majority holding allegation of negligence in use of engine from which fire escaped, not sufficient to support finding of negligence in use of defective spark arrester.

25 L. R. A. 178, *RUHE v. BUCK*, 124 Mo. 178, 46 Am. St. Rep. 439, 27 S. W. 412.

#### **Conflict of laws.**

Cited in *F. B. Hauck Clothing Co. v. Sharpe*, 83 Mo. App. 391, holding married woman's liability as accommodation maker of note governed by place of delivery; *Robison v. Pease*, 28 Ind. App. 611, 63 N. E. 479, holding married woman liable as surety on note executed in one state to make good default on bond on which she was surety in another state; *Bowles v. Field*, 78 Fed. 744, sustaining foreclosure of married woman's mortgage given to secure note with which she had taken up notes as surety though latter not valid in her domicile; *Walling v. Christian & C. Grocery Co.* 41 Fla. 489, 47 L. R. A. 612, footnote p. 608, 27 So. 46, holding law of one state as to married woman's contracts not

applicable to conveyances of real property in another state; *Smith v. Supreme Lodge, K. of P.* 83 Mo. App. 522, holding contract of insurance made by benefit society with its member controlled by common law which prevails as to it in state where made.

Cited in footnotes to *Freeman's Appeal*, 37 L. R. A. 452, which holds guaranty by married woman invalid in state of residence not validated by delivery by agent in other state; *Armstrong v. Best*, 25 L. R. A. 188, which denies enforceability in North Carolina of contract by married woman, valid in other state where made; *Thompson v. Taylor*, 54 L. R. A. 585, which holds written promise of married woman, valid where made, enforceable in New Jersey, though void if made therein; *Polson v. Stewart*, 36 L. R. A. 771, which holds surrender by man of marital rights to land in other state in consideration of release of dower to land in same state governed by law of that state; *Smith v. Ingram*, 61 L. R. A. 878, which holds law of place where land located, governs as to privy examination of married woman; *Williams v. Pope Mfg. Co.* 50 L. R. A. 816, which sustains nonresident married woman's right to bring in own name, according to law of domicil, action for tort to her person; *Gipps Brewing Co. v. De France*, 28 L. R. A. 386, which holds agreement to return or pay for barrels, etc., in which beer shipped contrary to law, unenforceable.

Cited in note (57 L. R. A. 520, 521, 525) on conflict of laws as to capacity of married woman to contract.

Distinguished in *Gates v. Tebbetts*, 100 Mo. App. 598, 75 S. W. 169, upholding defense under foreign statute prohibiting action on notes for recovery of debt after foreclosure of mortgage.

25 L. R. A. 188, *ARMSTRONG v. BEST*, 112 N. C. 59, 34 Am. St. Rep. 473, 17 S. E. 14.

#### **Conflict of laws.**

Cited in *Smith v. Ingram*, 130 N. C. 104, 61 L. R. A. 881, 40 S. E. 984 (distinguished in dissenting opinion, p. 110, 61 L. R. A. 883), holding married woman's contract for conveyance of land in another state governed by law where land situated; *Hanover Nat. Bank v. Howell*, 118 N. C. 274, 23 S. E. 1005, holding contract of married woman valid when made can only be enforced at her domicil in another state if valid in that state; *Brown v. Dalton*, 105 Ky. 672, 88 Am. St. Rep. 325, 49 S. W. 443, refusing enforcement of wife's agreement to assume purchase-money note of husband, in consideration of conveyance of land situated in another state where contract valid; *Robison v. Pease*, 28 Ind. App. 611, 63 N. E. 479, holding defense of coverture under law of forum not available as defense to note given for default under bond enforceable in state where made; *First Nat. Bank v. Shaw*, 109 Tenn. 241, 59 L. R. A. 500, 97 Am. St. Rep. 840, 70 S. W. 807, holding note signed in Tennessee by married woman domiciled with husband in that state, but payable in Ohio, is contract of latter state; *Young v. Hart*, 101 Va. 484, 44 S. E. 703, holding contract of married woman valid where made and to be performed, will be enforced in manner provided by local laws; *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 78, 70 N. W. 508, holding limitation of carrier's liability under foreign statute unenforceable when against public policy.

Cited in note (57 L. R. A. 514, 518) on conflict of laws as to capacity of married woman to contract.



Distinguished in *State v. Wernwag*, 116 N. C. 1003, 28 L. R. A. 297, 47 Am. St. Rep. 873, 21 S. E. 683, holding dealer delivering meat on telephonic message to hotel within certain area affected by ordinance though place of business outside, liable to fine.

25 L. R. A. 190, *LEVY v. WAITT*, 10 C. C. A. 227, 21 U. S. App. 394, 61 Fed. 1008.

**Exclusive use of trademark.**

Cited in *Atwater v. Castner*, 32 C. C. A. 79, 50 U. S. App. 394, 88 Fed. 643, upholding preliminary injunction against infringement of geographical trade name where there was public acquiescence for twenty years and infringement enjoined by court of another circuit; *Macmahon Pharmacal Co. v. Denver Chemical Mfg. Co.* 51 C. C. A. 306, 113 Fed. 468, holding that common-law right to exclusive use of trademark depends upon such use as to identify goods in connection with which it is used, as those of particular manufacturer; *Burt v. Tucker*, 178 Mass. 501, 52 L. R. A. 115, footnote p. 112, 86 Am. St. Rep. 499, 59 N. E. 1111, holding that use of trademark may be resumed as against another who has acquired right to use it in good faith in interval of discontinuance; *Heublein v. Adams*, 125 Fed. 785, holding appropriation of word "club" applied to cocktails as trade name, shown by use that was long continued, notorious, and universally recognized.

Cited in footnotes to *American Waltham Watch Co. v. United States Watch Co.* 43 L. R. A. 826, which authorizes injunction against deceptive use of word "Waltham" by other manufacturer of watches at same place; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 162, which authorizes injunction against use of geographical name on flour made elsewhere from wheat of different grade; *Hoyt v. J. T. Lovett Co.* 31 L. R. A. 44, which denies right to appropriate words "Green Mountain" as trademark.

25 L. R. A. 193, *MILLBRAE CO. v. TAYLOR* (Cal.) 37 Pac. 235.

25 L. R. A. 198, *PALTROVITCH v. PHOENIX INS. CO.* 143 N. Y. 73, 60 N. Y. S. R. 462, 37 N. E. 639.

**Notice of loss under policy.**

Cited in *Matthews v. American Cent. Ins. Co.* 154 N. Y. 457, 39 L. R. A. 436, 61 Am. St. Rep. 627, 48 N. E. 751, holding policy not void because of delay in notice of loss where fire occurred after death of insured and before appointment of administrator; *Solomon v. Continental F. Ins. Co.* 160 N. Y. 602, 46 L. R. A. 685, 73 Am. St. Rep. 707, 55 N. E. 279, holding service of notice of loss within reasonable time, if sent three days after actual knowledge by insured, though fifty days after fire; *Smaldone v. Insurance Co. of N. A.* 15 App. Div. 234, 44 N. Y. Supp. 201, holding insurance company estopped to deny liability when insured misled by agent as to procedure to prove loss; *Partridge v. Milwaukee Mechanics' Ins. Co.* 13 App. Div. 526, 43 N. Y. Supp. 632, holding policy not canceled where local agent without returning premium sent to insured other policies to take its place, who received them day after fire; *Messmer v. Niagara F. Ins. Co.* 24 App. Div. 246, 48 N. Y. Supp. 478, holding question of waiver of condition as to proof of loss should be submitted to jury when informal proof retained without objection; *Davis v. Grand Rapids F. Ins. Co.* 15 Misc. 265, 30

N. Y. Supp. 791, holding retention by company of proofs of loss for nearly a month without objection waiver of defects; *Porter v. Traders' Ins. Co.* 164 N. Y. 510, 52 L. R. A. 429, 58 N. E. 641, holding conditions and formalities for ascertaining extent of loss under policy, after loss has occurred, construed liberally in favor of insured; *Poele v. Provident Fund Soc.* 147 Ind. 552, 44 N. E. 661, holding notice by beneficiary within five days after coroner's finding of accidental death, though sixteen days after death, in time.

25 L. R. A. 200, *ANDERSON v. GILL*, 79 Md. 312, 47 Am. St. Rep. 402, 29 Atl. 527.

**Liability of collecting bank to customer.**

Cited in *Kershaw v. Ladd*, 34 Or. 381, 44 L. R. A. 239, 56 Pac. 402, holding receiving bank sending check same day by mail to drawee bank not negligent; *Morris v. Eufaula Nat. Bank*, 122 Ala. 592, 82 Am. St. Rep. 95, 25 So. 499, holding reasonable time to present check on bank in same place when it is drawn is till close of banking house in next secular day; *Morris v. Eufaula Nat. Bank*, 122 Ala. 591, 82 Am. St. Rep. 95, 25 So. 499, holding loss, brought about by failure of bank on which check drawn, falls on drawer of check, and not on collecting bank receiving it in payment of draft against accepting debtor; *Comer v. Dufour*, 95 Ga. 379, 30 L. R. A. 302, footnote p. 300, 51 Am. St. Rep. 89, 22 S. E. 543, holding first presentment of check for payment fixes rights of parties, and holder accepts check of drawee in lieu of money at his peril; *Kirkham v. Bank of America*, 26 App. Div. 121, 49 N. Y. Supp. 767, holding collecting bank bound to return draft to customer properly protested, or to pay him the money.

Cited in footnotes to *First Nat. Bank v. Buckhannon Bank*, 27 L. R. A. 332, which denies liability to drawer of worthless check by taking substituted check from drawee which is not presented with due diligence; *Edminsten v. Herpelsheimer*, 59 L. R. A. 934, which requires check to be presented not later than day after receipt to hold drawer; *Pepperday v. Citizens' Nat. Bank*, 39 L. R. A. 529, which holds bank taking check on sale of stock for principal and crediting him with its amount liable if check proves worthless.

25 L. R. A. 207; *KOFKA v. ROSICKY*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788.

**Specific performance of oral contract to convey.**

Cited in *McCabe v. Healy*, 138 Cal. 86, 70 Pac. 1008, enforcing trust against heirs of one persuading nephew to take charge of his business in consideration of promise to will him property; *Wilson v. Heath*, 23 Misc. 718, 53 N. Y. Supp. 160, holding oral promise to will all property to one consenting to be as daughter to promisor, if fully performed by promisee, enforceable against promisor's estate; *Svanburg v. Fosseen*, 75 Minn. 361, 43 L. R. A. 431, 74 Am. St. Rep. 490, 78 N. W. 4, decreeing specific performance of oral contract for conveyance of real estate in consideration of service not measurable in money; *Owens v. McNally*, 113 Cal. 449, 33 L. R. A. 372, footnote p. 369, 45 Pac. 710, refusing specific performance of contract between uncle and niece to leave her all his property at death, when promisor subsequently married woman who was ignorant of contract; *Lothrop v. Marble*, 12 S. D. 515, 76 Am. St. Rep. 626, 81 N. W. 885, enforcing agreement against estate of one promising to convey real estate

in consideration of care during life, while suffering from disease; *Lucas v. Lucas*, 64 Neb. 192, 89 N. W. 769, decreeing specific performance where complete conveyance refused on account of misrepresentation as to account transferred by vendee as consideration; *Davies v. Cheadle*, 31 Wash. 173, 71 Pac. 728, quieting title in promisee in possession of land under testamentary oral agreement to will same, in consideration of services afterwards performed by promisee; *Teske v. Dittberner*, 65 Neb. 169, 101 Am. St. Rep. 614, 91 N. W. 181, charging grantee of promisor, under conveyance in violation of testamentary oral agreement, with trust in favor of promisee.

Cited in footnotes to *Clancy v. Flusky*, 52 L. R. A. 277, which authorizes specific performance of oral contract to convey land to son for taking care of father for life, as fully performed by son as possible, though father moved away before death; *Bryson v. McShane*, 49 L. R. A. 527, which holds specifically, enforceable executed oral contract to give entire property for support during life and burial after death; *Atchison, T. & S. F. R. Co. v. Chicago & W. I. R. Co.* 35 L. R. A. 167, which refuses to require payment of interest not provided for as condition of specific performance of contract.

Distinguished in *Ferguson v. Herr*, 64 Neb. 657, 90 N. W. 625, holding where agreement of adoption made, right of adopted child to inherit dependent upon terms of contract; *Weeks v. Lund*, 69 N. H. 83, 45 Atl. 249, holding performance by stranger of services susceptible of pecuniary estimation, in consideration of oral agreement to convey, not sufficient to take case out of statute of frauds.

25 L. R. A. 215, *HEINBOKEL v. NATIONAL SAV. LOAN & BLDG. ASSO.*  
58 Minn. 340, 49 Am. St. Rep. 519, 59 N. W. 1050.

**Building and loan associations; rights of withdrawing member.**

Followed in *Hoyt v. Interoccean Bldg. Asso.* 58 Minn. 345, 60 N. W. 678, without discussion.

Cited in *Musial v. Kosciuszko Bldg. & L. Asso.* 80 Ill. App. 466; *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso.* 148 N. Y. 288, 35 L. R. A. 303, 42 N. E. 710; *Pawlick v. Homestead Loan Asso.* 15 Misc. 431, 37 N. Y. Supp. 164; *Domestic Bldg. Asso. v. Jourdain*, 110 Ill. App. 200, — holding withdrawing member of loan association cannot bring action until funds in treasury applicable to payment of his claim; *Daley v. People's Bldg. Loan & Sav. Asso.* 172 Mass. 536, 52 N. E. 1090, holding provision of building association that shareholder entitled to receive par value of shares binds corporation only to extent of funds accumulated for that purpose; *Denison v. Alpena Loan & Bldg. Asso.* 117 Mich. 103, 75 N. W. 300, liability of withdrawing member for embezzlement by secretary cannot be litigated in action by member for amount due if necessary conditions exist for payment upon withdrawal notices; *Andrews v. Roanoke Bldg. Asso. & Invest Co.* 98 Va. 455, 49 L. R. A. 660, 36 S. E. 531, holding statute of limitations does not run against withdrawing member of building association until fund accumulated sufficient to meet his demands.

Cited in note (35 L. R. A. 301) on withdrawal from building and loan associations.

**Association's right to alter by-laws.**

Cited in *Stilwell v. People's Bldg. Loan & Sav. Asso.* 19 Utah, 267, 57 Pac. 14, holding membership in loan association subject to association's right to

alter by-laws; *Eastern Bldg. & L. Asso. v. Snyder*, 98 Va. 719, 37 S. E. 293, holding building association may pass by-laws affecting remedies of its members after they have become members.

**Members of association as creditors.**

Cited in *Cook v. Emmet Perpetual & Mut. Bldg. Asso.* 90 Md. 291, 44 Atl. 1022, holding general creditors of loan association entitled to priority over withdrawing members in distribution of assets; *Rabbitt v. Wilcoxon*, 103 Iowa, 49, 38 L. R. A. 186, 64 Am. St. Rep. 152, 72 N. W. 306, holding shareholder of insolvent company giving notice of withdrawal, after withdrawal of entire amount permitted by by-laws, entitled to share only as general creditors; *Re Youth's Temple of Honor*, 73 Minn. 325, 76 N. W. 59, holding members of an endowment association undergoing dissolution are not creditors thereof.

**Allegations necessary in actions by withdrawing member.**

Cited in *Huntington County Loan & Sav. Asso. v. Emerick*, 23 Ind. App. 181, 55 N. E. 106, holding unnecessary, allegations of funds sufficient to meet claim of member; *Stilwell v. People's Bldg. Loan & Sav. Asso.* 19 Utah, 269, 57 Pac. 14, holding withdrawing member, in action against loan association, must allege and prove fund applicable to payment of his debt.

25 L. R. A. 217, *LINN v. CHAMBERSBURG*, 160 Pa. 511, 28 Atl. 842.

**Power of municipality to maintain public service plants.**

Cited in *Mealey v. Hagerstown*, 92 Md. 754, 48 Atl. 740, and *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 267, 30 L. R. A. 544, footnote p. 540, 51 Am. St. Rep. 24, 18 So. 677, holding city authorized to erect electric lighting plant for public and private use; *O'Brien v. Erie City*, 20 Pa. Co. Ct. 342, 7 Pa. Dist. R. 491, holding municipality may build conduit for electric wires; *Mayo v. Washington*, 122 N. C. 24, 40 L. R. A. 169, footnote p. 163, 29 S. E. 343 (dissenting opinion), majority holding that municipality cannot issue bonds for electric light plant without legislative authority.

Cited in footnote to *Mitchell v. Negaunee*, 38 L. R. A. 157, which sustains right of city to own electric light plant to furnish light to citizens.

**Limitations upon municipal indebtedness.**

Cited in *Gaston v. Meadville Schools*, 5 Pa. Dist. R. 550, 18 Pa. Co. Ct. 267, holding one claiming municipal indebtedness beyond constitutional limit must show it.

Cited in footnotes to *South Bend v. Reynolds*, 49 L. R. A. 795, which holds limitation of city debt not exceeded by contract for erection of city hall for which yearly rent to be paid, with option to purchase; *Saleno v. Neosho*, 27 L. R. A. 769, which holds contract by city to pay fixed price annually for water supply not a debt for aggregate amount; *Kelly v. Minneapolis*, 30 L. R. A. 281, which requires deduction of amount of sinking fund from total apparent debt to ascertain actual debt; *McBean v. Fresno*, 31 L. R. A. 794, which holds limitation of city indebtedness not violated by contract to pay annual sum for term of years if annual sum within limit; *Indianapolis v. Wann*, 31 L. R. A. 743, which holds contract for street lights for five years payable monthly void.

25 L. R. A. 222, *WILLIAMSON v. JONES*, 39 W. Va. 231, 19 S. E. 436.

**Life tenant's rights in minerals, etc.**

Cited in *Williamson v. Jones*, 43 W. Va. 565, 38 L. R. A. 697, footnote p.

694, 64 Am. St. Rep. 891, 27 S. E. 410, holding life tenant has no right to extract oil from land; Koen v. Bartlett, 41 W. Va. 566, 31 L. R. A. 130, footnote p. 128, 56 Am. St. Rep. 884, 23 S. E. 664, holding tenant of life estate has right to full enjoyment of land including oil and gas mines already opened or opened during life estate; Hook v. Garfield Coal Co. 112 Iowa, 219, 83 N. W. 963, holding that cotenant cannot use or sell coal found under entire tract where vein has not been already opened; Carter v. Tyler County Court, 45 W. Va. 810, 43 L. R. A. 726, footnote p. 725, 32 S. E. 216, holding prospective product of oil well cannot be taxed to lessee as personal property; Higgins Oil & Fuel Co. v. Snow, 51 C. C. A. 271, 113 Fed. 437, holding dowress in oil lands not bound by judgment in action to which she was not made party; Higgins Oil & Fuel Co. v. Snow, 51 C. C. A. 275, 113 Fed. 433, holding life tenant can work mines when already opened, but cannot open them; Wilson v. Youst, 43 W. Va. 839, 39 L. R. A. 296, 28 S. E. 781, holding court can direct sale of oil underlying land in possession of life tenant and apportion royalty among parties interested; Williamson v. Jones, 43 W. Va. 580, 38 L. R. A. 697, 64 Am. St. Rep. 891, 27 S. E. 410, holding equity has jurisdiction of suit by remainder man to enjoin removal of oil by life tenant; Haskell v. Sutton, 53 W. Va. 222, 44 S. E. 533 (dissenting opinion), majority holding equity will enjoin lessee from drilling wells and taking oil under void lease by widow.

Cited in footnotes to Marshall v. Mellon, 35 L. R. A. 816, which holds life tenant's right to operate for oil and gas limited to operations begun before life tenancy accrued; Gannon v. Peterson, 55 L. R. A. 701, which denies right of owners of expectancy to injunction against owner of determinable fee mining coal.

#### **When oil and gas part of realty.**

Cited in Wilson v. Youst, 43 W. Va. 835, 39 L. R. A. 296, 28 S. E. 781, and Haskell v. Sutton, 53 W. Va. 215, 44 S. E. 533, holding oil in crevices of rock is part of realty; Bettman v. Harness, 42 W. Va. 438, 36 L. R. A. 569, footnote p. 566, 26 S. E. 271, enjoining unlawful extraction of oil or gas from land, they being part of land; Lawson v. Kirchner, 50 W. Va. 347, 40 S. E. 344, holding lease of infant's land for oil and gas purposes is conditional contingent sale of oil and gas in place; Murray v. Allred, 100 Tenn. 115, 39 L. R. A. 252, footnote p. 249, 66 Am. St. Rep. 740, 43 S. W. 355, holding oil a mineral in reservation in deed of "all mines, minerals and metals in and under the land."

Cited in footnotes to Kelley v. Ohio Oil Co. 39 L. R. A. 765, which sustains right to drill oil well on own land near line of other person whose oil drawn out; Parish Fork Oil Co. v. Bridgewater Gas Co. 59 L. R. A. 566, which holds right to produce and take oil not vested in lessees by mere drilling of well and discovery of oil; Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co. 50 L. R. A. 768, which holds unlawful, pumping of natural gas to injury of other persons having wells supplied from same reservoir.

Cited in note (33 L. R. A. 847) on liability for rent on oil and gas lease.

#### **Use of ex parte affidavits.**

Cited in Shinn v. Board of Education, 39 W. Va. 509, 20 S. E. 604, discussing use of *ex parte* affidavits read without notice.

25 L. R. A. 238, NOBLE v. MITCHELL, 100 Ala. 519, 14 So. 581.

**Divisibility of statute partly unconstitutional.**

Affirmed in Noble v. Mitchell, 104 U. S. 369, 41 L. ed. 473, 17 Sup. Ct. Rep. 110, holding decision of state court that unconstitutional provisions of statute are separable, is binding.

Cited in Spigener v. Rives, 104 Ala. 438, 16 So. 74, per Coleman, J., dissenting, holding constitutionality of particular sections of statute will not be determined, when separable from sections on which case based.

**Actions against insurance agents.**

Cited in Adler-Weinberger S. S. Co. v. Rothschild, 123 Fed. 149, holding compliance with provisions of policy as to proofs of loss not condition to right of action against agent acting for unlicensed company.

Cited in footnotes to Com. v. Reinæhl, 25 L. R. A. 247, which holds Guarantee Lloyds not a "company" within provision as to acting as agent for foreign company; State v. Stone, 25 L. R. A. 243, which holds agents of individuals within provision as to acting as insurance agent for principal without certificate of permission to do business.

**Regulation of insurance.**

Cited in Hoadley v. Purifoy, 107 Ala. 290, 30 L. R. A. 353, footnote p. 351, 18 So. 220, refusing mandamus to compel issuance of license to unincorporated foreign insurance company; Enterprise Lumber Co. v. Mundy, 62 N. J. L. 21, 55 L. R. A. 200, 42 Atl. 1063, holding valid a "Lloyds" contract of insurance; Daggs v. Orient Ins. Co. 136 Mo. 391, 35 L. R. A. 229, 38 S. W. 85, holding valid, statute requiring payment of full amount of insurance on total loss.

Cited in footnotes to Com. v. Vrooman, 25 L. R. A. 250, which upholds legislative power to confine insurance business to corporations; State *ex rel.* Hoadley v. Insurance Comrs. 33 L. R. A. 238, which holds unconstitutional, discrimination between residents and nonresidents as to conditions of doing insurance business.

Cited in note (24 L. R. A. 303) on restrictions on business of foreign insurance companies.

**Argument to jury.**

Cited in McNeill v. State, 102 Ala. 127, 48 Am. St. Rep. 17, 15 So. 352, holding proper, prosecuting attorney's statement to jury that defendant on charge of murder should not be imprisoned, but hung.

25 L. R. A. 243, STATE v. STONE, 118 Mo. 388, 24 S. W. 164.

**Regulation of insurance.**

Cited in State v. Beardsley, 88 Minn. 25, 92 N. W. 472, holding agent for nonresident partnership, doing insurance business within statute requiring agents of insurance companies to be licensed; State v. Phelan, 66 Mo. App. 558, holding individuals not debarred from doing business, but must comply with regulations; People v. Gay, 107 Mich. 425, 30 L. R. A. 465, 65 N. W. 292, holding act prohibiting solicitation of insurance by nonresident person valid; Cravens v. New York L. Ins. Co. 148 Mo. 604, 53 L. R. A. 311, 71 Am. St. Rep. 628, 50 S. W. 519, holding foreign insurance companies doing business must conform to laws; Enterprise Lumber Co. v. Mundy, 62 N. J. L. 21, 55 L. R. A. 201, 42 Atl. 1063, holding "Lloyds" policy valid in absence of prohibiting statute;

New York L. Ins. Co. v. Cravens, 178 U. S. 396, 44 L. ed. 1122, 20 Sup. Ct. Rep. 962, holding state may prescribe conditions upon which foreign insurance company may transact business.

Cited in footnote to *Com. v. Reinöhl*, 25 L. R. A. 247, which holds Guarantee Lloyds not a "company" within provision as acting as agent for foreign company.

Cited in notes (24 L. R. A. 303) on restrictions on business of foreign insurance companies; (25 L. R. A. 239) on restrictions on insurance by unincorporated associations and individuals; "Lloyds" associations.

25 L. R. A. 247, *COM. v. REINÖHL*, 163 Pa. 287, 29 Atl. 896.

#### **Validity of "Lloyds" insurance.**

Explained in *Re Lloyd's Asso.* 15 Pa. Co. Ct. 586, 3 Pa. Dist. R. 822 holding "Lloyds" company cannot issue policy of insurance in commonwealth without committing misdemeanor.

Cited in *Enterprise Lumber Co. v. Mundy*, 62 N. J. L. 21, 55 L. R. A. 201, 42 Atl. 1063, holding "Lloyds" contract of insurance valid in absence of prohibiting statute.

#### **Liability of insurance agents.**

Cited in *Adler-Weinberger S. S. Co. v. Rothschild*, 123 Fed. 146, holding agent negotiating policy with company not complying with laws, personally liable, though personally insured not within state.

Cited in footnote to *State v. Stone*, 25 L. R. A. 243, which holds agents of individuals within provision as to acting as insurance agent for principal without certificate of permission to do business.

Cited in note (25 L. R. A. 239) on restrictions on insurance by unincorporated associations and individuals; "Lloyds" associations.

25 L. R. A. 250, *COM. v. VROOMAN*, 164 Pa. 306, 44 Am. St. Rep. 603, 30 Atl. 217.

#### **Regulation of insurance.**

Cited in *Swing v. Munson*, 191 Pa. 587, 58 L. R. A. 226, 71 Am. St. Rep. 772, 43 Atl. 342, and *O'Neil v. American F. Ins. Co.* 166 Pa. 78, 26 L. R. A. 717, 45 Am. St. Rep. 650, 30 Atl. 943, holding business of fire insurance proper subject of legislative control; *Swing v. Munson*, 191 Pa. 589, 58 L. R. A. 226, 71 Am. St. Rep. 772, 43 Atl. 342, holding member of mutual insurance company not complying with statute conditioning right to do business, cannot be assessed for debts of company after dissolution; *Re Lloyd's Asso.* 15 Pa. Co. Ct. 587, 3 Pa. Dist. R. 823, holding "Lloyds" contract of insurance invalid; *Western Massachusetts Mut. F. Ins. Co. v. Girard Point Storage Co.* 19 Pa. Co. Ct. 116, 6 Pa. Dist. R. 56, holding foreign fire insurance company not complying with state acts cannot recover premiums; *Re Insurance Co. Partnerships*, 20 Pa. Co. Ct. 128, 6 Pa. Dist. R. 701, holding two fire insurance companies cannot issue joint policy under name of underwriters, because not incorporated; *Weed v. Cuming*, 23 Pa. Co. Ct. 28, 8 Pa. Dist. R. 321, holding member of "Lloyds" company which has received premium liable for loss under policy; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 257, 28 L. R. A. 799, 32 S. W. 5, upholding constitutionality of statute making void all stipulations in policies which limit liability to less than full amount of loss, when same does not exceed amount of insurance; *State ex rel. Hoadley v. Insurance Comrs.* 37 Fla. 575, 33 L. R. A.

291, 20 So. 772, overruling motion to quash writ of mandamus to compel insurance commissioners to reissue to "Lloyds" association certificate to transact business; *Enterprise Lumber Co. v. Mundy*, 62 N. J. L. 21, 55 L. R. A. 201, 42 Atl. 1063, holding "Lloyd's" policy of insurance is valid in absence of statutes prohibiting it; *People v. Loew*, 23 Misc. 576, 52 N. Y. Supp. 799, restraining "Peoples Fire Lloyds" from transacting insurance business; *Hoadley v. Purifoy*, 107 Ala. 290, 30 L. R. A. 353, 18 So. 220, referring to business monopolized by corporations without discussing it.

**Legislative regulation of business.**

Cited in *Haigh v. Bell*, 41 W. Va. 24, 31 L. R. A. 132, 23 S. E. 666, sustaining act, as within police power, prohibiting owner from allowing hogs to run at large; *Overshiner v. State*, 156 Ind. 193, 51 L. R. A. 751, 83 Am. St. Rep. 187, 59 N. E. 468, upholding act permitting state dental association to appoint three members of board of dental examiners; *Com. v. Beatty*, 15 Pa. Super. Ct. 19, holding valid, act to regulate employment and provide for health and safety of workers.

Cited in footnote to *Third Nat. Bank v. Divine Grocery Co.* 34 L. R. A. 445, which denies right to prevent transfer of property in payment of debt while solvent.

Distinguished in *Clark's Estate*, 195 Pa. 528, 48 L. R. A. 595, 44 W. N. C. 471, 46 Atl. 127, Reversing 10 Pa. Super. Ct. 435, holding act authorizing persons acting in fiduciary capacity to include in compensation expenses for bond of surety company, invalid.

25 L. R. A. 257, *JEFFERSON v. ASCH*, 53 Minn. 446, 39 Am. St. Rep. 618, 35 N. W. 604.

**When promise for benefit of third person enforceable.**

Cited in *Young Men's Christian Asso. v. Croft*, 34 Or. 111, 75 Am. St. Rep. 568, 55 Pac. 439; *Hicks v. Hamilton*, 144 Mo. 490, 66 Am. St. Rep. 431, 46 S. W. 432; *McKay v. Ward*, 20 Utah, 183, 46 L. R. A. 633, footnote p. 623, 57 Pac. 1024, — holding assumption of mortgage by grantee will not make him personally liable unless grantor was liable; *Stites v. Thompson*, 98 Wis. 331, 73 N. W. 774, holding purchaser of mortgaged premises assuming to pay mortgage liable to mortgagee as principal debtor; *Montgomery v. Rief*, 15 Utah, 501, 50 Pac. 623, holding strangers to bond given to state by contractor for public building cannot sue on it for material furnished; *Union R. Storage Co. v. McDermott*, 53 Minn. 411, 55 N. W. 606, holding stranger cannot sue on bond given by contractor to United States to perform his contract although he furnished material to the contractor; *Coleman v. Hiler*, 85 Hun, 551, 33 N. Y. Supp. 357, holding third person cannot maintain action on promises for his benefit unless there is some liability in favor of beneficiary.

Cited in footnotes to *Capital Traction Co. v. Offutt*, 53 L. R. A. 390, which denies liability of street railway company for debts of other company whose property and franchises bought; *Bain v. Atkins*, 57 L. R. A. 791, which denies right of injured person to sue insurer against loss through liability for injuries, after settlement with insured; *Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* 58 L. R. A. 796, which denies right of action against railroad company carrying mail under contract with government, by sender of registered mail destroyed through negligence of its employees; *Morgan v. Randolph-Clowes Co.* 51 L. R.



A. 653, which denies right of firm creditor to sue corporation assuming firm debts; *McCartney v. Ridgway*, 32 L. R. A. 555, which holds court of equity will not aid mere volunteer to carry imperfect gift or trust into effect; *Tweeddale v. Tweeddale*, 61 L. R. A. 509, which sustains right of third person to enforce contract made for his benefit; *Enos v. Sanger*, 37 L. R. A. 862, and *Hare v. Murphy*, 29 L. R. A. 851, which sustains personal liability of purchaser assuming mortgage though grantor not liable; *Knapp v. Connecticut Mut. L. Ins. Co.* 40 L. R. A. 861, which upholds mortgagee's right to compel grantee to keep agreement to assume mortgage, by suit in equity; *Buchanan v. Tilden*, 44 L. R. A. 170, which sustains wife's right to sue on contract by third person with husband, to pay her part of proceeds of successful will contest; *Baxter v. Camp*, 42 L. R. A. 514, which holds contract to pay money to promisee's son if he survives parent not enforceable by son; *Adams v. Union R. Co.* 44 L. R. A. 273, which holds contract with town limiting street car fares available to passenger; *Buckley v. Gray*, 31 L. R. A. 862, which holds employment of attorney to draw will providing for one of testatrix's sons not contract for latter's benefit; *Ferris v. American Brewing Co.* 52 L. R. A. 305, which sustains right of action of one for whose benefit stipulation in lease against sale on premises of other person's beer, made.

Cited in note (64 L. R. A. 597) on who is real party in interest within meaning of statutes defining parties by whom action must be brought.

Criticized in *Electric Appliance Co. v. United States Fidelity & G. Co.* 110 Wis. 439, 53 L. R. A. 613, footnote p. 609, 85 N. W. 648, holding, to entitle third person to benefit of bond, there must be not only an interest to secure some benefit to that party, but also a legally enforceable promise.

25 L. R. A. 280, *SMITH v. LIBRARY BOARD*, 58 Minn. 108, 59 N. W. 979.

**When bailee liable for loss.**

Cited in footnote to *Prince v. Alabama State Fair*, 28 L. R. A. 716, which holds bailee of picture for competitive exhibition at fair liable for its loss.

25 L. R. A. 283, *STATE v. AUSTIN*, 114 N. C. 855, 41 Am. St. Rep. 817, 19 S. E. 919.

**Police powers of municipalities.**

Cited in *State v. Taylor*, 133 N. C. 758, 46 S. E. 5, holding town ordinance cannot make criminal, or prescribe punishment for, acts indictable at common law or by statute; *State v. Ray*, 131 N. C. 821, 60 L. R. A. 636, 92 Am. St. Rep. 795, 42 S. E. 960 (dissenting opinion), majority holding town ordinance requiring all stores selling merchandise to be closed after 7:30 P. M., invalid.

Cited in footnotes to *Re Stegenga*, 61 L. R. A. 763, which sustains city's authority to provide for punishment of loiterers in streets and bar-rooms; *People v. Ewer*, 25 L. R. A. 794, which holds valid, act prohibiting employment of girls under fourteen as dancers or in theatrical exhibitions.

25 L. R. A. 287, *SMITH v. NORFOLK & S. R. CO.* 114 N. C. 728, 19 S. E. 863, 923.

**Liability where defendant might have avoided injury.**

Cited in *Fulp v. Roanoke & S. R. Co.* 120 N. C. 529, 27 S. E. 74, holding

erroneous a charge that plaintiff's contributory negligence in being drunk on track prevented recovery, where it was not left to jury to determine whether injury could not then have been avoided; *Green v. Los Angeles Terminal R. Co.* 143 Cal. 46, 101 Am. St. Rep. 68, 76 Pac. 724, holding locomotive engineer entitled to assume person in full possession of faculties approaching track will not attempt to cross before train in full view.

Cited in footnotes to *Thompson v. Salt Lake Rapid-Transit Co.* 40 L. R. A. 172, which holds one having last clear chance, solely responsible for injury; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 802, which holds duty to exercise care to avoid injury from other's negligence does not arise till negligence apprehendible; *Tesch v. Milwaukee Electric R. & Light Co.* 53 L. R. A. 618, which denies liability for injury to one guilty of contributory negligence, notwithstanding subsequent opportunity of other party to avoid injury; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 99, which denies duty towards trespassers on track before discovery.

Cited in notes (55 L. R. A. 419, 421, 423, 454-456) on doctrine of last clear chance; (25 L. R. A. 787) on care required of railroad companies to prevent injuring small children on track; (25 L. R. A. 163) on constitutionality of statutes making railroad companies absolutely liable for damage by fires set out by them or for stock killed by them irrespective of negligence.

Cited as overruled in *Lloyd v. Albermarle & R. R. Co.* 118 N. C. 1015. 54 Am. St. Rep. 764, 24 S. E. 805, holding negligence of one lying insensible from intoxication on railway track not concurrent if injury to him could have been prevented.

#### **Railroads; duty to maintain lookout.**

Explained in *Pickett v. Wilmington & W. R. Co.* 117 N. C. 628, 30 L. R. A. 257, footnote p. 257, 53 Am. St. Rep. 611, 23 S. E. 264, holding engineer negligent in failing to keep lookout so as to see helpless person on track.

Cited in footnotes to *Mason v. Southern R. Co.* 53 L. R. A. 913, which holds company liable for death of child on track from failure to keep reasonable lookout; *Gunn v. Ohio River R. Co.* 36 L. R. A. 575, which holds it duty of engineer and fireman to keep lookout for persons on track.

#### **Contributory negligence as proximate cause of injury.**

Cited in *Neal v. Carolina C. R. Co.* 126 N. C. 638, 49 L. R. A. 686, footnote p. 684, 36 S. E. 117, denying liability for death of person on track by train running at excessive speed without ringing bell.

Cited in footnotes to *Schreiner v. Great Northern R. Co.* 58 L. R. A. 76, which holds failure to build fence not proximate cause of injury to one pushed on track by cow; *Baltimore Consol. R. Co. v. Armstrong*, 54 L. R. A. 424, which denies liability to one caught between two street cars by becoming confused after assenting to motorman's instructions as to reaching safe place.

#### **Intoxication not excuse for negligence.**

Cited in *Fisher v. West Virginia & P. R. Co.* 42 W. Va. 189, 33 L. R. A. 72, 24 S. E. 570, holding self-intoxication no excuse for negligence of remaining on platform of moving car after conductor's request to go inside; *Bageard v. Consolidated Traction Co.* 64 N. J. L. 322, 49 L. R. A. 427, 81 Am. St. Rep. 498,

45 Atl. 620, holding man cannot recover for injuries brought about by his intoxicated condition; *Burke v. Chicago & N. W. R. Co.* 108 Ill. App. 573, holding voluntary intoxication not excuse for failure to use degree of care reasonably expected of sober person.

Cited in footnote to *Price v. Philadelphia, W. & B. R. Co.* 36 L. R. A. 213, which holds negligence of trespasser sitting down on railroad track not excused by drunkenness.

Cited in note (40 L. R. A. 131) on intoxication as affecting negligence.

25 L. R. A. 300, *CHICAGO & N. W. R. CO. v. WEST CHICAGO PARK*, 151 Ill. 204, 37 N. E. 1079.

#### **Estoppel.**

Cited in *Chicago v. Union Stock Yards & Transit Co.* 164 Ill. 232, 35 L. R. A. 285, 45 N. E. 430, declaring city estopped when it has recognized for twenty years right of railroad to cross street; *West Chicago Park v. Sweet*, 167 Ill. 335, 47 N. E. 728, holding objections to control of streets by park commissioners of no force after long acquiescence by city; *Bass v. South Park*, 171 Ill. 371, 49 N. E. 549, holding that, when proceedings show on their face that park commissioners had secured control of streets, it will be presumed it was done legally; *Chicago v. Carpenter*, 201 Ill. 408, 66 N. E. 362, holding city estopped to deny control of park commissioners over streets where improvements were made by them without interference by city; *Soule v. People*, 205 Ill. 623, 69 N. E. 22, holding validity of village organization cannot be attacked by information in nature of quo warranto to oust officers, where corporate functions exercised for over twenty years.

#### **Reviewing error.**

Cited in *Glennon v. Britton*, 155 Ill. 239, 40 N. E. 594, refusing to review error committed at party's own instance, contrary to his stipulation.

25 L. R. A. 305, *CHIPMAN v. CARROLL*, 53 Kan. 163, 35 Pac. 1109.

#### **Mortgagee's right in fire policy.**

Cited in *Swearingen v. Hartford Ins. Co.* 52 S. C. 316, 29 S. E. 722, refusing equitable lien of mortgagee upon proceeds of fire policy taken out by mortgagor in own name under invalid verbal agreement with mortgagee.

Cited in footnotes to *Hocking v. Virginia F. & M. Ins. Co.* 39 L. R. A. 148, which denies mortgagee's right to recover where mortgagor burns building; *Farmers' Loan & T. Co. v. Penn Plate-Glass Co.* 56 L. R. A. 710, which denies mortgagee's lien on proceeds of insurance on premises by grantee for own benefit; *Shadgett v. Phillips & C. Co.* 56 L. R. A. 401, which holds mortgagee not entitled to insurance procured by donee for own benefit, by latter's knowledge of mortgagor's failure to keep agreement to insure; *Home Ins. Co. v. Koob*, 58 L. R. A. 58, which holds policy to mortgagor not avoided by policy to mortgagee; *Hardy v. Lancashire Ins. Co.* 33 L. R. A. 241, which holds mortgagee's rights unaffected by additional insurance taken by mortgagor; *Palmer Sav. Bank v. Insurance Co. of N. A.* 32 L. R. A. 615, which sustains mortgagee's right to sue on policy in own name; *Boyd v. Thuringia Ins. Co.* 55 L. R. A. 165, which holds question of forfeiture of policy payable to mortgagee not determined by provisions as to mortgagor's acts; *Pioneer Sav. & L. Co. v. Provi-*

dence Washington Ins. Co. 38 L. R. A. 397, which holds change of title by deed from mortgagor to mortgagee pending application for insurance not fatal to insurance; Harrison v. Pepper, 33 L. R. A. 239, which holds that, in absence of agreement to that effect, remainder man has no claim upon insurance carried by life tenant.

Annotation in 25 L. R. A. 305, referred to particularly in Lowry v. Insurance Co. of N. A. 75 Miss. 45, 37 L. R. A. 779, footnote p. 779, 46 Am. St. Rep. 587, 21 So. 664, authorizing suit by mortgagee in own name on policy payable to him.

**Execution against interest in insurance policy.**

Cited in footnote to Boisseau v. Penn, 57 L. R. A. 380, which holds execution not lien on interest of debtor in twenty-year distribution policy on his life which ceases on failure to pay premiums.

25 L. R. A. 309, KIMMEL v. DICKSON, 5 S. D. 221, 49 Am. St. Rep. 869, 58 N. W. 561.

**When bank deposit impressed with trust.**

Cited in Plano Mfg. Co. v. Auld, 14 S. D. 519, 86 Am. St. Rep. 769, 86 N. W. 21, sustaining action against receiver of bank, which had collected note and mingled proceeds with other funds, for balance due; State v. Foster, 5 Wyo. 216, 29 L. R. A. 251, 38 Pac. 926, holding commercial paper found in vaults of insolvent banker not impressed with trust of funds held in trust by it; Hoskins v. Dougherty, 29 Tex. Civ. App. 323, 69 S. W. 103, holding deposit in bank as forfeit to third party in event of nonperformance of contract, or payable as part of purchase money in case of performance is trust fund to be paid to account of contract; State v. Thum, 6 Idaho, 330, 55 Pac. 858, holding public moneys deposited by state treasurer become trust fund, which may be followed in hands of receiver.

Cited in footnote to Lincoln Sav. Bank & S. D. Co. v. Morrison, 57 L. R. A. 885, which holds *cestui que trust* entitled to preference, only to extent trustee's estate shown to have been increased by misappropriation of trust property.

Distinguished in McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. D. 202, 87 N. W. 974, holding sender of notes to bank for collection is mere creditor where it has been custom to credit the amounts collected.

25 L. R. A. 312, LIVERMORE v. WAITE, 102 Cal. 113, 36 Pac. 424.

**Constitutional amendments.**

Cited in Bott v. Wurta, 63 N. J. L. 297, 45 L. R. A. 255, 43 Atl. 744, maintaining jurisdiction to review by certiorari at instance of citizen determination of commission appointed to ascertain result of popular vote on constitutional amendment; People *ex rel.* Elder v. Sours, 31 Colo. 429, 74 Pac. 167 (dissenting opinion), majority holding legislature may propose amendment to Constitution by way of added article.

Cited in footnotes to State *ex rel.* Woods v. Tooker, 25 L. R. A. 560, which holds fatal to constitutional amendment, publication for two weeks only; State *ex rel.* Wineman v. Dahl, 34 L. R. A. 97, which holds submission to popular vote of proposal for constitutional convention properly made by legislature; Com. *ex rel.* Elkin v. Griest, 50 L. R. A. 568, which holds governor's approval of proposed constitutional amendment, unnecessary.

Criticized in *Edwards v. Lesueur*, 132 Mo. 436, 31 L. R. A. 820, footnote p. 815, 33 S. W. 1130, refusing to enjoin submission to people, of amendment to Constitution providing for change of seat of government of state because dependent on conditions.

25 L. R. A. 320, *DICKSON v. OMAHA & ST. L. R. CO.* 124 Mo. 140, 46 Am. St. Rep. 429, 27 S. W. 476.

**Railroads; liability to employees.**

Cited in *Missouri P. R. Co. v. Columbia*, 65 Kan. 397, 58 L. R. A. 403, 69 Pac. 338, holding locomotive fireman has right to assume that railway will not put grain doors in such position as to expose him to unnecessary danger.

**Liability for injury resulting from unfenced track.**

Cited in *Terre Haute & I. R. Co. v. Williams*, 172 Ill. 382, 64 Am. St. Rep. 44, 50 N. E. 116, holding railroad liable to employee injured through its failure to keep track fenced; *Terre Haute & I. R. Co. v. Williams*, 69 Ill. App. 394, holding road liable for death of engineer whose engine collided with cattle on track not fenced; *Mendizabal v. New York C. & H. R. R. Co.* 89 App. Div. 388, 85 N. Y. Supp. 896, holding railroad liable for injury to workman carried on construction train derailed by running over cow on unfenced track; *International & G. N. R. Co. v. Richmond*, 28 Tex. Civ. App. 516, 67 S. W. 1029, holding railroad liable for killing animal straying upon premises of abutting landowner, and entering right of way through defective fence.

Cited in footnotes to *Carper v. Kimball*, 35 L. R. A. 135, which denies liability for injuries to railroad employee from failure to build fences; *Barney v. Hannibal & St. J. R. Co.* 26 L. R. A. 847, which denies duty of railroad company to fence switch yards for protection of children; *Rosse v. St. Paul & D. R. Co.* 37 L. R. A. 591, which holds railroad company liable for injury to young child from failure to keep track fenced; *Kimball v. Carter*, 38 L. R. A. 570, which holds inclosed lands through which right of way must be fenced those which have line of obstacle of any kind setting them off as private property.

Distinguished in *Carper v. Norfolk & W. R. Co.* 35 L. R. A. 141, 23 C. C. A. 675, 42 U. S. App. 282, 78 Fed. 100, holding railroad owes no duty to its employees in keeping track fenced so as to make it liable for injury resulting from derailed train by collision with cattle.

**Contributory negligence.**

Cited in *Baker v. Kansas City, Ft. S. & M. R. Co.* 147 Mo. 167, 48 S. W. 838, which holds woman confused by first discovering approach of concealed cars, after going on tracks, not amenable to rule of stopping to look and listen; *Oates v. Metropolitan Street R. Co.* 168 Mo. 548, 58 L. R. A. 451, 68 S. W. 906, declaring erroneous instruction that plaintiff cannot recover if his negligence "but contributes to the injury."

25 L. R. A. 325, *ELLIS ex rel. REYNOLDS v. MAY*, 99 Mich. 538, 58 N. W. 483.

**Mandatory provisions of ballot laws.**

Cited in *Todd v. Election Comrs.* 104 Mich. 482, 29 L. R. A. 334, 64 N. W. 496, upholding act against printing name of candidate more than once on official ballot; *Tebbe v. Smith*, 108 Cal. 108, 29 L. R. A. 676, footnote p. 673,

49 Am. St. Rep. 68, 41 Pac. 454, refusing to declare ballots illegal because legal mark in legal place might serve to identify them; *Cole v. Tucker*, 164 Mass. 488, 29 L. R. A. 669, 41 N. E. 681, upholding statute making official ballot compulsory in election of city officers, and optional as to town officers; *Re Contested Election*, 3 Lack. Legal News, 78, holding ballot of voter who takes person into booth to see how he votes should be thrown out; *Tebbe v. Smith*, 108 Cal. 113, 29 L. R. A. 676, 49 Am. St. Rep. 68, 41 Pac. 454, discarding marked ballots where it appeared that only one person in precinct was lawfully assisted to mark his ballot; *Van Winkle v. Crabtree*, 34 Or. 471, 55 Pac. 831, holding mandatory, provisions as to space in which marking of ballot should be done.

Cited in footnotes to *Stackpole v. Hallahan*, 28 L. R. A. 502, which holds provisions of Australian ballot law not mandatory to extent that fair election invalidated; *Taylor v. Beakley*, 28 L. R. A. 683, which holds mandatory provision against counting ballot not marked as required by statute.

Distinguished in *Horning v. Board of Canvassers*, 119 Mich. 53, 77 N. W. 446, declaring provision that inspector's initials shall appear at one place only on back of ballot, directory merely.

25 L. R. A. 338, *AMERICAN WATERWORKS CO. v. FARMERS LOAN & T. CO.* 20 Colo. 203, 46 Am. St. Rep. 285, 37 Pac. 269.

**Extraterritorial effect of statutes.**

Cited in *House of Mercy v. Davidson*, 90 Tex. 533, 39 S. W. 924, holding provisions of general law of state under which company incorporated controlling as to possession of land in another state.

25 L. R. A. 341, *CONNOR v. PEOPLE*, 18 Colo. 373, 36 Am. St. Rep. 295, 33 Pac. 159.

**Conspiracy to commit crime.**

Cited in *Miller v. People*, 22 Colo. 533, 45 Pac. 408, holding there can be no conspiracy to do an act not in itself unlawful; *Lipschitz v. People*, 25 Colo. 265, 53 Pac. 1111, holding malicious and wilful burning, but not wilful and malicious conspiracy to burn, is unlawful; *Short v. People*, 27 Colo. 184, 60 Pac. 350, holding harmless, error to instruct that conspiracy is doing lawful act in unlawful manner, when indictment charges burglary.

**Effect of instigation or consent to criminal act.**

Cited in *Strait v. State*, 77 Miss. 697, 27 So. 617, holding burglary is not committed when would-be burglar is let into the office by decoy or detective; *Newman v. People*, 23 Colo. 305, 47 Pac. 278, holding it immaterial whether briber or bribed makes first advance; *State v. Hull*, 33 Or. 63, 72 Am. St. Rep. 694, 54 Pac. 159, holding cattle are not stolen when taken with consent and active aid of owner through agent; *State v. West*, 157 Mo. 322, 57 S. W. 1071, holding that superintendent of railroad does not consent to conspiracy to rob train because he takes steps to apprehend robber after being informed of intention.

Cited in footnotes to *State v. Abley*, 46 L. R. A. 862, which sustains liability for burglary though clerk, without employer's knowledge, loans key at officer's request to have duplicate made for burglar's use; *Com. v. Hollister*, 25

L. R. A. 349, which holds conviction not prevented because supposed confederate acted for purpose of detecting guilty parties; *Love v. People*, 32 L. R. A. 139, which holds no crime committed against one encouraging others to commit the act.

Distinguished in *State v. Chappell*, 179 Mo. 331, 78 S. W. 585, holding instruction to acquit defendant of larceny of goods from railroad car, if scheme was suggested by decoy, properly refused in absence of evidence to support; *Porter v. People*, 31 Colo. 516, 74 Pac. 879, holding detective arranging with defendant to ship his own cattle with those latter might steal in order to fill car, not accomplice, requiring corroborative evidence to convict.

#### **Evidence.**

Cited in *Kipp v. Silverman*, 25 Mont. 302, 64 Pac. 884, holding hearsay statements not under oath add nothing to confirmation of what witness says under oath.

#### **Contempt of court.**

Cited in *People ex rel. Connor v. Stapleton*, 18 Colo. 579, 23 L. R. A. 791, 33 Pac. 167, holding contempt of court shown by newspaper publication alleging in effect that court was influenced in its decision in particular case.

25 L. R. A. 349, *COM. v. HOLLISTER*, 157 Pa. 13, 27 Atl. 386.

#### **Participation in crime.**

Cited in *State v. Torphy*, 78 Mo. App. 208, holding person entering gambling place and engaging in game for sole purpose of enabling him to secure evidence to convict not punishable; *Wright v. Stewart*, 130 Fed. 914, holding bank corporation receiving and enjoying benefits of fraudulent scheme to extort money, with knowledge of fraud, chargeable as conspirator.

Cited in footnote to *State v. Abley*, 46 L. R. A. 862, which sustains liability for burglary though clerk, without employer's knowledge, loans key at officer's request to have duplicate made for burglar's use.

Cited in note (25 L. R. A. 341) on instigation or consent to crime for the purpose of detecting criminal, as a defense to prosecution.

25 L. R. A. 354, *STATE ex rel. HUNT v. SUPERIOR COURT*, 8 Wash. 210, 35 Pac. 1087.

#### **Right of possession to property under lien.**

Followed in *State ex rel. Shelly v. Superior Court*, 8 Wash. 659, 35 Pac. 1092, and *State ex rel. Perkins v. Graham*, 9 Wash. 528, 36 Pac. 1085, without discussion.

Cited in *Sanders v. Main*, 9 Wash. 47, 36 Pac. 1049, holding rightful possession under mortgage lien not affected by subsequent assignment for benefit of creditors; *Cherry v. Western Washington Industrial Exposition Co.* 11 Wash. 590, 40 Pac. 136, holding appointment of receiver before sale and after proceedings under execution will not affect right of purchaser thereunder; *State ex rel. Baum v. Superior Court*, 14 Wash. 328, 44 Pac. 542, holding assignee of insolvent debtor has title, but not right of possession, to property rightfully levied on by sheriff; *Smith v. Sioux City Nursery & Seed Co.* 109 Iowa, 55, 79 N. W. 457, holding receiver takes subject to payment of all valid prior liens.

Distinguished in *State ex rel. Schwabacher Bros. & Co. v. Superior Court*,

11 Wash. 65, 39 Pac. 244, upholding injunction against execution sale, and ordering property turned over to receiver.

25 L. R. A. 360, *FESTORAZZI v. ST. JOSEPH ROMAN CATHOLIC CHURCH*.  
104 Ala. 327, 53 Am. St. Rep. 48, 18 So. 394.

**Validity of charitable trusts.**

Cited in *McHugh v. McCole*, 97 Wis. 181, 40 L. R. A. 729, 72 N. W. 631, holding invalid a bequest "to be used and applied . . . for masses for the repose of" the soul of testator and other persons named, and referring particularly to annotation in 25 L. R. A. 360; *Harrington v. Pier*, 105 Wis. 513, 50 L. R. A. 319, 76 Am. St. Rep. 922, 82 N. W. 345, holding bequest for promotion of temperance work in city named, being public trust, is not invalid for indefiniteness of beneficiary.

Cited in footnote to *Webster v. Sughrow*, 48 L. R. A. 100, which sustains trust for saying of masses.

Cited in note (40 L. R. A. 717, 721) on validity of bequests for masses.

Distinguished in *Sherman v. Baker*, 20 R. I. 448, 40 L. R. A. 719, 40 Atl. 11, holding bequest to parish priest to say mass for testator is valid gift to priest himself for services; *Moran v. Moran*, 104 Iowa, 226, 39 L. R. A. 208, footnote p. 204, 65 Am. St. Rep. 443, 73 N. W. 617, holding bequest to pastor of church "that masses may be said for me," is valid private trust.

Disapproved in *Hoeffer v. Clogan*, 171 Ill. 472, 40 L. R. A. 763, 63 Am. St. Rep. 241, 49 N. E. 527, holding devise to church in trust for saying masses for souls of persons named, is valid charitable gift.

25 L. R. A. 363, *FLAGG v. SCHOOL DIST. NO. 70*, 4 N. D. 30, 58 N. W. 499.  
**Negotiability of promissory note.**

Cited in *Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 37, 47 N. E. 476; *Culbertson v. Nelson*, 93 Iowa, 190, 27 L. R. A. 226, 57 Am. St. Rep. 266, 61 N. W. 854; *Nicely v. Commercial Bank*, 15 Ind. App. 566, 57 Am. St. Rep. 245, 44 N. E. 572; *Tronson v. Colby University*, 9 N. D. 562, 84 N. W. 474; *Folsom v. Kilbourne*, 5 N. D. 403, 67 N. W. 291, — holding provision in note for exchange on New York renders it non-negotiable.

Cited in note (27 L. R. A. 224) on provision for exchange as affecting negotiability.

Disapproved in *Haslack v. Wolf*, 60 L. R. A. 435, holding promissory note not rendered non-negotiable by agreement to pay exchange at point other than place where note is payable.

**Rights of purchasers of municipal bonds.**

Explained in *Flagg v. School Dist. No. 70*, 5 N. D. 192, 65 N. W. 674, holding fact that warrants had not been audited and surrendered could be proved to show want of consideration for issue of bonds.

Cited in footnotes to *Wilkes County v. Call*, 44 L. R. A. 252, which denies possibility of bona fide holder of county bonds issued under unconstitutional statute; *Independent School District v. Rew*, 55 L. R. A. 364, which holds municipal corporation estopped to deny truth of recitals in bonds held by innocent purchaser; *People's Bank v. School Dist. No. 52*, 28 L. R. A. 642, which holds invalidity of municipal bonds leaves original liability of municipality unaffected.



25 L. R. A. 377, CUTTER v. POLLOCK, 4 N. D. 205, 50 Am. St. Rep. 644, 59 N. W. 1062.

**Transfer of partnership property as security.**

Cited in *Smith v. Baker*, 5 Okla. 335, 49 Pac. 61, and *Dyson v. St. Paul Nat. Bank*, 74 Minn. 447, 73 Am. St. Rep. 358, 77 N. W. 236, holding members of copartnership can transfer whole of copartnership assets, in good faith, to secure a debt of partnership, though insolvent.

**How receiver's compensation determined.**

Cited in *Patterson v. Ward*, 6 N. D. 613, 72 N. W. 1013, holding compensation of receiver is matter for judicial determination; *Cutter v. Pollock*, 7 N. D. 632, 76 N. W. 235, holding proper for court to adjudge three fifths of amount deducted for fees and expenses of receivership from property in which defendants held liens.

**Unlawful preferences.**

Cited in footnote to *Re Fixen*, 50 L. R. A. 605, which holds payment of money by insolvent to unsecured creditor in ordinary course of business, an unlawful preference.

25 L. R. A. 383, HOSMER v. SHELDON SCHOOL DIST. NO. 2, 4 N. D. 197, 50 Am. St. Rep. 639, 59 N. W. 1035.

**Teacher's contract.**

Cited in *Bryan v. Fractional School Dist. No. 1*, 111 Mich. 70, 69 N. W. 74, holding contract made with teacher not legal certificate of qualification, being prohibited by law, cannot be made basis of recovery.

Cited in footnote to *Mayor v. Cayce*, 30 L. R. A. 697, which holds valid, contract giving school teacher right to charge extra from pupils taking special studies.

Distinguished in *Western U. Teleg. Co. v. Partlow*, 30 Tex. Civ. App. 602, 71 S. W. 584, holding person without certificate prevented from making contract to teach because of neglect to deliver telegraph message may recover damages, if certificate obtained before school year began.

25 L. R. A. 386, LITTLE ROCK & M. R. CO. v. BARRY, 58 Ark. 198, 23 S. W. 1097.

**Who are fellow servants.**

Cited in *Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 201, 102 Fed. 108, Affirming 2 Ind. Terr. 421, 51 S. W. 1067; *Clyde v. Richmond & D. R. Co.* 69 Fed. 678; *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 240, 31 U. S. App. 213, 65 Fed. 960, holding train despatcher not fellow servant with train hands; *Wallace v. Boston & M. R. Co.* 72 N. H. 517, 57 Atl. 913, holding train despatcher having direction of trains not fellow servant of brakeman injured through improper issuance of orders.

Cited in footnote to *Hankins v. New York, L. E. & W. R. Co.* 25 L. R. A. 396, which holds train despatcher and fireman not fellow servants.

Cited in notes (54 L. R. A. 38, 91) on vice principalship as determined with reference to character of act which caused the injury; (25 L. R. A. 387, 389) on train despatcher and telegraph operator as fellow servants of trainmen.

**Master's duty in respect to rules.**

Cited in footnote to *Sprague v. New York & N. E. R. Co.* 37 L. R. A. 633, which holds railroad company's duty to employees not performed *per se* by preparing time-table and printed rules for running of trains on regular time.

Cited in note (43 L. R. A. 347) on duties of master and servant as to rules promulgated for safe conduct of business.

**Measure of damages.**

Cited in *St. Louis, I. M. & S. R. Co. v. Sweet*, 63 Ark. 569, 40 S. W. 463, and *Foster v. Pitts*, 63 Ark. 395, 38 S. W. 1114, holding instruction as to damages which introduces elements not in evidence, erroneous.

25 L. R. A. 396, *HANKINS v. NEW YORK, L. E. & W. R. CO.* 142 N. Y. 416, 59 N. Y. S. R. 802, 40 Am. St. Rep. 616, 37 N. E. 466.

**Who are fellow servants.**

Cited in *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 314, 50 N. E. 988; *Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 200, 102 Fed. 96; *Clyde v. Richmond & D. R. Co.* 69 Fed. 678; *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 240, 31 U. S. App. 213, 65 Fed. 952, — holding train despatcher not fellow servant of trainmen; *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 57 N. J. L. 402, 51 Am. St. Rep. 604, 31 Atl. 619, holding agent selected to keep machinery and appliances in repair not fellow servant with those using them unless also using them; *Norfolk & W. R. Co. v. Houchins*, 95 Va. 411, 46 L. R. A. 367, 64 Am. St. Rep. 791, 28 S. E. 578, holding conductor of train not necessarily superior of rest of crew because he has work of operating or moving train; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 395, 46 L. R. A. 350, 27 S. E. 278, holding conductor and brakeman of freight train are fellow servants; *Sutter v. New York C. & H. R. R. Co.* 79 App. Div. 367, 79 N. Y. Supp. 1106, holding locomotive engineer inspecting engine not fellow servant of conductor of train to which engine is attached; *Meehan v. Judson*, 43 App. Div. 51, 59 N. Y. Supp. 578, holding superintendent of street railway vice principal as to duty of furnishing suitable machinery and keeping it in repair; *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 384, 70 Am. St. Rep. 687, 47 S. W. 493, holding section boss operating brake of hand car is fellow servant to section hand injured by negligent operation of brake; *Bryant v. New York C. & H. R. R. Co.* 81 Hun, 168, 30 N. Y. Supp. 737, holding railroad not liable for injury to engineer by collision because train despatcher had not sent order where rules of company, if observed by engineer of other train would have prevented collision; *Vitto v. Keogan*, 15 App. Div. 332, 44 N. Y. Supp. 1, holding foreman fellow servant with workman whom he had sent to clear out of hole unexploded charge of dynamite; *Miller v. Thomas*, 15 App. Div. 108, 44 N. Y. Supp. 277, holding foreman of gang in which injured man working his fellow servant; *Kimmer v. Weber*, 151 N. Y. 423, 45 N. E. 860, holding error of judgment by foreman and workmen as to safety of scaffold erected by them, did not render master liable for injury due to its instability; *Southern Indiana R. Co. v. Harrell*, 161 Ind. 699, 63 L. R. A. 466, 68 N. E. 262, holding foreman of railway-bridge gang not vice principal in directing operation of derrick; *Bagley v. Consolidated Gas. Co.* 5 App. Div. 438, 39 N. Y. Supp. 302, *Reversing* 13 Misc. 7, 34 N. Y. Supp. 187 (dissenting opinion), majority holding foreman fellow servant with employee

injured by loose plank thrown from scaffold against which tank, being raised, struck; *Sweeney v. Vacuum Oil Co.* 3 App. Div. 616, 38 N. Y. Supp. 96 (dissenting opinion), majority holding negligence of superintendent by which injury occurred, that of coemployee; *Northern P. R. Co. v. Dixon*, 194 U. S. 351, 48 L. ed. 1012, 24 Sup. Ct. Rep. 683 (dissenting opinion), majority holding that telegraph operator furnishing misinformation to train despatcher as to movement of trains is fellow servant to fireman on train.

Cited in notes (50 L. R. A. 429) on what servants are deemed to be in same common employment apart from statutes, where no questions as to vice principalship arise; (25 L. R. A. 387) on train despatcher and telegraph operator as fellow servants of trainmen; (51 L. R. A. 590, 594) on vice principalship considered with reference to superior rank of negligent servant; (54 L. R. A. 39, 42, 90, 93, 94, 106) on vice principalship as determined with reference to character of act which caused injury.

Distinguished in *Savage v. Nassau Electric R. Co.* 42 App. Div. 244, 59 N. Y. Supp. 225, holding negligence of conductor in taking car out on wrong track on densely foggy morning imputable to motorman whose fellow servant he was.

#### **Duties of master not subject to delegation.**

Cited in *Galveston, H. & S. A. R. Co. v. Buch*, 27 Tex. Civ. App. 287, 65 S. W. 681, and *Franck v. American Tartar Co.* 91 App. Div. 576, 87 N. Y. Supp. 219, holding master cannot absolve himself from duty of inspection by providing for inspection by servants generally competent; *Hoes v. New York, N. H. & H. R. Co.* 73 App. Div. 368, 77 N. Y. Supp. 117, and *Wallace v. Boston & M. R. Co.* 72 N. H. 515, 57 Atl. 913, holding negligence of train despatcher in giving erroneous orders to trains, resulting in injury to locomotive engineer, is that of master; *Rollings v. Levering*, 18 App. Div. 228, 45 N. Y. Supp. 942, holding duty of master to provide safe appliances cannot be delegated; *Yaw v. Whitmore*, 37 App. Div. 102, 55 N. Y. Supp. 1091, holding master, furnishing cable reasonably proper for work, is not liable for break due to manner in which it was used; *Joyce v. Rome, W. & O. R. Co.* 92 Hun, 110, 36 N. Y. Supp. 731, holding question whether railroad was guilty of negligence on account of condition of drawheads of cars being coupled is for jury; *Tully v. New York & T. S. S. Co.* 10 App. Div. 468, 42 N. Y. Supp. 29, which holds for jury question of master's negligence where there is no evidence of any rules or regulations or any directions required to be given employees temporarily working on steamships of precautionary means for their safety; *Byrne v. Eastmans Co.* 163 N. Y. 465, 57 N. E. 738, holding proper inspection of appliances is question for jury; *McGuire v. Bell Teleph. Co.* 167 N. Y. 212, 52 L. R. A. 438, 60 N. E. 433, holding telephone company using poles under license not relieved of duty of inspection; *Denenfeld v. Baumann*, 40 App. Div. 505, 58 N. Y. Supp. 110, holding master not liable for manner in which safe freight elevator loaded; *Hatton v. Hilton Bridge Constr. Co.* 42 App. Div. 400, 59 N. Y. Supp. 272, holding master should provide clamps properly adjusted to prevent rod slipping on girder; *Larkin v. Washington Mills Co.* 45 App. Div. 9, 61 N. Y. Supp. 93, holding notice to shipping clerk in charge of employee and directing use of elevator of a defective spring out of order for some weeks is notice to employer; *Scherer v. Holly Mfg. Co.* 86 Hun, 41, 33 N. Y. Supp. 205, holding master responsible for injury due to faulty ladle which it was duty of another employee to keep in proper order.

Cited in note (43 L. R. A. 342, 347) on duties of master and servants as to rules promulgated as to safe conduct of business.

Distinguished in *Ryan v. Third Ave. R. Co.* 92 App. Div. 312, 86 N. Y. Supp. 1070, holding that cable railway company, having provided competent foreman to warn oiler in "pot-hole" of approach of car, is not responsible for foreman's negligence in performance of that duty; *Galvin v. Pierce*. 72 N. H. 83. 54 Atl. 1014, holding master not liable for injury to servant from improper direction of foreman respecting detail of service, which is subject of delegation; *Dittman v. Edison Electric Illuminating Co.* 87 App. Div. 70, 83 N. Y. Supp. 1078, questioning, without deciding, whether master liable for failure of servant to discover defect in common appliance like leather belt, when same might have been discovered had inspection been performed with greater care.

25 L. R. A. 399, *PEOPLE v. CADY*, 143 N. Y. 100, 60 N. Y. S. R. 474, 37 N. E. 673.

**Right of inmates of public institution to vote.**

Cited in *People ex rel. McShane v. Hagen*, 48 App. Div. 205, 62 N. Y. Supp. 816, holding unpaid helpers in public hospital not residents entitled to vote; *Powell v. Spackman*, 7 Idaho, 703, 54 L. R. A. 382, 65 Pac. 503, holding inmate of soldier's home cannot acquire right to vote in county where home is located.

25 L. R. A. 402, *LYON v. MANHATTAN R. CO.* 142 N. Y. 298, 31 Abb. N. C. 356, 52 N. Y. S. R. 860, 37 N. E. 113.

**Physical examination before trial.**

Cited in *Easler v. Southern R. Co.* 60 S. C. 120, 38 S. E. 258, holding plaintiff cannot be compelled to be physically examined by physician selected by opponent; *McGovern v. Hope*, 63 N. J. L. 80, 42 Atl. 830, upholding act providing for physical examination before trial; *Camden & Suburban R. Co. v. Stetson*, 177 U. S. 176, 44 L. ed. 722, 20 Sup. Ct. Rep. 617, holding circuit court of United States can order surgical examination of plaintiff before trial under state statute authorizing it; *Chicago, R. I. & T. R. Co. v. Langston*, 19 Tex. Civ. App. 578, 47 S. W. 1027 (dissenting opinion), majority holding railway entitled to have experts of its own selection in physical examination of plaintiff, who exposed her injuries to jury; *Re Davies*, 168 N. Y. 89, 56 L. R. A. 862, 61 N. E. 118, holding effect of physical examination is simply to qualify physicians to testify upon trial; *Lawrence v. Samuels*, 20 Misc. 280, 45 N. Y. Supp. 743, Affirming 20 Misc. 16, 44 N. Y. Supp. 602, denying right of counsel and referee to be present at physical examination of female plaintiff by female physician; *Lawrence v. Samuels*, 17 Misc. 559, 40 N. Y. Supp. 686, holding female plaintiff entitled of right to be examined physically by female instead of male physician; *Neill v. Brooklyn Elev. R. Co.* 13 Misc. 404, 34 N. Y. Supp. 1144, refusing to compel plaintiff to exhibit his knee to jury; *People ex rel. Mosher v. Roosa*, 43 App. Div. 612, 60 N. Y. Supp. 244, holding one who has obtained mandamus to determine right to become chief of police need not submit to physical examination; *Campbell v. Joseph H. Bauland Co.* 41 App. Div. 477, 58 N. Y. Supp. 984, holding plaintiff, though nonresident, should submit to physical examination which law authorizes; *Green v. Middlesex Valley R. Co.* 31 App. Div. 417, 53 N. Y. Supp. 500, holding depositions of physicians making

physical examinations of injured plaintiff before action cannot be read in evidence when witnesses can be produced; *Whitaker v. Staten Island Midland R. Co.* 76 App. Div. 354, 78 N. Y. Supp. 410, holding statute giving right to physical examination before trial does not entitle defendant to second examination upon retrial.

Cited in footnotes to *Wanek v. Winona*, 46 L. R. A. 448, which sustains court's power to order physical examination of plaintiff under penalty of dismissal of action; *Bagwell v. Atlanta Consol. Street R. Co.* 47 L. R. A. 486, which holds action for injury to minor daughter should not be dismissed for her refusal, after attaining majority, to submit to physical examination; *Stack v. New York, N. H. & H. R. Co.* 52 L. R. A. 328, and *Austin & N. W. R. Co. v. Cluck*, 64 L. R. A. 494, which denies power of court to order physical examination of plaintiff by physician, in action for personal injury, in absence of express legislative authority; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 36 L. R. A. 681, which holds production of plaintiff's urine for examination should be required where claim of disease of urine made; *O'Brien v. La Crosse*, 40 L. R. A. 831, which denies power of court to order examination as to condition of plaintiff's bladder under evidence that it might be dangerous; *Lane v. Spokane Falls & N. R. Co.* 46 L. R. A. 153, which sustains power of court to order physical examination of woman by experts in action for personal injuries; *State v. Height*, 59 L. R. A. 438, which holds unlawful, disclosures by physicians of knowledge as to venereal disease obtained by examination against his will of one accused of rape; *Hall v. Manson*, 34 L. R. A. 207, which denies right to reject measurement in jury's presence of woman's foot and leg 6 inches above ankle in suit for injuries; *Atchison, T. & S. F. R. Co. v. Palmore*, 64 L. R. A. 90, which holds that, in physical examination of plaintiff's eyes by defendant's physician, drugs may be used to dilate pupils, if not attended with serious discomfort or deleterious consequences.

Distinguished in *Green v. Middlesex R. Co.* 10 Misc. 474, 32 N. Y. Supp. 177, holding that where it is made to appear that defendant is ignorant of nature and extent of injuries, he has shown enough to entitle him to physical examination of plaintiff.

#### **Deposition before trial.**

Cited in *Hanks Dental Asso. v. International Tooth Crown Co.* 194 U. S. 310, 48 L. ed. 991, 24 Sup. Ct. Rep. 700, holding circuit court of United States without authority to order deposition of party to cause to be taken before trial.

#### **Construction of statute.**

Cited in *Morgan v. Hedstrom*, 164 N. Y. 230, 58 N. E. 26, holding statute and all its amendments must be read together as one act passed at same time; *Gilllin v. Canary*, 19 Misc. 596, 44 N. Y. Supp. 313, holding that single section cannot be separated from provisions regulating jurisdiction of city court, as though such section contained everything necessary as independent enactment.

25 L. R. A. 406, *FRANCIS v. WESTERN U. TELEG. CO.* 58 Minn. 252, 49 Am. St. Rep. 507, 59 N. W. 1078.

#### **Recovery for mental anguish because of failure to deliver telegram.**

Cited in *Peay v. Western U. Teleg. Co.* 64 Ark. 543, 39 L. R. A. 466, footnote p. 463, 43 S. W. 965; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 73, 54 L. R.

Å. 849, footnote p. 846, 60 N. E. 674; *Connelly v. Western U. Teleg. Co.* 100 Va. 60, 56 L. R. A. 668, 93 Am. St. Rep. 919, 40 S. E. 618, — holding that damages for mental suffering merely, caused by delay or nondelivery of telegram, cannot be recovered; *Curtin v. Western U. Teleg. Co.* 13 App. Div. 255, 42 N. Y. Supp. 1109, denying recovery for mental distress, due to failure to deliver telegram announcing brother's death; *Western U. Teleg. Co. v. Ferguson*, 26 Ind. App. 218, 59 N. E. 416, transferring to supreme court, action in which recovery was asked for mental suffering due to failure to deliver telegram, and asking court to reverse rule; *Cowan v. Western U. Teleg. Co.* 64 L. R. A. 550, footnote p. 546, holding mental anguish and suffering resulting from failure to transmit telegraph message will support action for damages.

Cited in footnotes to *Morton v. Western U. Teleg. Co.* 32 L. R. A. 735, which denies sendee's right to recover for mental suffering alone, from failure to deliver telegram; *Western U. Teleg. Co. v. Crocker*, 59 L. R. A. 398, which sustains recovery for mental anguish for failure to promptly deliver telegram announcing serious illness of grandchild.

Disapproved in *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 756, 28 L. R. A. 73, footnote p. 72, 57 Am. St. Rep. 294, 62 N. W. 1. holding recovery may be had for mental suffering caused by nondelivery of telegram.

**Liability of telegraph companies in general.**

Cited in footnotes to *Birkett v. Western U. Teleg. Co.* 33 L. R. A. 404, which holds valid, condition against liability beyond amount paid for sending unrepeatd message; *Reed v. Western U. Teleg. Co.* 34 L. R. A. 492, which holds void stipulation limiting liability for mistakes in transmitting unrepeatd telegrams; *Shaw v. Postal Teleg. Cable Co.* 56 L. R. A. 487, which denies power to enforce in other state liability for mistakes in transmitting cipher telegram, without payment of additional fee required to insure against mistake; *Simmons v. Western U. Teleg. Co.* 57 L. R. A. 607, which sustains statute rendering telegraph companies liable for delay in delivering messages; *Coit v. Western U. Teleg. Co.* 53 L. R. A. 678, which holds transmission of telegram while wires working badly not gross negligence if wires working well when actually sent.

25 L. R. A. 414, *ARTHUR v. OAKES*, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310.

**Equitable jurisdiction; injunction to prevent employee quitting service.**

Cited in *Clemmitt v. Watson*, 14 Ind. App. 42, 42 N. E. 367, declaring employee will not be compelled to specifically perform contract of service; *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 121, 94 N. W. 78, refusing preliminary injunction against workman quitting service, contrary to contract, where answer denied having acquired peculiar skill or knowledge in plaintiff's business; *Longshore Printing Co. v. Howell*, 26 Or. 542, 28 L. R. A. 472, 46 Am. St. Rep. 640, 38 Pac. 547, holding general strike inaugurated by labor union not unlawful, if purpose and means used to uphold it not illegal; *Wabash R. Co. v. Hannahan*, 121 Fed. 567, upholding right of employees, either singly or as labor organization, to impose conditions upon continuance to labor, unless restrained by contract obligations, or to quit work if conditions not complied with.

Cited in note (28 L. R. A. 470) on injunction against strikes.

Distinguished in *Southern R. Co. v. Machinist's Local Union No. 14*, 111

Fed. 56, holding that, while equity will not compel performance of employee's contract for personal services, it will enjoin others from enticing him to break contract.

— **Injunction against "picketing."**

Cited in *Union P. R. Co. v. Ruef*, 120 Fed. 125, upholding jurisdiction of equity to enjoin members of labor organization engaged in "picketing" if accompanied by acts of violence and intimidation; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 615, enjoining strikers from patrolling streets adjoining premises of corporation to dissuade others from taking employment; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 518, 42 L. R. A. 415, 74 Am. St. Rep. 421, 77 N. W. 13, enjoining maintenance of pickets and distribution of boycott circulars with intention to destroy business; *Davis v. Zimmerman*, 91 Hun, 493, 36 N. Y. Supp. 303, enjoining conspiracy to induce employees to leave service, and to prevent others from entering it, by means of intimidation; *Southern R. Co. v. Machinists' Local Union No. 14*, 111 Fed. 56, holding state statute making it unlawful to decoy or entice away any one under contract of employment strengthens common-law right of injunction.

— **Injunction to prevent injury to business or property.**

Cited in *United States v. Elliott*, 5 Inters. Com. Rep. 154, 64 Fed. 32, holding equity may interfere to preserve rights of property, against threatened injury by strikers, in advance of its molestation and appropriation; *Elder v. Whitesides*, 72 Fed. 724, enjoining conspiracy to prevent loading or unloading of vessel except by labor acceptable to conspirators, although no overt act committed; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 80, holding ticket scalping may be enjoined to prevent injury to business of railroads; *Wabash R. Co. v. Hannahan*, 121 Fed. 565, holding bill alleging malicious conspiracy of officers of labor organizations to force recognition of union, to compel discharge of non-union men, and to interfere with operation of plaintiff's trains, the performance of its contracts, and the transportation of the mails,—sufficient to warrant temporary injunction; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 698, holding combination and conspiracy to boycott goods of particular manufacturer is unlawful; *Hopkins v. Oxley Stave Co.* 28 C. C. A. 104, 49 U. S. App. 709, 83 Fed. 917, enjoining labor organizations from executing boycott against barrel manufacturer because of use of machine for hoops same; *Matthews v. Shankland*, 25 Misc. 614, 56 N. Y. Supp. 123, holding conspiracy on part of labor unions to boycott business of newspaper will be enjoined when irreparable injury probable.

Distinguished in *Longshore Printing Co. v. Howell*, 26 Or. 549, 28 L. R. A. 474, 46 Am. St. Rep. 640, 38 Pac. 547, refusing to enjoin boycott, where irreparable injury not apparent, although loss of business shown.

— **Sufficiency of remedy at law.**

Cited in *Elder v. Whitesides*, 72 Fed. 725, holding equitable jurisdiction to prevent interference with loading or unloading of vessel not taken away because threatened act is criminal; *Vegelahn v. Guntner*, 167 Mass. 99, 35 L. R. A. 724, 57 Am. St. Rep. 443, 44 N. E. 1077, holding that criminal nature of act of patrolling street in front of place of business, to intimidate others from entering employment of proprietor, not ground for refusing injunction; *Storm v. Ben-*

nett, 91 Hun, 303, 36 N. Y. Supp. 290, canceling deed where destruction of trust in which plaintiff has contingent interest is averred, although no allegation that trustee insolvent.

**Validity of combinations against personal or property rights.**

Cited in *Clemmitt v. Watson*, 14 Ind. App. 42, 42 N. E. 367, holding agreement of employees to quit work unless another employee is discharged not actionable conspiracy; *People v. McFarlin*, 43 Misc. 600, 89 N. Y. Supp. 527, holding members of labor union may lawfully quit work, if demands not complied with, and persuade others to withdraw, but not threaten destruction of employer's business by malicious use of boycott; *United States v. Cassidy*, 67 Fed 764, holding combination of employees to quit work in order to injure business or property of third party having business relation with employer unlawful; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 72, 71 S. W. 691, holding agreement between brewers not to sell beer to one indebted to either of them, unlawful combination.

Cited in footnote to *United States v. Workingmen's Amalgamated Council*. 26 L. R. A. 158, which holds stopping of transportation between states by strike in certain city unlawful restraint of commerce.

Distinguished in *United States v. Debs*, 5 Inters. Com. Rep. 223, 64 Fed. 763, holding right of workmen to strike does not warrant conspiracy to do unlawful thing, and advise strike in accomplishment of such purpose.

**Right to discharge employee.**

Cited in *Platt v. Philadelphia & R. R. Co.* 65 Fed. 663, holding equity will not interfere to prevent discharge of employee upon ground that he is member of labor union; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 535, 58 L. R. A. 751, 91 Am. St. Rep. 934, 90 N. W. 1098, refusing to sustain statute forbidding discharge of employee because member of union.

**Jurisdiction of Federal courts.**

Cited in *Elder v. Whitesides*, 72 Fed. 725, holding Federal court has jurisdiction of suit by alien to enjoin conspiracy by citizens of United States to prevent loading or unloading of vessel.

25 L. R. A. 414, note *FARMERS' LOAN & T. CO. v. NORTHERN P. R. CO.* 60 Fed. 803.

**Conspiracy to injure business of another.**

Modified in 25 L. R. A. 414, 4 Inters. Com. Rep. 744, 11 C. C. A. 209, 24 U. S. App. 239, 63 Fed. 310.

Cited in *Davis v. Zimmerman*, 91 Hun, 492, restraining conspiracy formed with intent to intimidate people from seeking employment and to destroy business; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union Nos. 1 & 3*, 90 Fed. 615, denying right of union to patrol street for purpose of forcibly preventing men seeking work to gain access to works of manufacturer; *State ex rel. Durner v. Huegin*, 110 Wis. 259, 62 L. R. A. 745, 85 N. W. 1046, holding executed conspiracy to inflict malicious injury is actionable; *Union P. R. Co. v. Ruef*, 120 Fed. 105, upholding jurisdiction of equity to enjoin members of labor organization engaged in "picketing" if accompanied by acts of violence and intimidation; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 62 L. R. A. 745, 85 N. W. 1046, holding that a combination of newspaper proprietors to compel another



newspaper to reduce its rates for advertising or lose customers, is within a statute punishing conspiracy to maliciously injure the business of another.

**Relief to employees against acts of receiver.**

Cited in *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 62 Fed. 18, holding employees may apply to court for relief from reduction in wages by receiver of railroad.

Cited in note (28 L. R. A. 468) on injunction against strikes.

25 L. R. A. 434, *STATE v. BUTLER*, 8 Wash. 194, 40 Am. St. Rep. 900, 35 Pac. 1093.

**When attempt to commit crime indictable.**

Cited in *Cornwell v. Fraternal Acci. Asso.* 6 N. D. 203, 40 L. R. A. 439, 69 N. W. 191, holding that one who has started to hunt prairie chickens with loaded gun, at unlawful season, has not committed offense of attempting to kill prairie chickens; *Com. v. Hutchinson*, 6 Pa. Super. Ct. 408, 42 W. N. C. 141, holding incitement to incendiarism an indictable offense; *United States v. Dietrich*, 126 Fed. 667, holding agreement of member of Congress to accept money from candidate for postmaster, in consideration of influence in securing appointment, and agreement of candidate to pay same, not conspiracy.

Cited in footnotes to *Groves v. State*, 59 L. R. A. 598, which holds mere preparatory acts for commission of crime not an attempt; *People v. Youngs*, 47 L. R. A. 108, which holds preparation for committing burglary prevented by arrest while proceeding towards house not an attempt.

Annotation in 25 L. R. A. 434 referred to with approval in *Reed v. Maley*, 115 Ky. 827, 62 L. R. A. 904, 74 S. W. 1079 (dissenting opinion), majority denying right of action to woman for mere solicitation to sexual intercourse.

25 L. R. A. 441, *WEST PUB. CO. v. LAWYERS' CO-OP. PUB. CO.* 64 Fed. 360.

Reversed in 35 L. R. A. 400, 25 C. C. A. 648, 51 U. S. App. 216, 79 Fed. 761.

25 L. R. A. 449, *STATE v. BEHRMAN*, 114 N. C. 797, 19 S. E. 220.

**Opinion evidence.**

Cited in *Sherrill v. Western U. Teleg. Co.* 117 N. C. 363, 23 S. E. 277, permitting evidence of appearance of mental anguish by one in whose home the one so suffering lived and constantly associated.

**Proof of laws of foreign state.**

Cited in footnotes to *Jackson v. Jackson*, 34 L. R. A. 773, which allows lawyer of other state claiming to be familiar with its law as to marriage to prove the same; *Goodwin v. Provident Sav. Life Assur. Soc.* 32 L. R. A. 473, which holds volume of laws of foreign state not purporting to have been published under authority of legislature, nor shown to be commonly admitted in evidence in such state, not evidence.

Cited in note (40 L. R. A. 574) on law books as evidence.

**Right of accused to confront witnesses.**

Cited in *State v. Mitchell*, 119 N. C. 786, 25 S. E. 783, holding right to be confronted by presence of accuser waived in objection to testimony of prosecutrix taken on previous trial is not based on that ground.

Cited in footnote to *People v. Elliott*, 60 L. R. A. 318, which sustains right to read on second trial testimony of witness dying after first trial.

25 L. R. A. 470, *CANADIAN P. R. CO. v. JOHNSTON*, 9 C. C. A. 587, 26 U. S. App. 85, 61 Fed. 738.

**Who are fellow servants.**

Cited in notes (46 L. R. A. 352) on when conductor is deemed to be co-servant of other railroad employees; (51 L. R. A. 579, 591) on vice principalship considered with reference to superior rank of negligent servant.

**Statute of limitations.**

Cited in *Hobbs v. National Bank of Commerce*, 37 C. C. A. 514, 96 Fed. 397, holding statute of limitations of state applies to action against stockholder of corporation of that state but resident of another state.

Cited in note (48 L. R. A. 638) as to when statute of limitation will govern action in another state or country.

25 L. R. A. 477, *Re PICKENS*, 163 Pa. 14, 29 Atl. 875.

**Presumption as to legitimacy.**

Cited in *Eddy's Estate*, 8 Pa. Dist. R. 701, and *Leaming's Estate*, 25 Pa. Co. Ct. 441, holding that to repel presumption, evidence must be strong, satisfactory, and conclusive; *Wile's Estate*, 6 Pa. Super. Ct. 442, 41 W. N. C. 575, holding presumption that married relation exists may be overcome by reputation and by presumption of legitimacy of issue of second marriage; *Staiger's Estate*, 7 Pa. Dist. R. 354, holding presumption as to legitimacy is almost conclusive where parents for many years maintained family relation under general reputation of being husband and wife.

**Proof of identity.**

Cited in *Arnold v. Metropolitan L. Ins. Co.* 20 Pa. Super. Ct. 68, holding that information obtained from mother-in-law of person's son, competent to prove identity; *Re Charles*, 33 Pittsb. L. J. N. S. 222, holding pedigree and relationship of decedent may be shown by testimony of witness to family tradition and declarations of relatives.

Cited in footnotes to *Young v. State*, 47 L. R. A. 548, which holds man's declarations as to own history and pedigree provable after his death for purpose of identification; *Re Hurlburt*, 35 L. R. A. 794, which holds general reputation in family as to death of member, not derived from deceased members of family, inadmissible.

Cited in note (41 L. R. A. 449) on entries in family Bible or other religious books as evidence.

**Right of participation in estate of decedent.**

Cited in *Re Peterson*, 34 Pittsb. L. J. N. S. 299, holding right to participate in distribution may be raised upon audit or adjudication of account of executor or administrator.

25 L. R. A. 480, *STATE ex rel. ALLISON v. BLAKE*, 57 N. J. L. 6, 29 Atl. 417.  
**Restrictions upon elective franchise.**

Followed in *Allison v. Englewood Twp.* 58 N. J. L. 141, 32 Atl. 688, and *Allison*

*v. Corker*, 67 N. J. L. 596, 60 L. R. A. 567, 52 Atl. 362, holding public roads and parks act of 1893, limiting right to vote for road commissioners to freeholders of district, unconstitutional.

Cited in *State ex rel. Kimball v. Hendee*, 57 N. J. L. 308, 30 Atl. 894, holding women cannot vote for school trustees; *McArdle v. Jersey City*, 66 N. J. L. 596, 88 Am. St. Rep. 496, 49 Atl. 1013, holding provision of statute that no ballot shall contain name of more than one person for excise commissioner, where two are to be voted for, in conflict with constitutional provision giving right to vote for all elective officers; *Eagle County v. Love*, 26 Colo. 305, 57 Pac. 1080, holding general assembly impliedly prohibited from adding other or different qualifications to legal voters at election for removal of county seat.

Cited in footnotes to *Taylor v. Bleakley*, 28 L. R. A. 683, which upholds legislative power to adopt reasonable restrictions on exercise of elective franchise; *Boyd v. Mills*, 25 L. R. A. 486, which holds valid, act disfranchising all persons bearing arms against United States; *State v. Old*, 31 L. R. A. 837, which holds valid, act making it a crime to vote without proof of payment of poll-tax.

Distinguished in *Harris v. Burr*, 32 Or. 360, 39 L. R. A. 771, 52 Pac. 17, holding women may vote for director of school district at school meeting.

#### **Legislative discretion as to political subdivisions of state.**

Cited in footnote to *State ex rel. Guerguin v. McAllister*, 28 L. R. A. 523, which upholds statute authorizing each city ward to elect one alderman.

Distinguished in *Allison v. Corker*, 67 N. J. L. 596, 60 L. R. A. 570, 52 Atl. 362, upholding constitutionality of statute giving power of local township government to road and lamp districts thereby created.

#### **Regulation of elections.**

Cited in footnotes to *Moyer v. Van de Vanter*, 29 L. R. A. 670, which authorizes counting of ballots cast in good faith with official stamp or election officers' initials omitted; *Cole v. Tucker*, 29 L. R. A. 668, which sustains statute making official ballot compulsory in city elections and optional in town elections; *Jones v. Skinner*, 40 L. R. A. 752, which denies purser's power by living on boat to change voting residence to other district of same city.

25 L. R. A. 486, *BOYD v. MILLS*, 53 Kan. 594, 42 Am. St. Rep. 306, 37 Pac. 16.

#### **Effect of ballot laws on rights of voters.**

Cited in *Lynip v. Buckner*, 22 Nev. 439, 30 L. R. A. 357, 41 Pac. 762, holding valid, ballots from which inspectors unintentionally omitted to take strips containing numbers; *Taylor v. Bleakley*, 55 Kan. 11, 28 L. R. A. 687, 49 Am. St. Rep. 233, 39 Pac. 1045, holding ballots not marked with cross upon proper place should not be counted; *Slaymaker v. Phillips*, 5 Wyo. 466, 47 L. R. A. 847, 40 Pac. 971, holding official stamp with name or initials of a judge of election must appear on exterior of ballot when folded; *Hope v. Flentge*, 140 Mo. 413, 47 L. R. A. 828, 41 S. W. 1002 (dissenting opinion), majority holding mandatory, provision of ballot law requiring voter to cross out the groups of officers he does not wish to vote; *Stackpole v. Hallahan*, 16 Mont. 56, 28 L. R. A. 508, 40 Pac. 80, refusing to disfranchise voters because of defects in nominating certificate, provisions of which were not made mandatory by statute; *Jones v. State*, 153 Ind. 451, 55 N. E. 229, sustaining election where absence of party emblem at head of ticket could not have deceived voters; *Nall v. Tinsley*, 107 Ky. 460, 54 S. W. 187

(dissenting opinion), majority holding local option election valid, notwithstanding ballots too thin.

Cited in note (25 L. R. A. 483) on how far right to vote is absolute.

**Ex post facto law.**

Cited in footnote to *People ex rel. Chandler v. McDonald*, 29 L. R. A. 334, which holds statute not *ex post facto* for abrogating provision for change of magistrate or of venue for prejudice.

25 L. R. A. 491, *ROGERS v. KENNEBEC S. B. CO.* 86 Me. 261, 29 Atl. 1069.

**Stipulations exempting carrier from liability for negligence to passenger.**

Cited in *Doyle v. Fitchburg R. Co.* 166 Mass. 495, 33 L. R. A. 846, 55 Am. St. Rep. 417, 44 N. E. 611, holding railroad cannot relieve itself from liability to employee riding on ticket with stipulation relieving it, where ticket given to one living in one part of line and working in another; *Payne v. Terre Haute & I. R. Co.* 157 Ind. 619, 56 L. R. A. 474, footnote p. 472, 62 N. E. 472, holding stipulation in pass releasing carrier from liability for negligence, valid; *Duncan v. Maine C. R. Co.* 113 Fed. 509, holding one riding on pass usually bound to perform conditions on which it was granted; *Northern P. R. Co. v. Adams*, 192 U. S. 452, 48 L. ed. 517, 24 Sup. Ct. Rep. 408, holding condition in gratuitous pass exempting carrier from liability for negligence, not against public policy.

Cited in footnote to *Crary v. Lehigh Valley R. Co.* 59 L. R. A. 815, which requires proof of negligence causing injury to passenger using excursion ticket by which passenger assumes risk of accident.

**Who are passengers.**

Cited in *Citizens Street R. Co. v. Jolly*, 161 Ind. 88, 67 N. E. 935, holding person stepping upon step of rear platform of car, which has stopped to take on passengers, with intention to take passage thereon, is passenger; *Haselton v. Portsmouth, K. & Y. Street R. Co.* 71 N. H. 591, 53 Atl. 1016, holding physical contact with car unnecessary to constitute one a passenger.

25 L. R. A. 499, *WRIGHT v. WOODCOCK*, 86 Me. 113, 29 Atl. 953.

**Right to cut and remove ice.**

Cited in footnotes to *Eidemiller Ice Co. v. Guthrie*, 28 L. R. A. 581, which holds right to take ice from pond in non-navigable stream, in owner of land as against owner of pond with right of flowage; *Becker v. Hall*, 56 L. R. A. 573, which holds marking, staking, or cleaning ice not thick enough for harvesting, insufficient appropriation; *Sanborn v. People's Ice Co.* 51 L. R. A. 829, which holds taking of ice in large quantities from public lake not exercise of common right in its waters.

**Liability for damming water.**

Cited in note (59 L. R. A. 853) on liability for damming back water of stream.

25 L. R. A. 502, *KINGSLEY v. GOULDSBORO LAND IMPROV. CO.* 86 Me. 279, 29 Atl. 1074.

**When way by necessity exists.**

Followed in *Hildreth v. Googins*, 91 Me. 228, 39 Atl. 550, denying right of way by necessity over land of grantor when grantee's property borders on sea.

Cited in *Burlew v. Hunter*, 41 App. Div. 152, 53 N. Y. Supp. 453, discussing right of way by necessity where land bordered on navigable lake.

Cited in footnotes to *Ellis v. Blue Mountain Forest Asso.* 42 L. R. A. 570, which denies right of way by necessity for tract entirely surrounded by other person's land in absence of unity of ownership; *Ritchey v. Welsh*, 40 L. R. A. 105, which holds way by necessity created by partition on lands in same manner as if parcel sold by ancestor; *Lebus v. Boston*, 47 L. R. A. 79, which holds parol evidence that grantor agreed he should have no passway over land conveyed admissible to rebut implied reservation of way of necessity.

Distinguished in *Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 574, 55 N. E. 462, sustaining way of necessity over land bordering on navigable water, where it appears that for two hundred and fifty years the land had been used for pasturage.

25 L. R. A. 503, *MITCHELL v. ABBOTT*, 86 Me. 338, 41 Am. St. Rep. 559, 29 Atl. 1118.

**When performance must be in reasonable time.**

Cited in *Donworth v. Sawyer*, 94 Me. 251, 47 Atl. 521, holding right of selection of certain number of acres in deed to tenant in common, no time being fixed, must be made within reasonable time, or it is lost.

Distinguished in *Wheeler v. Harrison*, 94 Md. 156, 50 Atl. 523, holding agreement to pay for obtaining release of obligation to pay subscription to stock not mere offer which lapsed before release obtained at end of seven years.

**Reward for detection of criminal.**

Cited in footnote to *Haskell v. Davidson*, 42 L. R. A. 155, which holds person informing proper person of facts necessary to secure arrest and conviction of unknown perpetrator of crime entitled to reward for his "arrest and conviction."

25 L. R. A. 504, *STATE v. EDWARDS*, 86 Me. 102, 41 Am. St. Rep. 528, 29 Atl. 947.

**Waiver of rights.**

Cited in *Latimer v. Equitable Loan & Invest. Co.* 81 Fed. 781, holding statutory right to withdraw from loan association cannot be waived; *Dennis v. Moses*, 18 Wash. 588, 40 L. R. A. 313, 52 Pac. 333 (dissenting opinion), majority holding stipulation in mortgage waiving statutory right of possession during time for redemption, of no effect.

**Regulation of matters of public use.**

Cited in *Briggs v. Hunton*, 87 Me. 151, 47 Am. St. Rep. 318, 32 Atl. 794, holding price for service of stallion may be recovered, though animal not registered, when not kept for public use.

Cited in note (33 L. R. A. 182) on legislative power to fix tolls, rates, or prices.

25 L. R. A. 506, *WILLIAMSON v. LACEY*, 86 Me. 80, 29 Atl. 943.

**Immunity for official acts.**

Cited in *Raymond v. Lowe*, 87 Me. 329, 32 Atl. 964, holding justice protected from suit for injury resulting to party arrested and brought before him judicially, for honest error of judgment; *Webb v. Fisher*, 109 Tenn. 709, 60 L. R.

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A. 793, 97 Am. St. Rep. 863, 72 S. W. 110, holding judge not liable in damages to attorney against whom he has maliciously entered decree of disbarment.

Cited in footnotes to *Tillman v. Beard*, 46 L. R. A. 215, which denies liability of village president for procuring arrest for violating void ordinance; *Webb v. Fisher*, 60 L. R. A. 791, which holds judge not subject to private action for corruptly entering decree disbaring attorney; *Scott v. Fishplate*, 30 L. R. A. 696, which denies liability of mayor to civil action for imprisonment for contempt.

25 L. R. A. 508, *HICKS v. CITIZENS' R. CO.* 124 Mo. 115, 27 S. W. 542.

**When negligence question for jury.**

Cited in *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 55, 29 L. R. A. 290, 61 N. W. 543, holding proximate cause of injury for jury where gripman of street car saw persons in dangerous situation; *Citizens' Street R. Co. v. Albright*, 14 Ind. App. 438, 42 N. E. 238, holding contributory negligence of one driving across track is for jury, when evidence is that motorman could have seen driver about to cross track, and did not attempt to prevent collision; *Robinson v. Louisville R. Co.* 50 C. C. A. 359, 112 Fed. 486, holding that jury should determine whether motorman could have prevented collision with plaintiff's wagon trying to turn out of track; *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 124, 33 S. W. 920, holding negligence and contributory negligence for jury where one driving across track of street railway at street crossing thought he had time to cross ahead of approaching car; *Ames v. Waterloo & C. F. Rapid Transit Co.* 120 Iowa, 662, 95 N. W. 161 (dissenting opinion), majority holding directed verdict for defendant proper, in action for death, where deceased in full possession of senses, and with unobstructed view, stepped in front of street car running at unlawful speed.

**Duty of persons crossing railway track.**

Cited in *Bunyan v. Citizens' R. Co.* 127 Mo. 18, 29 S. W. 842, holding that it is duty of pedestrian approaching street car track to ascertain if cars are approaching, and avoid injury therefrom; *Hays v. Tacoma R. & Power Co.* 106 Fed. 48, holding pedestrian crossing street railway track not negligent in assuming, from observations, that collision will not occur if car running at lawful speed.

Cited in footnotes to *Johnson v. St. Paul City R. Co.* 36 L. R. A. 586, which holds failure of aged person riding with another to look or listen for street car not negligence; *Citizens' R. Co. v. Ford*, 46 L. R. A. 457, which holds ordinance requiring person "riding or driving" to check up or halt at crossing not applicable to electric car; *Garrity v. Detroit Citizens' Street R. Co.* 37 L. R. A. 529, which holds driving fire truck at speed preventing stopping before collision with street car at crossing negligence.

**Care required of street railways as to persons on or near track.**

Cited in *Bunyan v. Citizens' R. Co.* 127 Mo. 19, 29 S. W. 842, holding that it is duty of gripman of street car to keep lookout for persons on, or approaching track, and avoid injuring them, if in danger.

Cited in footnotes to *Everett v. Los Angeles Consol. Electric R. Co.* 34 L. R. A. 350, which sustains motorman's right to assume that bicyclists in front of car will get out of danger; *Montgomery v. Lansing City Electric R. Co.* 29 L. R. A. 287, which holds negligent, motorman running with lever in next the fastest notch until within a few feet of band parading street; *Richmond R. & Electric*

Co. v. Garthright, 32 L. R. A. 220, which holds company liable for accident resulting from overloading and unlawful speed of street car; Cincinnati Street R. Co. v. Wright, 32 L. R. A. 340, which holds boy catching ride on private vehicle not chargeable with driver's negligence, so as to prevent recovery for injury due to negligence of street railway company.

Distinguished in Consolidated Traction Co. v. Haight, 59 N. J. L. 579, 37 Atl. 135, holding it duty of motorman to keep car in control when approaching truck traveling ahead of it in track; Moore v. Kansas City & I. Rapid Transit R. Co. 126 Mo. 273, 29 S. W. 9, holding that greater care is needed on part of street railways in more thickly populated portion of city than where thinly settled.

25 L. R. A. 514, GIRARD v. ST. LOUIS CAR-WHEEL CO. 123 Mo. 358, 45 Am. St. Rep. 556, 27 S. W. 648.

**Tender back of amount received under settlement before action.**

Cited in Dwyer v. Wabash R. Co. 66 Mo. App. 337, holding where fraud, or deception charged in execution of settlement contract with railroad for personal injury, return or tender of amount received not required; Sanford v. Royal Ins. Co. 11 Wash. 666, 40 Pac. 609, holding that return of amount received on settlement of loss under fire insurance policy need not be tendered where it is evident that it would be rejected; Sanford v. Royal Ins. Co. 11 Wash. 661, 40 Pac. 609, sustaining action on fire insurance policies without requiring cancelation in equity of release of liability signed by insured; Winter v. Kansas City Cable R. Co. 160 Mo. 190, 61 S. W. 606, Affirming 73 Mo. App. 203, setting aside compromise of judgment against railway company in favor of infant ordered by court on misstatement of facts without offer to return amount paid under it; Smith v. Kander, 85 Mo. App. 36, holding rescission of settlement of judgment, obtained without fraud, not warranted without return or offer to return amount received.

Criticized in Lyons v. Allen, 11 App. D. C. 551, holding laborer cannot sue contractor for injuries while in his employ without offering to return amount received on settlement therefor.

**Sufficiency of tender.**

Cited in Steckel v. Standley, 107 Iowa, 700, 77 N. W. 489, holding tender on mortgage valid though not in hand, where one making it could have got money in gold in a few minutes if he had not been assured by owner it would not be received.

**When fraud in contract no defense to action at law.**

Cited in Dwyer v. Wabash R. Co. 66 Mo. App. 337, holding that question of fraud in execution of lease to railway for personal injury, may be determined in action for injury.

Distinguished in Koffman v. Southwest Missouri Electric R. Co. 95 Mo. App. 472, 68 S. W. 212, holding that in action at law on verbal agreement to furnish continued medical attendance, evidence is not admissible to show that substituted written agreement signed by injured party was procured through fraud; Och v. Missouri, K. & T. R. Co. 130 Mo. 41, 36 L. R. A. 446, 31 S. W. 962 (Approved in dissenting opinion), Dwyer v. Wabash R. Co. 66 Mo. App. 337, holding that fraud in inducing injured woman to sign release to railway cannot be tried in action at law for damages for such injury.

**Objections not available on appeal.**

Cited in *Kelly v. Thuey*, 143 Mo. 437, 45 S. W. 300, holding that objection to insufficiency of answer not objected to or in any way raised at trial cannot be availed of for first time on appeal.

25 L. R. A. 523, *AKIN v. JONES*, 93 Tenn. 353, 42 Am. St. Rep. 921, 27 S. W. 669.

**When trust impressed on property of insolvent estate.**

Cited in *Hallam v. Tillinghast*, 19 Wash. 27, 52 Pac. 329, holding trust not created by collection of draft by bank, without request that specific money be set aside; *Sayles v. Cox*, 95 Tenn. 582, 32 L. R. A. 723, 49 Am. St. Rep. 940, 32 S. W. 626, holding insolvent bank receiving note and mortgage for collection and collecting same, before general assignment, not trustee; *Friberg v. Cox*, 97 Tenn. 553, 37 S. W. 283, and *Williams v. Cox*, 97 Tenn. 559, 37 S. W. 282, holding that where check is received by insolvent bank and credited as cash, the relation of debtor and creditor arises, and depositor loses right of reclamation; *Williams v. Cox*, 97 Tenn. 559, 37 S. W. 282, holding that where credit is given for proceeds of check, and paying bank fails same day, the presumption is that it was given before failure; *Showalter v. Cox*, 97 Tenn. 549, 37 S. W. 286, holding that where check is sent to insolvent bank for collection, and by bank examiner forwarded, proceeds received by receiver of bank belonged to owner; *Bruner v. First Nat. Bank*, 97 Tenn. 543, 34 L. R. A. 534, 37 S. W. 286, and *Klepper v. Cox*, 97 Tenn. 537, 34 L. R. A. 537, 56 Am. St. Rep. 823, 37 S. W. 284, holding that proceeds of check mingled with funds of bank before its failure cannot be identified and reclaimed; *Union Nat. Bank v. Citizens Bank*, 153 Ind. 54, 54 N. E. 97, holding that relation of trustee is not created by bank collecting note, and sending remittance by draft, which is not paid before failure; *Arbuckle Bros. v. Kirkpatrick*, 98 Tenn. 230, 36 L. R. A. 288, 60 Am. St. Rep. 854, 39 S. W. 3, holding trust in favor of consignors of goods sold by agents cannot be impressed on funds in hands of assignee of agents.

Cited in note (32 L. R. A. 718) on trust in proceeds of collection made by bank when insolvent.

**Effect of check.**

Cited in footnotes to *Cincinnati H. & D. R. Co. v. Metropolitan Nat. Bank*, 31 L. R. A. 653, which holds acceptance of check necessary to give holder right of action against bank for refusal to pay; *Raesser v. National Exch. Bank*, 56 L. R. A. 174, which holds bank's authority to pay check working assignment *pro tanto* of fund, not revoked by depositor's death.

25 L. R. A. 527, *CAIRO, V. & C. R. CO. v. BREVOORT*, 62 Fed. 129.

**Liability for diversion of surface water.**

Cited in *Brandenberg v. Zeigler*, 62 S. C. 20, 55 L. R. A. 416, 89 Am. St. Rep. 887, 39 S. E. 790, holding that water collected in basin surrounded by hills, depending entirely on rain, and sometimes completely dry, not stream, but surface water which cannot be drained onto land of neighboring owner; *Kansas City, M. & B. R. Co. v. Smith*, 72 Miss. 683, 27 L. R. A. 763, footnote p. 762, 48 Am. St. Rep. 579, 17 So. 78, holding railroad not liable for damage to growing crop



by maintenance of embankment where flood occurred through natural causes, and referring particularly to annotation in 25 L. R. A. 527.

Cited in footnotes to *Yazoo & M. Valley R. Co. v. Davis*, 32 L. R. A. 262, which holds railroad company liable for increased overflow of surface water by embankment; *Brandenberg v. Zeigler*, 55 L. R. A. 414, which denies owner's right to drain surface water from pond on neighbor's land, by cutting through natural rim of basin.

Disapproved in effect in *New York, C. & St. L. R. Co. v. Speelman*, 12 Ind. App. 379, 40 N. E. 541, holding that water escaping from channel of stream in flood time is mere surface water and that railroad is not liable for obstructing same by its embankments.

**Injunction against interference with easement.**

Cited in *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 3, 123 Fed. 3, holding that equity has jurisdiction to prevent, by injunction, interference with easement of railroad company in right of way; *Sullivan v. Dooley*, 31 Tex. Civ. App. 591, 73 S. W. 82, holding that filling of low places in stream, and construction of levee which will cause stream to unnaturally overflow lands of riparian owner, may be enjoined.

25 L. R. A. 535, *BARROWS v. SYCAMORE*, 150 Ill. 588, 41 Am. St. Rep. 400, 37 N. E. 1096.

**Power of city over use of streets.**

Cited in *Cicero Lumber Co. v. Cicero*, 176 Ill. 25, 42 L. R. A. 703, 68 Am. St. Rep. 155, 51 N. E. 758, holding that municipality may exclude traffic from street intended to be pleasure driveway, but cannot make it discretionary with board of trustees; *Doyle v. Sycamore*, 193 Ill. 505, 61 N. E. 1117, Affirming 81 Ill. App. 504, refusing to sustain action for damage to property by erection of stand-pipe, against which statute of limitation had run; *Pennsylvania Co. v. Chicago*, 181 Ill. 296, 53 L. R. A. 226, 54 N. E. 825, holding that city cannot grant exclusive use of streets to any private person for private purpose; *McWethy v. Aurora Electric Light & P. Co.* 202 Ill. 225, 67 N. E. 9, holding that municipality may lawfully authorize erection of electric lighting poles in streets by private corporation or individual.

Cited in footnote to *Eddy v. Granger*, 28 L. R. A. 517, which denies power of city to give vested right to maintain private drain in highway.

Cited in note (61 L. R. A. 77) on right of public to use of highway.

**When special damage must be shown.**

Cited in *Cicero Lumber Co. v. Cicero*, 176 Ill. 29, 42 L. R. A. 705, 68 Am. St. Rep. 155, 51 N. E. 758, holding that one whose business requires use of certain street suffers special damage when excluded from its use for traffic teams; *Chicago General R. Co. v. Chicago, B. & Q. R. Co.* 181 Ill. 610, 54 N. E. 1026, refusing to enjoin building abutments in street which would not interfere with running of plaintiff's cars.

25 L. R. A. 538, *WILMINGTON v. VANDEGRIFT*, 1 Marv. (Del.) 5, 65 Am. St. Rep. 256, 29 Atl. 1047.

**Jurisdiction of municipal courts.**

Cited in *Zuchowski v. State*, 3 Penn. (Del.) 340, 51 Atl. 877, and *State ex*

*rel. Ward v. Churchman*, 3 Penn. (Del.) 177, 49 Atl. 381, holding that municipal court of city of Wilmington is inferior court within scope of constitutional provision as to establishment of such courts.

**Liability of city for injury from acts permitted.**

Cited in *Jones v. Williamsburg*, 97 Va. 727, 47 L. R. A. 302, 34 S. E. 883, denying recovery against city for injury to pedestrian by bicycle ridden on sidewalk; *Landau v. New York*, 90 App. Div. 55, 85 N. Y. Supp. 616, holding city not liable in damages for injury from explosion of fireworks.

**Relation of municipal agents to state.**

Cited in *State ex rel. Ward v. Churchman*, 3 Penn. (Del.) 373, 51 Atl. 49, holding municipal agencies are agents of state as well.

25 L. R. A. 543, *SULLIVAN v. SULLIVAN TIMBER CO.* 103 Ala. 371, 15 So. 941.

**Jurisdiction.**

Cited in *Pullman Palace Car Co. v. Harrison*, 122 Ala. 154, 82 Am. St. Rep. 68, 25 So. 697, holding court without jurisdiction in attachment for tort in another state; *Smith v. State*, 103 Ala. 69, 15 So. 866, holding city court has jurisdiction of action for injuries occurring within limits designated in statute, although outside of city.

**When corporation is doing business in state.**

Cited in *International Cotton Seed Oil Co. v. Wheelock*, 124 Ala. 370, 27 So. 517, holding that continuity of business may be inferred, giving jurisdiction of action against corporation, from course of business before and after suit brought; *International Cotton Seed Oil Co. v. Wheelock*, 124 Ala. 370, 27 So. 517, holding that business is not done by agent when everything to consummate sale except transmission of mutual propositions is independent of agent; *State v. Anniston Rolling Mills*, 125 Ala. 123, 27 So. 921, holding that manufacturing company is not doing business as corporation subjecting it to license tax when all that is done are mere incidents to preservation of property; *Denson v. Chattanooga Nat. Bldg. & L. Asso.* 46 C. C. A. 637, 107 Fed. 780, holding that foreign loan association is doing business in state when it lends money to residents and takes real-estate mortgages as collateral; *Chattanooga Nat. Bldg. & L. Asso. v. Denson*, 189 U. S. 414, 47 L. ed. 874, 23 Sup. Ct. Rep. 630, holding that building and loan association of another state taking mortgage on real estate in Alabama is doing business in latter state, although contract drawn in other state, and made payable there.

25 L. R. A. 546, *ELMIRA SAV. BANK v. DAVIS*, 142 N. Y. 590, 37 N. E. 646.  
Reversed in 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502.

**Illegal preference by insolvent corporation.**

Approved in *Miller v. Miller Knitting Co.* 23 Misc. 408, 52 N. Y. Supp. 184, upholding mortgage given after insolvency to secure debt incurred before, under agreement at that time to secure debt.

Distinguished in *Mathews v. Hardt*, 79 App. Div. 579, 80 N. Y. Supp. 462, holding that agreement by corporation that seller of goods to it should at all times have lien on all corporate assets gives seller unlawful preference as to

property taken thereunder within four months before it is adjudicated a bankrupt.

**— By insolvent bank.**

Cited in *O'Brien v. Grant*, 146 N. Y. 176, 28 L. R. A. 365, footnote p. 361, 40 N. E. 871, holding payment of checks on insolvent bank by member of clearing house in accordance with previous contract, not illegal preference; *Stone v. Jenison*, 111 Mich. 604, 36 L. R. A. 680, 70 N. W. 149, holding payments to depositor on morning of day bank was compelled to close, not preference.

Cited in footnotes to *Chemical Nat. Bank v. Armstrong*, 28 L. R. A. 231, which denies right to deduct credit for collections from collateral made after declared insolvency of national bank; *James Clark Co. v. Colton*, 49 L. R. A. 698, which holds void, payment by insolvent bank of check of company in which bank president chief stockholder and of note on which directors are indorsers; *Standard Oil Co. v. Hawkins*, 33 L. R. A. 739, which holds proving claim as general creditor against bank receiver not conclusive election against following fund fraudulently obtained; *O'Brien v. East River Bridge Co.* 48 L. R. A. 122, which upholds notice by insolvent bank director to corporation of which he is president on signing of check for withdrawal of notes deposited; *Woodhouse v. Crandall*, 58 L. R. A. 385, which requires entire balance in insolvent bank, to be turned over to beneficiary of trust fund exceeding such balance.

**Bank's liability to depositors.**

Cited in *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 789, 59 Am. St. Rep. 572, 69 N. W. 115, holding proceeds of note received by bank for collection only cannot be mingled with its funds to defeat claim of owner against receiver.

Cited in footnote to *State Sav. Bank v. Foster*, 42 L. R. A. 404, which holds bank holding certificate of deposit of other bank for amount of which it has given credit on its own books not within statute making stockholders liable to depositors.

Distinguished in *Davis v. Knipp*, 92 Hun, 301, 36 N. Y. Supp. 705, denying right to set off against holder of note of defendant claim purchased subsequent to insolvency of holder and before appointment of receiver for it.

**Clearing house business.**

Cited in note (25 L. R. A. 831) on clearing house business.

25 L. R. A. 552, *ILLINGSWORTH v. BOSTON ELECTRIC LIGHT CO.* 161 Mass. 583, 37 N. E. 778.

**Care due licensees and others from electric company.**

Cited in *Barker v. Boston Electric Light Co.* 178 Mass. 510, 60 N. E. 2, holding electric lighting company bound to use reasonable care for protection of members of fire alarm department using its poles under license to city; *Perham v. Portland Electric Co.* 33 Or. 476, 40 L. R. A. 809, 72 Am. St. Rep. 730, 53 Pac. 14, holding that workman repairing bridge over which electric wires strung has right to assume that they are properly protected; *Wagner v. Brooklyn Heights R. Co.* 69 App. Div. 350, 74 N. Y. Supp. 809, holding lineman of city police department repairing city wire carried over structure of elevated railroad for hire, entitled to recover for injury from uninsulated trolley wire belonging to defendant; *Knowlton v. Des Moines Edison Light Co.* 117 Iowa. 456,

90 N. W. 818, holding electric lighting company having wires supported on poles which support other electrical wires, negligent if it fails to use proper insulation to protect linemen of other companies; *Geismann v. Missouri-Edison Electric Co.* 173 Mo. 678, 73 S. W. 654, holding it duty of electric lighting company to use every protection reasonably accessible to insulate its wires, to use utmost care to keep them so, and that death of sign hanger through contact with wire defectively insulated conclusive proof of negligence; *Fitzgerald v. Edison Electric Light Co.* 19 Lanc. L. Rev. 339, holding lighting company permitting electric wire strung 13 inches above roof of building to become uninsulated, liable for injury to painter; *Riley v. New England Teleph. & Teleg. Co.* 184 Mass. 155, 68 N. E. 17, by Lathrop, J., dissenting, who holds that statute imposing liability upon proprietors of telegraph poles and wires for injuries caused thereby, not applicable to injuries from poles of telephone, electric light, or power companies.

Cited in footnotes to *Hector v. Boston Electric Light Co.* 25 L. R. A. 554, which holds no duties assumed by electric light company to employees of telegraph company allowed to use former's support for wires; *Mitchell v. Raleigh Electric Co.* 55 L. R. A. 398, which sustains telephone company employee's right to presume that electric light wires properly insulated; *Giraudi v. Electric Improv. Co.* 28 L. R. A. 596, which holds failure to raise electric light wires on roof of hotel high enough to prevent shock, negligence.

Cited in notes (46 L. R. A. 99) on right of servant to recover damages from persons other than his master for injuries received in performance of duties; (32 L. R. A. 402) on negligence as to electric wires on or in buildings.

Distinguished in *Huber v. La Crosse City R. Co.* 92 Wis. 649, 31 L. R. A. 588, 53 Am. St. Rep. 940, 66 N. W. 708, holding negligence of defendant not proximate cause of accident, where injured person engaged in changing location of hanging street lamps came in contact with charged span wire in way company could not have foreseen.

#### **When negligence for jury.**

Cited in *Griffin v. United Electric Light Co.* 164 Mass. 493, 32 L. R. A. 403, 49 Am. St. Rep. 477, 41 N. E. 675, holding for jury question of due care of tinsmith injured by electric wire where it was shown that he was not an expert; *Reagan v. Boston Electric Light Co.* 167 Mass. 413, 45 N. E. 743, holding that jury should determine question of contributory negligence of roofer receiving injuries by coming in contact with electric wires; *Reagan v. Boston Electric Light Co.* 167 Mass. 413, 45 N. E. 743, holding that contributory negligence of man working on roof of building in taking hold of imperfectly insulated wire, question for jury.

Cited in footnotes to *Block v. Milwaukee Street R. Co.* 27 L. R. A. 365, which holds question for jury as to trolley company's liability for injury by contact with broken telephone wire lying across trolley wire; *Neeley v. Southwestern Cotton Seed Oil Co.* 64 L. R. A. 146, which holds negligence question for jury, where evidence such that fair-minded men may draw different conclusions.

#### **Assumption of risk.**

Cited in *Warren v. Boston & M. R. Co.* 163 Mass. 488, 40 N. E. 895, holding that, in action between injured person and railway, plaintiff must have appreciated danger and voluntarily put himself in way of it to be said to have assumed risk; *Carver v. Minneapolis & St. L. R. Co.* 120 Iowa, 351, 94 N. W. 862, hold-

ing risk of injury from throwing mail bags from moving train so as to fall on platform in front of station, not assumed by carrier accustomed to stand at point removed from such spot.

Cited in note (47 L. R. A. 165) on *volenti non fit injuria*, as defense to actions by injured servants.

25 L. R. A. 554, *HECTOR v. BOSTON ELECTRIC LIGHT CO.* 161 Mass. 558, 37 N. E. 773.

**Care due licensees and others from electric company.**

Followed on second appeal in 174 Mass. 213, 75 Am. St. Rep. 300, 54 N. E. 539, holding lineman injured by contact with electric wires of another company bound to show that he was invited or licensed by that company to go where injury occurred.

Cited in *Illingsworth v. Boston Electric Light Co.* 161 Mass. 585, 25 L. R. A. 552, 37 N. E. 778, denying liability of electric light company for injuries from posts, wires, or other apparatus, under statute, in absence of evidence of defect in insulation; *Griffin v. United Electric Light Co.* 164 Mass. 494, 32 L. R. A. 403, 49 Am. St. Rep. 477, 41 N. E. 675, holding that electric light company owed duty of keeping wires properly insulated to all persons rightfully on premises; *Jackson & Suburban Street R. Co. v. Simmons*, 107 Tenn. 406, 64 S. W. 705, holding that lineman whose duty was to inspect wires had no right to assume their sufficient insulation; *Riley v. New England Teleph. & Tel. Co.* 184 Mass. 155, 68 N. E. 17, by Lathrop, J., dissenting, who holds that statute imposing liability upon proprietors of telegraph poles and wires for injuries caused thereby, not applicable to injuries from poles of telephone, electric light, or power companies.

Cited in footnotes to *Giraudi v. Electric Improv. Co.* 28 L. R. A. 596, which holds failure to raise electric light wires on roof of hotel high enough to prevent shock, negligence; *Mitchell v. Raleigh Electric Co.* 55 L. R. A. 398, which sustains telephone company employee's right to presume that electric light wires properly insulated.

Cited in notes (46 L. R. A. 100) on right of servant to recover damages from persons other than his master for injuries received in performance of duties; (32 L. R. A. 402) on negligence as to electric wires on or in building.

Distinguished in *Perham v. Portland Electric Co.* 33 Or. 478, 40 L. R. A. 810, 72 Am. St. Rep. 730, 53 Pac. 14, holding that workman rightfully repairing bridge over which electric wires strung has right to assume them properly insulated.

25 L. R. A. 560, *STATE ex rel. WOODS v. TOOKER*, 15 Mont. 8, 37 Pac. 840.  
**Construction of constitutional provisions.**

Cited in *State v. Mitchell*, 17 Mont. 77, 42 Pac. 100; *State v. Camp Sing*, 18 Mont. 137, 32 L. R. A. 638, 56 Am. St. Rep. 551, 44 Pac. 516; *Palmer v. Helena*, 19 Mont. 68, 47 Pac. 209, — advocating decision against validity of legislative act rather than establish precedent for nullification of Constitution by loose and questionable interpretations; *Durfee v. Harper*, 22 Mont. 363, 56 Pac. 582, holding provisions of Constitution prescribing legislative proceedings for submission of proposed amendment to Constitution mandatory.

Cited in footnotes to *State ex rel. Wineman v. Dahl*, 34 L. R. A. 97, which

holds submission to popular vote of proposal for constitutional convention properly made by legislature; *Com. ex rel. Elkin v. Griest*, 50 L. R. A. 568, which holds governor's approval of proposed constitutional amendment unnecessary.

**Time for mandamus.**

Cited in *State ex rel. Lloyd v. Rotwitt*, 15 Mont. 38, 37 Pac. 845, holding where officer refuses performance of ministerial duty in advance of time fixed by law, mandamus will at once lie to compel performance at proper time.

25 L. R. A. 564, *SHELLENBERGER v. RANSOM*, 41 Neb. 631, 59 N. W. 935.

**Murderer as beneficiary of deceased.**

Cited in *Carpenter's Estate*, 170 Pa. 210, 29 L. R. A. 149, footnote p. 145, 50 Am. St. Rep. 765, 32 Atl. 637, holding son inherits from father whom he has killed; *Re Fleming*, 16 Misc. 444, 38 N. Y. Supp. 611, holding remainderman under will has no right to possession of fund while under indictment for murder of tenant for life; *Holdom v. Ancient Order of U. W.* 159 Ill. 625, 31 L. R. A. 70, footnote p. 67, 50 Am. St. Rep. 183, 43 N. E. 772, holding insane beneficiary can recover under policy on insured whom he has murdered; *Lauier v. Box*, 64 L. R. A. 463, holding murderer of wife not entitled to common-law right of succession to wife's property.

Cited in footnote to *New York L. Ins. Co. v. Davis*, 44 L. R. A. 305, which holds only assignee's interest in policy forfeited by his murder of insured.

Distinguished in *Schmidt v. Northern Life Asso.* 112 Iowa, 45, 51 L. R. A. 144, 84 Am. St. Rep. 323, 83 N. W. 800, holding beneficiary who murders assured forfeits amount of policy.

**Rights of descent.**

Cited in *Johnson v. Colby*, 52 Neb. 331, 72 N. W. 313, holding intestate's estate vests in heirs though it may be defeated by proceedings for sale to pay debts; *Douglas v. Cameron*, 47 Neb. 361, 66 N. W. 430, holding effect must be given statutes of descent regardless of consequences; *Lewon v. Heath*, 53 Neb. 709, 74 N. W. 274, holding ejectment can be maintained by heirs of intestate against all except such as claim under administrator.

Cited as overruled in *Veeder v. McKinley-Lanning Loan & T. Co.* 61 Neb. 912, 86 N. W. 982, holding survivor of two children of intestate took real estate subject only to life estate of father as tenant by curtesy.

**Rights of wrongdoers under statute.**

Cited in note (28 L. R. A. 749) on whether wrongdoer may take advantage of general statutory imposition of damages for negligent injuries.

**Statute of limitations.**

Cited in footnotes to *Lewey v. H. C. Frick Coke Co.* 28 L. R. A. 283, which holds limitation of action for removal of coal by wrongfully extending mine under land of others does not run till discovery or reasonable possibility of same; *Smith v. Blachley*, 53 L. R. A. 849, which holds running of limitation against action to recover back money not prevented by fraud unless investigation prevented by affirmative efforts; *Sanborn v. Gale*, 26 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery known to husband to deny same.

Annotation in 25 L. R. A. 564, particularly referred to in *Mereness v. First*

Nat. Bank, 112 Iowa, 14, 51 L. R. A. 411, footnote p. 410, 84 Am. St. Rep. 318, 83 N. W. 410, holding running of limitations on demand certificate of deposit, not interrupted by bank's misrepresentations in denial of liability.

25 L. R. A. 577, *Re LANAUX*, 46 La. Ann. 1036, 15 So. 708.

**Requisites of pledge.**

Cited in *Cameron v. Orleans & J. R. Co.* 108 La. 105, 32 So. 208, holding delivery of bills of lading to members of company purchasing goods does not constitute pledge in favor of bank advancing price.

Cited in footnote to *First Nat. Bank v. Harkness*, 32 L. R. A. 408, which holds oil in tank effectively pledged by written order to owner's agent to hold for pledgees.

25 L. R. A. 591, *STATE v. TAYLOR*, 46 La. Ann. 1332, 49 Am. St. Rep. 351, 16 So. 190.

**Forgery by false assumption of agency.**

Cited in note (31 L. R. A. 831) on forgery by false assumption of authority in signing another's name as agent for him.

25 L. R. A. 598, *Re FOSS*, 102 Cal. 347, 41 Am. St. Rep. 182, 36 Pac. 669.

25 L. R. A. 598, *WHITING v. ADAMS*, 66 Vt. 679, 44 Am. St. Rep. 875, 30 Atl. 32.

**Measure of damages for conversion.**

Cited in *Anderson v. Besser*, 131 Mich. 486, 91 N. W. 737, holding in trover for timber unlawfully cut and sold by defendant, but in good faith, measure of damage is value of logs at place of sale, less cost of cutting and hauling.

Cited in footnotes to *Keys v. Pittsburg & W. Coal Co.* 41 L. R. A. 681, which holds damages for unauthorized mining of coal by tenant in good faith value of coal in place; *Keystone Lumber Co. v. Kolman*, 34 L. R. A. 821, which requires licensee to repay trespasser enhanced value of timber before recovering.

25 L. R. A. 602, *DOWNS v. HARPER HOSPITAL*, 101 Mich. 555, 45 Am. St. Rep. 427, 60 N. W. 42.

**Liability for negligent acts of employee or agent.**

Cited in footnote to *Hannon v. Siegel-Cooper Co.* 52 L. R. A. 429, which holds department store estopped to deny responsibility for malpractice of dentist.

**— Of institutions for treatment of sick or injured.**

Cited in *Hearns v. Waterbury Hospital*, 66 Conn. 121, 31 L. R. A. 231, footnote p. 224, 33 Atl. 595, holding charitable hospital not liable for alleged negligence in gratuitous operation when it has exercised due care in selection of surgeon; *Powers v. Massachusetts Homeopathic Hospital*, 47 C. C. A. 128, 109 Fed. 300, holding charitable hospital not liable to paying patient for negligent act of nurse; *Collins v. New York Post Graduate Medical School*, 59 App. Div. 68, 69 N. Y. Supp. 106, holding charitable hospital not liable for alleged negligence in gratuitous surgical operation upon patient paying for board and other attendance; *McAndrews v. Hamilton County*, 105 Tenn. 406, 58 S. W. 483, holding

county institution not liable for negligence of its servant who tied its mule so close to railway that it became frightened, ran away and caused injury complained of.

Cited in footnotes to *Eighmy v. Union P. R. Co.* 27 L. R. A. 296, which holds railroad company not liable for negligence of physicians in hospitals voluntarily maintained for injured employees.

Distinguished in *Pepke v. Grace Hospital*, 130 Mich. 496, 90 N. W. 278, holding trustees of hospital not negligent in employing surgeon upon recommendation of board of twenty-five physicians; *Brown v. La Société Française De Bienfaisance Mutuelle*, 138 Cal. 476, 71 Pac. 516, holding society established on basis of mutuality for treatment of sick members, and for others for compensation, liable to paying patient for negligence of surgeon; *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 443, 74 S. W. 456, holding railroad relief department not to be deemed charitable institution so as to exempt railroad from liability for negligence in selecting physician to treat injured employee.

Disapproved in *Ward v. St. Vincent's Hospital*, 78 App. Div. 320, 79 N. Y. Supp. 1004, holding authority of sister of charity in charge of hospital to bind institution by contract to furnish skilled nurse, question for jury.

**Operation of hospital enjoined.**

Cited in *Deaconess Home & Hospital v. Bontjes*, 104 Ill. App. 492, restraining as nuisance operation of hospital built within 3 feet of private residence.

25 L. R. A. 605, *BULLARD v. THORPE*, 66 Vt. 599, 44 Am. St. Rep. 867, 30 Atl. 36.

**When prohibition lies.**

Cited in *Eastham v. Holt*, 43 W. Va. 619, 27 S. E. 883, holding writ of prohibition will not lie to stop proceedings on indictment found by one grand jury after another has refused bill and been discharged by judge; *State ex rel. Boston & M. Consol. Copper & S. Min. Co. v. Second Judicial Dist. Court*, 22 Mont. 232, 56 Pac. 219, refusing writ of prohibition to arrest proceedings in appointment of receiver *pendente lite* in suit alleging unlawful taking of ore of one company to use of another.

Cited in note (51 L. R. A. 35, 36, 101, 108) on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

Distinguished in *Wilkins v. Stiles*, 75 Vt. 45, 98 Am. St. Rep. 804, 52 Atl. 1048, holding writ will not lie to restrain proceedings on erroneous judgment by justice of peace having jurisdiction.

25 L. R. A. 608, *COWHICK v. SHINGLE*, 5 Wyo. 87, 63 Am. St. Rep. 17, 37 Pac. 689.

**Limitation of actions.**

Followed in *Bergman v. Bly*, 66 Fed. 41, 13 C. C. A. 321, 27 U. S. App. 650, holding payment by one of joint makers of note does not prevent running of statute against others.

Cited in *Oleson v. Wilson*, 20 Mont. 550, 63 Am. St. Rep. 639, 52 Pac. 372, and *First Nat. Bank v. Bullard*, 20 Mont. 122, 49 Pac. 658, holding part payment on past-due note by one joint maker does not stop running of statute of limitations as to other maker; *Stubblefield v. McAuliff*, 20 Wash. 446, 55 Pac. 637, holding



part payment by maker of note, secured by mortgage upon property held in common with wife, does not prevent running of statute as to wife's interest.

**When decision of state court not binding on Federal court.**

Cited in *Hale v. Wharton*, 73 Fed. 749, holding service of process on person, exempt from service at time, invalid, notwithstanding contrary ruling of state court; *Marks v. Uinta County*, 11 Wyo. 493, 72 Pac. 894, holding statute of limitations not available on demurrer, unless petition shows affirmatively statutory period had elapsed before commencement of suit.

25 L. R. A. 613, *BARNARD v. TAGGART*, 66 N. H. 362, 29 Atl. 1027.

**Effect of award by arbitrators.**

Cited in *Horne v. Hutchins*, 71 N. H. 132, 51 Atl. 631, holding award of arbitrators binds parties to proceedings and persons claiming under them.

**When vacancy occurs in public office.**

Cited in footnotes to *Ijams v. Duvall*, 36 L. R. A. 127, which holds vacancy not created by decision in contested election case that judge commissioned was not elected and order for new election; *State ex rel. Sadler v. La Grave*, 35 L. R. A. 233, which sustains right of lieutenant governor to governor's salary while acting as governor after governor's death; *People ex rel. Lynch v. Budd*, 34 L. R. A. 46, which denies right of election to fill vacancy in office of lieutenant governor; *State, Clifford, Prosecutor, v. Heller*, 57 L. R. A. 312, which denies right of president of senate to act, after resignation, as governor in place of governor resigning office.

**Jurisdiction in mandamus.**

Cited in note (58 L. R. A. 834-836, 862, 867) on original jurisdiction of court of last resort in mandamus case.

25 L. R. A. 618, *GREGORY v. LEE*, 64 Conn. 407, 30 Atl. 53.

**Minor's contracts.**

Cited in footnotes to *Peacock v. Linton*, 53 L. R. A. 192, which denies father's liability for tutoring of minor son during vacation, without his knowledge; *Goodman v. Alexander*, 55 L. R. A. 781, which authorizes recovery against infant for food and lodging without alleging that defendant an orphan.

25 L. R. A. 621, *SIOUX FALLS v. KIRBY*, 6 S. D. 62, 60 N. W. 150.

**When action on city ordinance civil.**

Cited in *Lead v. Klatt*, 11 S. D. 111, 75 N. W. 896, holding trial in police court for violating health ordinance not criminal action making rules of criminal pleading applicable; *Lead v. Klatt*, 13 S. D. 143, 82 N. W. 391, denying arrest of judgment in action in police court for failure to demur to complaint charging violation of ordinance; *Madison v. Horner*, 15 S. D. 360, 89 N. W. 474, vacating writ of error from judgment in action in police court for violation of ordinance, since appeal is proper way to review civil action.

**Validity of ordinance affecting erection of buildings.**

Cited in footnote to *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings.

Distinguished in *Fischer v. St. Louis*, 194 U. S. 372, 48 L. ed. 1024, 24 Sup. Ct. Rep. 673, sustaining validity of ordinance prohibiting erection of dairy or cow stable within city limits without permission of municipal assembly.

25 L. R. A. 625, *PHELPS v. PHELPS*, 143 N. Y. 197, 62 N. Y. S. R. 156, 38 N. E. 280.

**Married woman's right in husband's realty.**

Cited in *Nichols v. Park*, 78 App. Div. 97, 79 N. Y. Supp. 547, denying right of dower in property purchased by husband, but which he caused to be conveyed to brother; *Poillon v. Poillon*, 90 App. Div. 75, 85 N. Y. Supp. 689, holding wife without inchoate right of dower in real estate held by corporation, in which husband holds practically all the stock.

Cited in footnotes to *Walker v. Walker*, 27 L. R. A. 799, which holds fraudulent, transfer of corporate stock to defeat wife's distributive share; *Smith v. Smith*, 34 L. R. A. 49, which holds delivery by husband just before death, of deed of all realty made years before, fraudulent as to wife; *Stroup v. Stroup*, 27 L. R. A. 523, which holds dower right attaches to land paid for by husband but conveyed by invalid trust to another for his benefit.

Distinguished in *Starbuck v. Starbuck*, 62 App. Div. 450, 71 N. Y. Supp. 104, holding divorce procured by wife in one state for cruelty does not deprive her of dower in real estate in another state, where absolute divorce only granted for adultery, though property in name of third party under naked trust; *Brownell v. Briggs*, 173 Mass. 532, 54 N. E. 251, holding void, conveyance of husband to third party without consideration for purpose of cutting off dower of wife from whom he had been separated.

Disapproved in *Redmond v. Redmond*, 112 Ky. 766, 66 S. W. 745, holding widow entitled to dower in land conveyed by husband before his decease to son for purpose of defeating dower right.

25 L. R. A. 627, *HEINLEIN v. IMPERIAL L. INS. CO.* 101 Mich. 250, 45 Am. St. Rep. 409, 59 N. W. 615.

**Insurable interest.**

Cited in *Ashford v. Metropolitan L. Ins. Co.* 80 Mo. App. 642, holding policy valid which is procured by insured on his own life for benefit of one who has no insurable interest; *Clement v. New York L. Ins. Co.* 101 Tenn. 36, 42 L. R. A. 251, 70 Am. St. Rep. 650, 46 S. W. 561, holding policy issued to assured payable to his executors, but under agreement with others having no insurable interest, to pay premiums, a wagering contract; *Taylor v. Travelers' Ins. Co.* 15 Tex. Civ. App. 255, 39 S. W. 185, holding woman has insurable interest in life of fiancé; *Foster v. Preferred Acci. Ins. Co.* 125 Fed. 539, holding in suit on policy taken by insured on own life, in which "friend" named as beneficiary, insurer cannot set up beneficiary's want of insurable interest.

Cited in footnotes to *Union Fraternal League v. Walton*, 46 L. R. A. 424, which sustains right to take insurance on own life making policy payable to one without insurable interest; *Exchange Bank v. Loh*, 44 L. R. A. 372, which holds creditor's insurable interest limited to amount of indebtedness; *Adams v. Reed*, 35 L. R. A. 692, which holds woman has insurable interest in life of son-in-law.

Cited in note (54 L. R. A. 229) on insurable interest in life of parent or child or other relative by blood.

**Forfeiture of policy.**

Cited in footnotes to *Johnson v. New York L. Ins. Co.* 50 L. R. A. 99, which holds necessity of giving notice before forfeiting policy for nonpayment of premium dispensed with by converting life policy into nonforfeitable policy for fixed term of years; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default without notice of any condition affixed; *Mutual L. Ins. Co. v. Hill*, 49 L. R. A. 127, which requires notice of accrual of premium before forfeiting policy for nonpayment.

**Equitable jurisdiction of suit for fraud.**

Cited in footnotes to *John Hancock Mut. L. Ins. Co. v. Dick*, 43 L. R. A. 566, which holds suit for cancelation of receipt renewing lapsed life policy obtained by fraud within jurisdiction of equity; *Titus v. Rochester German Ins. Co.* 28 L. R. A. 478, which holds fraudulent representations inducing compromise through mistake as to legal rights ground for relief.

25 L. R. A. 632, *STATE v. HAMLIN*, 86 Me. 495, 41 Am. St. Rep. 569, 30 Atl. 76.

**Validity of inheritance tax laws in general.**

Cited in *Knowlton v. Moore*, 9 Pa. Dist. R. 308; *Re Inheritance Tax*, 23 Colo. 493, 48 Pac. 535; *Re Wilmerding*, 117 Cal. 284, 49 Pac. 181; *Knowlton v. Moore*, 178 U. S. 55, 44 L. ed. 975, 20 Sup. Ct. Rep. 747,—holding Congress can levy succession tax; *State v. Alston*, 94 Tenn. 681, 28 L. R. A. 180, 30 S. W. 750, holding right to tax inheritance is reasonable since right of inheritance depends on statute; *Black v. State*, 113 Wis. 216, 90 Am. St. Rep. 853, 89 N. W. 522, holding reasonable succession taxes unobjectionable if Constitution not violated; *State ex rel. Fath v. Henderson*, 160 Mo. 216, 60 S. W. 1093, holding succession tax as to collateral kindred, and exempting lineal descendants, not unlawful and arbitrary classification.

Cited in footnotes to *Ferry v. Campbell*, 50 L. R. A. 92, which holds succession tax void for want of notice of proceedings to fix amount of tax; *Minot v. Winthrop*, 26 L. R. A. 259, which upholds reasonable, succession tax on transmission of decedents' property.

**Validity of tax as respects uniformity.**

Approved in *State ex rel. Fath v. Henderson*, 160 Mo. 218, 60 S. W. 1093, holding uniformity is satisfied when tax uniform as to entire class affected.

Cited in *State ex rel. Garth v. Switzler*, 143 Mo. 333, 40 L. R. A. 290, footnote p. 280, 65 Am. St. Rep. 653, 45 S. W. 245, holding succession tax invalid because classification not uniform; *State v. Alston*, 94 Tenn. 683, 28 L. R. A. 180, footnote p. 178, 30 S. W. 750, holding inheritance tax act not invalid because of discrimination between direct descendants and collateral kindred and strangers; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 288, 42 L. ed. 1041, 18 Sup. Ct. Rep. 594, sustaining collateral inheritance tax act which operates uniformly on all persons in same degree of relationship; *State v. Clark*, 30 Wash. 446, 71 Pac. 20, holding statute imposing proportional inheritance tax not violation of constitutional provision requiring uniformity of taxation; *Dixon v. Ricketts*, 26 Utah, 218, 72 Pac. 947, holding inheritance tax upon all estates of decedents above \$10,000, after payment of debts, not unconstitutional for want of uniformity.

Cited in footnotes to *Drew v. Tift*, 47 L. R. A. 525, which requires uniformity and equal application in exemption from inheritance tax; *State ex rel. Gels thorpe v. Furnell*, 39 L. R. A. 170, which sustains exemption from succession tax of estate less than \$7,500; *Billings v. People*, 59 L. R. A. 807, which sustains transfer tax on lineal descendants to whom life estate given with remainder to lineal descendants, but exempting lineal descendants taking fee; *State ex rel. Schwartz v. Ferris*, 30 L. R. A. 218, which holds void for lack of uniformity exempting estates less than \$20,000 in value.

Cited in note (60 L. R. A. 340) on power of legislature to classify taxpayers.

Distinguished in *Herriott v. Bacon*, 110 Iowa, 346, 81 N. W. 701, holding collateral heir not exempt from inheritance tax to extent of \$1,000.

**Upon what tax is imposed.**

Cited in *Gelathorpe v. Furnell*, 20 Mont. 304, 39 L. R. A. 173, 51 Pac. 267, and *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 492, 84 N. W. 1101, holding succession tax imposed on privilege to inherit, and not on property.

Distinguished in *Eidman v. Martinez*, 184 U. S. 591, 46 L. ed. 704, 22 Sup. Ct. Rep. 515, holding United States inheritance tax law does not apply to property passing either by will executed in foreign country or by intestate laws of that country.

25 L. R. A. 637, **FORWARD v. CONTINENTAL INS. CO.** 142 N. Y. 382, 59 N. Y. S. R. 777, 37 N. E. 615.

**Insurance; waiver of conditions in policy.**

Cited in *Thebaud v. Great Western Ins. Co.* 155 N. Y. 522, 50 N. E. 284, holding implied seaworthiness of insured vessel waived where company knew that fact on issuing policy; *Stewart v. Union Mut. L. Ins. Co.* 155 N. Y. 269, 42 L. R. A. 152, 49 N. E. 876, holding forfeiture of policy for nonpayment of premium may be waived by general manager of foreign corporation extending time of payment of premium note; *McElwain v. Metropolitan L. Ins. Co.* 50 App. Div. 66, 63 N. Y. Supp. 293, denying recovery of amount of premiums paid on irregularly issued life policy, the irregularity of which had been waived; *Roblee v. Masonic Life Asso.* 38 Misc. 482, 77 N. Y. Supp. 1098, forfeiting policy issued to applicant after his death when application required policy to be delivered to him in life; *Stage v. Home Ins. Co.* 76 App. Div. 511, 78 N. Y. Supp. 555, and *Lewis v. Guardian Fire & Life Assur. Co.* 93 App. Div. 160, 87 N. Y. Supp. 525, holding provision in policy against other insurance may be waived by local agent receiving application for insurance.

Distinguished in *Roblee v. Masonic L. Asso.* 38 Misc. 482, 77 N. Y. Supp. 1098, holding rule that general agent of insurance company may waive conditional clauses in policy, not applicable to membership in benefit association where insured died before issue of certificate.

**When forfeiture effected by want of ownership.**

Cited in *Neafe v. Woodcock*, 15 App. Div. 621, 44 N. Y. Supp. 768, holding undelivered chattel mortgage on insured property has no legal inception to work forfeiture; *Wood v. American F. Ins. Co.* 149 N. Y. 386, 52 Am. St. Rep. 733, 44 N. E. 80, holding sale under execution does not work forfeiture of policy for breach of condition of change of ownership; *Franklin Ins. Co. v. Feist*, 31 Ind. App. 396, 68 N. E. 188, holding recorded deed not otherwise delivered, and in-

tended to take effect only upon death of grantor, who remained in possession, not breach of condition of sole ownership of assured.

Cited in footnotes to *Arkansas F. Ins. Co. v. Wilson*, 48 L. R. A. 510, which holds policy not affected by mere agreement to buy premises, definite only as to price; *Farmers' & M. Ins. Co. v. Jensen*, 44 L. R. A. 861, which holds policy void by conveyance to wife of insured through third person.

Distinguished in *Rosenstein v. Traders' Ins. Co.* 79 App. Div. 483, 79 N. Y. Supp. 736, holding deed by insured to son, to hinder judgment creditor, is "change of title" avoiding policy.

#### **Effect of notice to agent.**

Cited in *Robbins v. Springfield F. & M. Ins. Co.* 149 N. Y. 484, 44 N. E. 159, holding insurance company barred from claiming policy void because of incumbrance, where its agent was informed of its existence upon issuance of policy; *Weber v. Germania F. Ins. Co.* 16 App. Div. 600, 44 N. Y. Supp. 976, holding notice to agent, when negotiating insurance, of unpaid property on instalment plan notice to company; *McGuire v. Hartford F. Ins. Co.* 7 App. Div. 584, 40 N. Y. Supp. 300, holding company estopped to deny liability under policy issued to illiterate man by agent, with authority, on unfulfilled promise to indorse waiver of condition as to chattel mortgage; *Georgia Home Ins. Co. v. Goode*, 95 Va. 756, 30 S. E. 366, sustaining estoppel on company whose soliciting agent, informed of lien, stated it to be too small to be noted, and dictated in application that there was no encumbrance; *Strause v. Palatine Ins. Co.* 128 N. C. 65, 38 S. E. 256, holding company estopped to set up want of "unconditional ownership" by knowledge of soliciting agent that goods bought on credit; *Ames v. Manhattan L. Ins. Co.* 40 App. Div. 467, 58 N. Y. Supp. 244, holding knowledge by company's agent when he delivered policy and accepted premium, of bad health of insured, waived condition as to issuing policy only "during good health" of insured; *Koenig v. United L. Ins. Asso.* 16 Misc. 534, 38 N. Y. Supp. 506, holding life policy not vitiated by false statement as to refusal by other insurers, when knowledge brought home to company through its medical examiner; *Will v. Postal Teleg. Cable Co.* 3 App. Div. 26, 37 N. Y. Supp. 933, holding messenger boy asking, waiting for, and receiving telegram in answer to another, agent of company, and not of sender.

Distinguished in *Traders Ins. Co. v. Cassell*, 24 Ind. App. 242, 56 N. E. 259, holding policy void because of chattel mortgage though known to local agent, but concealed from adjuster; *Gray v. Germania F. Ins. Co.* 155 N. Y. 184, 49 N. E. 675, holding knowledge of insurance company's agents of intention to procure other insurance after valid policy issued not waiver of condition in policy as to other insurance; *Dimick v. Metropolitan L. Ins. Co.* 69 N. J. L. 403, 62 L. R. A. 783, 55 Atl. 291, holding warranty in application cannot be avoided on ground that insurer's agent knew facts, and incorrectly entered them in application where latter contains express limitation upon powers of agent.

#### **Sufficiency of pleading.**

Cited in *Hickey v. Hartford F. Ins. Co.* 92 Hun, 194, 36 N. Y. Supp. 329, holding complaint sufficient to recover for loss by fire, which alleged contract of insurance, destruction by fire, offer of proofs of loss and their refusal on ground that policy was canceled.

25 L. R. A. 640, *EELS v. AMERICAN TELEPH. & TELEG. CO.* 143 N. Y. 133, 38 N. E. 202.

**What constitutes additional servitude on street.**

Followed in *Kester v. Western U. Telegr. Co.* 108 Fed. 926, holding that Federal statute permitting construction of telegraph lines along post roads of United States does not affect right of owner to claim damages for additional burden on fee.

Cited in *Postal Telegr. Cable Co. v. Bruen*, 39 N. Y. Supp. 221; *Andrews v. Delhi & S. Teleph. Co.* 36 Misc. 26, 72 N. Y. Supp. 50; *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 108, 50 L. R. A. 304, 81 N. W. 1041; *Bronson v. Albion Teleph. Co. (Neb.)* 60 L. R. A. 428, 93 N. W. 201; *Donovan v. Allert*, 11 N. D. 295, 58 L. R. A. 779, 95 Am. St. Rep. 720, 91 N. W. 441,—holding telephone poles impose additional servitude on street use; *Castle v. Bell Teleph. Co.* 49 App. Div. 442, 63 N. Y. Supp. 482, and *Halleran v. Bell Teleph. Co.* 64 App. Div. 43, 71 N. Y. Supp. 685, denying right of abutting owner, without title to center of highway, to compel removal of telephone poles; *Utica v. Utica Teleph. Co.* 24 App. Div. 364, 48 N. Y. Supp. 916, holding legislature may authorize use of city streets for any purpose not inconsistent with public use; *Johnson v. New York & P. Teleph. & Teleg. Co.* 76 App. Div. 564, 78 N. Y. Supp. 598, holding village street may be used for erection of telephone poles and wires, with permission of municipality, without consent of abutting proprietors; *Gray v. York State Teleph. Co.* 41 Misc. 110, 83 N. Y. Supp. 920, Affirmed on appeal, 92 App. Div. 90, 86 N. Y. Supp. 771, holding state franchise does not give right to erect telephone poles and wires along suburban highway without compensation to abutting proprietors; *Myers v. Bell Teleph. Co.* 83 App. Div. 624, 82 N. Y. Supp. 83, holding owner under deed reserving highway entitled to maintain ejectment against telephone company, to compel removal of poles erected without right along country highway; *Hodges v. Western U. Telegr. Co.* 133 N. C. 232, 45 S. E. 572, holding owner of land entitled to compensation for use of railroad right of way for telegraph poles, erected with consent of railroad company; *Weeks v. New York & N. J. Teleph. Co.* 86 App. Div. 258, 83 N. Y. Supp. 678, questioning, without deciding, right of telephone company to erect poles in rural part of city street, without condemnation or consent of abutting proprietor; *Jayne v. Cortland Waterworks Co.* 42 Misc. 265, 86 N. Y. Supp. 571, holding village without authority to grant permission to construct water main in street which had never been accepted, without compensation to abutting owners; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 550, 28 L. R. A. 315, footnote p. 310, 63 N. W. 111 (dissenting opinion), majority holding erection of telephone poles does not impose additional servitude; *Re Grade Crossing*, 6 App. Div. 339, 40 N. Y. Supp. 520 (concurring opinion), majority holding owner of land taken for street crossing also entitled to compensation for injury to remnant of land; *Weed v. McKeg*, 37 Misc. 113, 74 N. Y. Supp. 250, holding servient estate, over which right of way passes, cannot be made to yield to use of way, by a building over it not contemplated in original grant; *Peck v. Schenectady R. Co.* 170 N. Y. 306, 63 N. E. 357, and *Jaynes v. Omaha Street R. Co.* 53 Neb. 649, 39 L. R. A. 757, 74 N. W. 67, holding poles and wires of electric railway in street impose an additional burden upon street entitling abutting owner to damages; *Coatsworth v. Lehigh Valley R. Co.* 156 N. Y. 457, 51 N. E. 301, Affirming 24 App. Div. 278, 48 N. Y. Supp. 511, holding owner of land, on which was public street, in which railroad maintained abut-

**ment for bridge**, entitled to have such erection removed; *Sun Printing & Pub. Asso. v. New York*, 8 App. Div. 283, 40 N. Y. Supp. 607 (dissenting opinion), majority holding rapid transit act affecting city only is valid as for city purpose.

Cited in footnote to *Coburn v. New Teleph. Co.* 52 L. R. A. 672, which holds occupation of sidewalk with trench and pipes for conduit for telephone wires not additional burden.

Distinguished in *Magee v. Overshiner*, 150 Ind. 139, 40 L. R. A. 374, 65 Am. St. Rep. 358, 49 N. E. 951, holding reasonable use of street for telephone poles and wires not additional servitude; *Palmer v. Larchmont Electric Co.* 158 N. Y. 234, 43 L. R. A. 674, 52 N. E. 1092, Reversing 6 App. Div. 12, 39 N. Y. Supp. 522, holding electric light pole in country highway not additional burden.

**Effect of long acquiescence in act.**

Cited in *Wilcox v. American Teleph. & Telegr. Co.* 73 App. Div. 615, 76 N. Y. Supp. 1037, Spring, J., dissenting, who holds right to maintain ejectment to compel removal of telephone poles erected on plaintiff's lands without his knowledge not lost by acquiescence; *Rathbone v. Wirth*, 6 App. Div. 307, 40 N. Y. Supp. 535, denying validity of act intended to equally divide police board of city between political parties without reference to majority, although act uniform and acquiesced in for long time.

25 L. R. A. 645, *JAFFRAY v. JENNINGS*, 101 Mich. 515, 60 N. W. 52.

**When attachment will not lie.**

Cited in *Cottrell v. Hatheway*, 108 Mich. 623, 66 N. W. 596, holding attachment will not lie for several acts of joint debtors unless so alleged in affidavit.

Cited in footnote to *Davis v. Dodson*, 29 L. R. A. 496, which denies right to attach property of one member of law firm for copartner's failure to account for money collected.

25 L. R. A. 649, *BYERS v. SCHLUPE*, 51 Ohio St. 300, 38 N. E. 117.

**Jurisdiction in attachment.**

Cited in *Halliday Hay Co. v. Cline*, 9 Ohio C. C. 283, holding justice may acquire jurisdiction in attachment proceeding against firm by publication.

Cited in footnote to *State use of Burt v. Allen*, 50 L. R. A. 284, which holds nonresidence, preventing claim of exemption, determinable as of date of sale of property.

25 L. R. A. 654, *MONTGOMERY v. SANTA ANA & W. R. CO.* 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786.

**Use of street for railroad.**

Questioned in *O'Connor v. Southern P. R. Co.* 122 Cal. 684, 55 Pac. 688, sustaining injunction against construction of railroad in public street in front of plaintiff's premises.

Disapproved in *Rische v. Texas Transp. Co.* 27 Tex. Civ. App. 37, 66 S. W. 324, holding street railway for transportation of freight additional servitude entitling abutting owner to damages not suffered in common.

**Ejectment for land dedicated for street.**

Cited in footnote to *San Francisco v. Grote*, 41 L. R. A. 335, which sustains city's right of ejectment for land dedicated for street.

**What is a railway.**

Cited in footnote to *Freiday v. Sioux City Rapid Transit Co.* 26 L. R. A. 240, which holds elevated railroad a "railway."

25 L. R. A. 658, *O'DONNELL v. MAINE C. R. CO.* 86 Me. 552, 30 Atl. 116.

**Who are volunteers.**

Cited in *Ryan v. O'Brien Boiler Works*, 68 Mo. App. 151, holding servant of shipper injured while assisting railway employees to load car so as to facilitate his own work not volunteer; *Louisville & N. R. Co. v. Ward*, 98 Tenn. 127, 60 Am. St. Rep. 848, 38 S. W. 727, holding employee of shipper of potatoes, assisting in moving car for his own convenience in loading not volunteer.

Cited in footnotes to *Cincinnati N. O. & T. P. R. Co. v. Finnell*, 57 L. R. A. 266, which denies liability to one helping brakemen at their request to load piano; *Cleveland Terminal & Valley R. Co. v. Marsh*, 52 L. R. A. 142, which denies liability for injury to small boy, employed by station agent to put up switch light, from explosion of torpedo found by him on track.

**Measure of damages for causing death.**

Cited in *Ramsdell v. Grady*, 97 Me. 322, 54 Atl. 763, holding, in case of malpractice resulting in death, physician liable to estate only for loss sustained by deceased in his lifetime.

Cited in footnote to *Smith v. Chicago, M. & St. P. R. Co.* 28 L. R. A. 573, which holds only pecuniary damages recoverable for causing death.

**When master liable.**

Cited in footnote to *Mitchell-Tranter Co. v. Ehmet*, 55 L. R. A. 710, which authorizes recovery for injury during noon intermission to servant removing broken timbers at superior's direction.

Cited in note (26 L. R. A. 527) on liability to employees of contractor for unsafe appliances or place of labor.

25 L. R. A. 663, *WALLACE v. CITY & SUBURBAN R. CO.* 26 Or. 174, 37 Pac. 477.

**When nonsuit warranted.**

Cited in *Perkins v. McCullough*, 36 Or. 148, 59 Pac. 182, and *Barr v. Rader*, 33 Or. 376, 54 Pac. 210, holding nonsuit will not be granted unless evidence for plaintiff will not authorize finding of jury or would require setting aside verdict for want of evidence; *Haines v. McKinnon*, 35 Or. 582, 57 Pac. 903 (dissenting opinion), majority holding nonsuit cannot be sustained where there was enough evidence to go to jury upon bona fides of sale of property; *First Nat. Bank v. Fire Asso.* 33 Or. 188 53 Pac. 8, refusing to set aside verdict that fire was of incendiary origin, when competent evidence before jury from which it might have drawn such inference; *Lowe v. Salt Lake City*, 13 Utah, 99, 57 Am. St. Rep. 709, 44 Pac. 1050, holding if facts are such that reasonable men may differ it is for jury to decide; *Mayes v. Stephens*, 38 Or. 521, 64 Pac. 319, refusing nonsuit where jury might have inferred that lien of mortgage still subsisted.

**Contributory negligence of children.**

Cited in *Chicago City R. Co. v. Tuohy*, 196 Ill. 426, 58 L. R. A. 275, 63 N. E. 997, holding it will not be presumed that child of tender years, who had to cross



tracks to reach school near by, ran some risk as at another point; *Frauenthal v. Laclede Gaslight Co.* 67 Mo. App. 6, holding child contributed directly to his death where he took hold of live wire while watching others trying to avoid contact with it; *Citizens Street R. Co. v. Hamer*, 29 Ind. App. 434, 62 N. E. 661, holding infant's negligence in going upon track in front of approaching street car, when attention attracted in opposite direction, question for jury; *Schleiger v. Northern Terminal Co.* 43 Or. 15, 72 Pac. 324, holding whether child of tender years stepping in front of moving train, approaching with little noise, guilty of contributory negligence, question for jury.

Cited in footnote to *Cincinnati Street R. Co. v. Wright*, 32 L. R. A. 340, which holds boy catching ride on private vehicle not chargeable with driver's negligence.

#### **Negligence of railway employees.**

Cited in *Citizens Street R. Co. v. Hamer*, 29 Ind. App. 431, 62 N. E. 661, holding that presumption that person will leave street railway track upon seeing approaching car, does not relieve motorman from exercising care required by circumstances.

Cited in footnotes to *Montgomery v. Lansing City Electric R. Co.* 29 L. R. A. 287, which holds negligent, motorman running with lever in next the fastest notch until within a few feet of band parading street; *Roberts v. Spokane Street R. Co.* 54 L. R. A. 184, which holds street car company not free from negligence *per se* in having cars meet at busy street crossing while running at rate of 2½ miles an hour; *Smith v. Union Trunk Line*, 45 L. R. A. 169, which holds running two cable cars past each other at much frequented crossing without signal, gross negligence; *Consolidated Traction Co. v. Scott*, 33 L. R. A. 122, which holds negligence of motorman and boy injured on street car track for jury under evidence; *Sample v. Consolidated Light & R. Co.* 57 L. R. A. 186, which requires high degree of care from motorman to prevent injury to small children; *Chicago City R. Co. v. Tuohy*, 58 L. R. A. 270, which denies right to run electric car at speed incompatible with lawful and customary use of street by others; *Rack v. Chicago City R. Co.* 44 L. R. A. 127, which denies negligence of gripman in failing to slacken speed of car on seeing boys standing in front of car 12 feet from track; *Citizens' R. Co. v. Ford*, 46 L. R. A. 457, which holds ordinance requiring person "riding or driving" to check up or halt at crossing to avoid injury to pedestrian, not applicable to electric car; *Bamberger v. Citizens' Street R. Co.* 28 L. R. A. 486, which holds instruction as to motorman's negligence in not stopping car not erroneous under circumstances.

Cited in note (25 L. R. A. 292) on duty to maintain lookout on railroad train.

25 L. R. A. 667, *NEGUS v. BECKER*, 143 N. Y. 303, 62 N. Y. S. R. 313, 42 Am. St. Rep. 724, 38 N. E. 20.

#### **Liability for negligence of independent contractor.**

Cited in *Burke v. Ireland*, 166 N. Y. 314, 59 N. E. 914, holding owner of building being erected not liable to employee of subcontractor for architectural defect when competent architect had been employed.

Cited in footnotes to *Sanford v. Pawtucket Street R. Co.* 33 L. R. A. 564, which denies liability of street railway company for negligence of contractor building road; *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor

repairing chimney; *Hoff v. Shockley*, 64 L. R. A. 538, which holds assent of owner's agent to independent contractor's placing sand in street in front of premises, does not render owner liable for injury resulting therefrom; *Peerless Mfg. Co. v. Bagley*, 53 L. R. A. 285, which holds landlord liable for independent contractor's negligence in putting in automatic fire extinguisher; *Leavitt v. Bangor & A. R. Co.* 36 L. R. A. 382, which denies liability of railroad company for contractor's negligence in communicating fire from cooking car while cutting wood for railroad company; *Thompson v. Lowell, I. & H. Street R. Co.* 40 L. R. A. 345, which holds street railway company liable for injury to spectator at free exhibition of marksmanship given by independent contractor on company's grounds; *Bonaparte v. Wiseman*, 44 L. R. A. 482, which requires one employing independent contractor to excavate near neighbor's house to notify neighbor or see that contractor exercises due care; *Wertheimer v. Saunders*, 37 L. R. A. 146, which holds landlord liable for independent contractor's negligence in putting new roof on building.

**Rights in party wall.**

Cited in *Pearsall v. Westcott*, 30 App. Div. 105, 51 N. Y. Supp. 663, holding party wall can be used by party without title if use not detrimental to other; *Batt v. Kelly*, 75 App. Div. 322, 78 N. Y. Supp. 142, enjoining use by owner of party wall of flues built into it for exclusive use of other though extending 2 inches beyond center; *Moeller v. Wolkenberg*, 67 App. Div. 492, 73 N. Y. Supp. 890 (dissenting opinion), majority refusing to cancel *lis pendens* in action to enjoin defendant from so constructing addition to party wall as to weaken plaintiff's house.

Cited in footnote to *Barry v. Edlavitch*, 33 L. R. A. 294, which holds easement acquired by possession in party wall appurtenant to estate.

25 L. R. A. 670, *CASSGNE v. MARVIN*, 143 N. Y. 292, 38 N. E. 265.

25 L. R. A. 674, *LOUGH v. OUTERBRIDGE*, 143 N. Y. 271, 62 N. Y. S. R. 324. 42 Am. St. Rep. 712, 38 N. E. 292.

Motion for reargument granted in 144 N. Y. 642, 39 N. E. 494.

Reaffirmed on reargument in 145 N. Y. 602, 65 N. Y. S. R. 866, 40 N. E. 164.

**Combinations in restraint of trade.**

Cited in *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 54 App. Div. 227, 66 N. Y. Supp. 615, Affirming 30 Misc. 679, 64 N. Y. Supp. 276, holding manufacturers may combine for purpose of enforcing contracts made in sale of goods to jobbers and retailers; *Kellogg v. Lehigh Valley R. Co.* 61 App. Div. 39, 70 N. Y. Supp. 237, holding complaint charging conspiracy to injure plaintiff's business and refusal of defendant railroads to carry grain shipped through his elevator, sufficient to make case of unlawful combination; *Walsh v. Dwight*, 40 App. Div. 518, 58 N. Y. Supp. 91, holding contract between manufacturer and jobbers and retailers to deal exclusively in his goods with advantage of lower price than to others legal; *Reynolds v. Plumbers' Material Protective Asso.* 30 Misc. 717, 63 N. Y. Supp. 303, holding advice to members of a plumber's association not to sell goods to debtor until he has settled for goods already purchased is not unlawful interference with trade.

**Discrimination by public corporations.**

Cited in *Gould v. Edison Electric Illuminating Co.* 29 Misc. 243, 60 N. Y.

Supp. 559, holding reasonableness and uniformity of charges of quasi-public corporation subject to inquiry by court; *Sanford v. American Dist. Teleg. Co.* 13 Misc. 91, 34 N. Y. Supp. 144, holding district telegraph company having "call" instrument in bank, liable for loss of property which it undertook to carry for bank's employee, who used instrument to call messenger.

Cited in footnotes to *Griffin v. Goldsboro Water Co.* 41 L. R. A. 240, which holds discrimination in rates charged consumers for water, unlawful; *Western U. Teleg. Co. v. Call Pub. Co.* 27 L. R. A. 622, which authorizes difference in telegraph rates to morning and evening paper; *State v. Southern R. Co.* 41 L. R. A. 246, which denies carrier's right to discriminate in favor of high official, larger shipper, or powerful politician.

**What constitutes common carrier.**

Cited in *Faucher v. Wilson*, 68 N. H. 339, 39 L. R. A. 432, 38 Atl. 1002, holding truckman, whose business is limited to trucking for special customers, not common carrier so as to make him insurer of goods carried; *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 38, 70 Am. St. Rep. 432, 52 N. E. 665, holding general truckmen are common carriers.

**Effect of motive upon validity of action.**

Cited in note (62 L. R. A. 706) on effect of bad motive to make actionable what would otherwise not be.

Limited in *People v. Duke*, 19 Misc. 297, 44 N. Y. Supp. 336, holding officers and agents of trading corporation may become criminally liable for conspiracy to secure monopoly by threats and menaces against competitors.

**Waiver of jury trial.**

Cited in *Hawkins v. Mapes-Reeve Constr. Co.* 82 App. Div. 78, 81 N. Y. Supp. 794, holding jury trial waived in suit for foreclosure of mechanics' lien if not asked for after parties had notice personal judgment could be recovered, though lien denied.

**Waiver of defense of adequate remedy at law.**

Cited in *Stuyvesant v. Weil*, 26 Misc. 448, 57 N. Y. Supp. 592, holding defense of adequate remedy at law waived if not taken by answer; *Wakeman v. Wilbur*, 147 N. Y. 664, 42 N. E. 341; *Nickerson v. Canton Marble Co.* 35 App. Div. 114, 54 N. Y. Supp. 705; *Stiefel v. New York Novelty Co.* 14 App. Div. 373, 43 N. Y. Supp. 1012; *Reilly v. Freeman*, 1 App. Div. 564, 37 N. Y. Supp. 570,—holding that defense of adequate remedy at law cannot be first set up on appeal.

Distinguished in *Weller v. Bartlett*, 79 N. Y. S. R. 627, 45 N. Y. Supp. 626, rescinding contract which proof shows not to have been intentionally fraudulent where objection that action was at law not raised at beginning of trial; *Everett v. De Fontaine*, 78 App. Div. 223, 79 N. Y. Supp. 692, holding the want of remedy at law, being essential to plaintiff's case, need not be pleaded; *Vincent v. Moriarty*, 31 App. Div. 494, 52 N. Y. Supp. 519, holding equitable action cannot be changed into legal action with money judgment where contract denied and no opportunity offered for trial by jury; *Erste Sokolower Congregation v. First United Royatiner Sokolower Verein*, 32 Misc. 270, 66 N. Y. Supp. 356, holding defense of adequate remedy at law available where its nonexistence is alleged in complaint and denied in answer; *McCann v. Hazard*, 36 Misc. 11, 72

N. Y. Supp. 45, holding answer to complaint by administrators of partner for accounting, that plaintiffs have adequate remedy at law, not demurrable.

25 L. R. A. 679, PHENIX INS. CO. v. OMAHA LOAN & T. CO. 41 Neb. 834. 60 N. W. 133.

**Rights of mortgagee under insurance policy to mortgagor.**

Reaffirmed in Hanover F. Ins. Co. v. Bohn, 48 Neb. 747, 58 Am. St. Rep. 719. 67 N. W. 774, holding sale by mortgagor subsequent to insurance, without written consent of company, does not invalidate mortgagee's interest

Cited in Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 724, 36 L. R. A. 674, footnote p. 673, 53 Am. St. Rep. 663, 66 N. W. 646, holding provisions of policy not made applicable to mortgagee's interest by rider attached, do not affect that interest; State Ins. Co. v. New Hampshire Trust Co. 47 Neb. 70, 66 N. W. 1106, holding mortgagee may recover notwithstanding omission to state in application existence of another mortgage or use of building for other purpose than livery barn; Farmers & M. Ins. Co. v. Newman, 58 Neb. 507, 78 N. W. 933, holding action to foreclose mortgage in which stay after judgment obtained does not involve the property in litigation to defeat mortgagee's interest; Baldwin v. German Ins. Co. 105 Iowa, 385, 75 N. W. 326, holding that attaching of mortgage clause to void policies does revive them or create valid contracts; Lowry v. Insurance Co. of N. A. 75 Miss. 46, 37 L. R. A. 779, 46 Am. St. Rep. 587, 21 So. 664, discussing right of mortgagee to maintain action on policy when it does not appear that mortgage debt is unpaid; Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 724, 36 L. R. A. 674, footnote p. 673, 53 Am. St. Rep. 663, 66 N. W. 646, holding policy not avoided as to mortgagee's interest by insured's violation of provision against transfer of property without consent; Key *ex rel.* Heaton v. Continental Ins. Co. 101 Mo. App. 356, 74 S. W. 162, holding indorsement of mortgage note, and deposit of policy of insurance as collateral security, gives indorser sufficient interest to maintain action on policy.

Cited in footnotes to Hocking v. Virginia F. & M. Ins. Co. 39 L. R. A. 148, which denies mortgagee's right to recover where mortgagor burns building; Syndicate Ins. Co. v. Bohn, 27 L. R. A. 614, which holds mortgagee's rights under mortgage clause in policy not affected by mortgagor's false statements; Farmers' Loan & T. Co. v. Penn Plate-Glass Co. 56 L. R. A. 710, which denies mortgagee's lien on proceeds of insurance on premises by grantee for own benefit; Shadgett v. Phillips & C. Co. 56 L. R. A. 461, which holds mortgagee not entitled to insurance procured by donee for own benefit, by latter's knowledge of mortgagor's failure to keep agreement to insure; Pioneer Sav. & L. Co. v. Providence-Washington Ins. Co. 38 L. R. A. 397, which holds change of title by deed from mortgagor to mortgagee pending application for insurance not fatal to insurance; Whiting v. Burkhardt, 52 L. R. A. 788, which holds mortgagee's rights in policy not affected by conveyance of mortgagor's interest in property; Southern Home Bldg. & L. Asso. v. Home Ins. Co. 27 L. R. A. 844, which holds standard mortgage clause not relieve mortgagee from necessity of proof of loss; Boyd v. Thuringia Ins. Co. 55 L. R. A. 165, which holds question of forfeiture of policy payable to mortgagee not determined by provisions as to mortgagor's acts; Eddy v. London Assur. Corp. 25 L. R. A. 686, which construes provision against mortgagee's interest in policy being "invalidated" by owner's acts, as preventing reduction for other insurance taken without his knowledge; Delaware Ins. Co.

v. Greer, 61 L. R. A. 137, which holds mortgagee's indemnity placed at risk of every act and omission of mortgagor which would avoid latter's interest.

Cited in note (30 L. R. A. 636) on effect of riders or slips attached to insurance policies.

Distinguished in *Jaskulski v. Citizens' Mut. F. Ins. Co.* 131 Mich. 605, 92 N. W. 98, holding that under ordinary mortgage rider on policy issued to mortgagor, mortgagee is bound by condition making policy void on transfer of property without consent of insurer.

25 L. R. A. 686, *EDDY v. LONDON ASSUR. CORP.* 143 N. Y. 311, 62 N. Y. S. R. 316, 38 N. E. 307.

Followed in *Eddy v. Williamsburgh City F. Ins. Co.* 143 N. Y. 656, 38 N. E. 307, without discussion.

**Effect of mortgagor's acts on mortgagee's interest under policy.**

Cited in *Genesee Falls Permanent Sav. & L. Asso. v. United States F. Ins. Co.* 16 App. Div. 588, 44 N. Y. Supp. 979, holding mortgagor's failure to state correctly interest in insured's premises, not within mortgagee clause that policy shall not be invalidated by "act or neglect of mortgagor;" *Hardy v. Lancashire Ins. Co.* 166 Mass. 214, 33 L. R. A. 244, 55 Am. St. Rep. 395, 44 N. E. 209, holding mortgagee's right to full payment of loss under mortgagee clause not affected by mortgagor's taking other insurance, though former policy contains *pro rata* provision; *Baldwin v. German Ins. Co.* 105 Iowa, 385, 75 N. W. 326, holding attaching mortgage clauses to void policies does not revive them or create valid contracts.

Cited in footnotes to *Syndicate Ins. Co. v. Bohn*, 27 L. R. A. 614, which holds mortgagee's rights under mortgage clause in policy not affected by mortgagor's false statements; *Farmers' Loan & T. Co. v. Penn Plate-Glass Co.* 56 L. R. A. 710, which denies mortgagee's lien on proceeds of insurance on premises by grantee for own benefit; *Oakland Home Ins. Co. v. Bank of Commerce*, 36 L. R. A. 673, which holds policy not avoided as to mortgagee's interest by insured's violation of provision against transfer of property without consent; *Delaware Ins. Co. v. Greer*, 61 L. R. A. 137, which holds mortgagee's indemnity placed at risk of every act and omission of mortgagor which would avoid latter's interest; *Boyd v. Thuringia Ins. Co.* 55 L. R. A. 165, which holds question of forfeiture of policy payable to mortgagee not determined by provisions as to mortgagor's acts.

Distinguished in *Queen Ins. Co. v. Dearborn Sav. Loan & Bldg. Asso.* 75 Ill. App. 377, holding parts of policy indicated therein as applicable to contract with mortgagee makes complete contract to exclusion of remainder of policy; *Sun Ins. Office v. Varble*, 103 Ky. 768, 41 L. R. A. 794, 46 S. W. 486, holding fire insurance company bound to pay loss sustained by lessor under policy issued to her, notwithstanding payment of portion of loss contracted for under policies to lessees, where lessee not required to rebuild.

**Trustee's liability for misapplied insurance money.**

Cited in *Re Olmstead*, 52 App. Div. 518, 66 N. Y. Supp. 212, holding trustee liable for amount of insurance directed by him to be paid to person in possession on mere verbal understanding that it be used in repair of building.

25 L. R. A. 691, *McGRAW v. DISTRICT OF COLUMBIA*, 3 App. D. C. 405.

**Liability for safety of bathers.**

Cited in footnote to *Brotherton v. Manhattan Beach Improv. Co.* 33 L. R. A. 598, which requires keeper of bathing resort to take proper precautions for safety of bathers.

25 L. R. A. 694, *WOOSTER v. MULLINS*, 64 Conn. 340, 30 Atl. 144.

**Right to give casting vote.**

Cited in footnotes to *State ex rel. Morris v. McFarland*, 39 L. R. A. 282, which holds auditor's right to give casting vote on tie vote by township trustees not limited to vote by ballot; *Cate v. Martin*, 48 L. R. A. 613, which denies mayor's power to veto action by aldermen in passing on election for member of board; *State ex rel. Young v. Yates*, 37 L. R. A. 205, which holds mayor's right to casting vote in case of tie not restricted by provision requiring majority vote of all members of council; *Brown v. Foster*, 31 L. R. A. 116, which authorizes mayor to vote only to break tie.

**Record of ayes and nays.**

Cited in footnote to *Board of Education v. Best*, 27 L. R. A. 78, which holds mandatory, provision for requiring ayes and nays on motion to employ teacher.

25 L. R. A. 695, *Re ROOSEVELT*, 143 N. Y. 120, 62 N. Y. S. R. 130, 38 N. E. 231.

**What law governs taxable transfers.**

Cited in *State ex rel. Garth v. Switzler*, 143 Mo. 327, 40 L. R. A. 280, 65 Am. St. Rep. 653, 45 S. W. 245, holding collateral succession tax is governed by law in force at death of testator; *Re Meyer*, 83 App. Div. 384, 82 N. Y. Supp. 329, holding vested remainder of uncertain value taxable according to law in force at death of testator.

**Interests subject to succession tax.**

Cited in *Talmadge v. Seaman*, 85 Hun, 246, 32 N. Y. Supp. 906, holding contingent estate in remainder subject to succession tax under statute existing upon termination of life estate, though statute enacted subsequent to will creating it; *Re Westurn*, 152 N. Y. 100, 46 N. E. 315, holding transfer tax cannot be fixed until finally determined whether will valid or property passes under interstate laws; *Re Sloane*, 154 N. Y. 114, 47 N. E. 978, holding transfer tax assessable on value of legacy, dependent on widowhood or widow's death, after deducting value of widow's estate during widowhood; *Re Hoffman*, 143 N. Y. 334, 38 N. E. 311, holding collateral inheritance tax is assessable only on present ownership or absolute right of future enjoyment; *Coxe's Estate*, 193 Pa. 111, 44 Atl. 256, holding, under statute laying transfer tax upon value of estate when right of possession accrues, remainder taxable only on value of property when possession acquired; *Re Vanderbilt*, 68 App. Div. 33, 74 N. Y. Supp. 450, and *Billings v. People*, 189 Ill. 472, 59 L. R. A. 814, 59 N. E. 798, holding future contingent remainders not taxable at death of testator; *Re Plum*, 37 Misc. 471, 75 N. Y. Supp. 940, holding remainders, under will of property to trustees to invest and divide upon contingencies happening to life tenant, not presently taxable; *Re Babcock*, 37 Misc. 446, 75 N. Y. Supp. 926, holding taxation of remainders when life tenant has power to reduce principal postponed until value determined; *Re Eldridge*, 29 Misc. 738, 62 N. Y. Supp. 1026, holding legacies to remainder men dependent

upon survival at death of life tenant not taxable until determinable; *Billings v. People*, 189 Ill. 487, 59 L. R. A. 814, 59 N. E. 798, holding transfer tax cannot be assessed on remainder until life estate terminates; *People v. McCormick*, 208 Ill. 445, 64 L. R. A. 779, 70 N. E. 350, holding estate in remainder, if subject to defeasance, is not liable to inheritance tax until it becomes indefeasible; *Lick's Estate*, 28 Pa. Co. Ct. 122, holding payment of inheritance tax by executor within three months after death of testator, erroneous, where payment of bequests postponed by trust created by will; *Re Vanderbilt*, 172 N. Y. 77, 64 N. E. 782 (dissenting opinion), majority holding trust estate, with remainder to beneficiary contingent only upon his surviving stated period, immediately taxable; *Re Pell*, 171 N. Y. 54, 57 L. R. A. 543, 89 Am. St. Rep. 791, 63 N. E. 789, Reversing 60 App. Div. 290, 70 N. Y. Supp. 196, holding remainder, vesting prior to act, but not in possession until subsequent thereto, not taxable; *State ex rel. Garth v. Switzler*, 143 Mo. 329, 40 L. R. A. 288, 65 Am. St. Rep. 653, 45 S. W. 245, holding tax upon whole estate of deceased payable by personal representatives of estate, not succession tax, but one upon property; *Re Dows*, 52 L. R. A. 433, which holds real property subject to power of appointment, converted into personalty, subject to transfer tax on personalty.

Distinguished in *Re Dows*, 167 N. Y. 234, 52 L. R. A. 436, 88 Am. St. Rep. 509, 60 N. E. 439, holding absolute remainders alienable, devisable, and descendible, are taxable.

#### **Validity of succession tax.**

Cited in footnote to *Minot v. Winthrop*, 26 L. R. A. 259, which upholds reasonable succession tax on transmission of decedent's property.

#### **Exemption from succession tax.**

Cited in *Stellwagen v. Wayne Probate Judge*, 130 Mich. 171, 89 N. W. 728 (dissenting opinion), majority holding exemption of \$5,000 from tax is to be taken from estate as a whole.

#### **Penalty for nonpayment of tax.**

Cited in *Re Davis*, 91 Hun, 64, 36 N. Y. Supp. 822, holding per-cent penalty for nonpayment of transfer tax on personal property, of which remainderman cannot get possession until death of life tenant, does not begin to run until death of life tenant.

25 L. R. A. 697, *HARDIE v. HARDIE*, 162 Pa. 227, 29 Atl. 886.

#### **Grounds for divorce.**

Cited in *Mendenhall v. Mendenhall*, 12 Pa. Super. Ct. 296, holding desertion not justified on ground of cruel and barbarous treatment, where there was only short struggle resulting in slight physical injury; *Roth v. Roth*, 15 Pa. Super. Ct. 202, holding annoyance by husband coming to house and rapping on door and window of house where wife lived apart is not sufficient indignity to support action for divorce.

Cited in footnotes to *Tirrell v. Tirrell*, 47 L. R. A. 750, which holds mere payment of allowance to abandoned wife under order of court will not prevent divorce for desertion; *Maddox v. Maddox*, 52 L. R. A. 628, which denies right to divorce for cruelty from failure to provide suitable dwelling house, clothing, and food.

25 L. R. A. 699, PRICE v. SCHAEFFER, 161 Pa. 530, 29 Atl. 279.

**When foreign judgments may be impeached.**

Cited in Jones v. Quaker City Mut. F. Ins. Co. 23 Pa. Co. Ct. 531, 9 Pa. Dist. R. 214, holding judgment of another state can be impeached to show want of jurisdiction through failure to serve process; Wilmer v. Lewis. 24 Pa. Co. Ct. 616, holding judgments entered solely on authenticated transcripts of judgments of another state void *ab initio*; Com. v. Bolich, 18 Pa. Co. Ct. 403, holding judgment of divorce in another state, void because process not served, unavailing elsewhere; Levison v. Blumenthal, 10 Kulp, 256, holding judgment of another state will not be given "faith and credit" when cause of action had ceased to exist before judgment rendered; Levison v. Blumenthal, 8 Northampton Co. Rep. 38, holding judgment rendered in favor of defendant in one state good defense to action on judgment subsequently obtained by plaintiff on same cause of action in another state.

Distinguished in Schnader v. Bender, 8 Northampton Co. Rep. 262, 19 Lanc. L. Rev. 198, holding personal judgment against nonresident in action *in rem* not subject to attack in action thereon in another state, where defendant submitted himself to jurisdiction of court.

25 L. R. A. 701, WALTON v. KENDRICK, 122 Mo. 504, 27 S. W. 872.

**Proof of execution of will.**

Cited in Schierbaum v. Schemme, 157 Mo. 16, 80 Am. St. Rep. 604, 57 S. W. 526, and Gordon v. Burris, 141 Mo. 613, 43 S. W. 642, holding declarations of testatrix made subsequent to execution of will, inadmissible; Throckmorton v. Holt, 180 U. S. 571, 45 L. ed. 673, 21 Sup. Ct. Rep. 474, holding declarations of deceased, and letters written after execution of will, inadmissible upon question of its having been forged; Ortt v. Leonhardt, 102 Mo. App. 43, 74 S. W. 423 (concurring opinion), holding witnesses attesting testator's signature must know instrument is "last will," and be able to so testify upon proof of will.

Distinguished in Mendenhall's Will, 43 Or. 557, 73 Pac. 1033, holding recitals in attestation clause cannot prevail against positive and convincing proof that will was not signed when witnessed.

25 L. R. A. 710, NORFOLK & W. R. CO. v. HOOVER, 79 Md. 253, 47 Am. St. Rep. 392, 29 Atl. 994.

**Who are fellow servants.**

Cited in Hearn v. Quillen, 94 Md. 45, 50 Atl. 402, holding operating sawmill is not same general business as that of erecting shed roof over mill; Missouri P. R. Co. v. Lyons, 54 Neb. 640, 75 N. W. 13, holding each member of two switching crews, switching same cars under general supervision of yardmaster, fellow servants, although each crew with different foreman; Missouri, K. & T. R. Co. v. Elliott, 42 C. C. A. 204, 102 Fed. 111, holding superior servant is fellow servant of those under him unless he has entire management of business; Maryland Clay Co. v. Goodnow, 95 Md. 355, 51 Atl. 202 (dissenting opinion), majority holding superintendent of company is fellow servant with laborers engaged by another employee to do work.

Cited in notes (50 L. R. A. 429) on what servants are deemed to be in same common employment, apart from statutes, where no questions as to vice prin-



cialship arise; (51 L. R. A. 515, 567, 578, 584, 612) on vice principalship considered with reference to superior rank of negligent servant; (54 L. R. A. 95) on vice principalship as determined with reference to character of act which caused injury; (25 L. R. A. 387, 392) on train despatcher and telegraph operator as fellow servants of trainmen.

Disapproved in *Wallace v. Boston & M. R. Co.* 72 N. H. 517, 57 Atl. 913, holding train despatcher causing collision through erroneous orders not fellow servant of brakeman injured thereby.

**Knowledge as element of master's liability.**

Cited in *Weeks v. Scharer*, 49 C. C. A. 377, 111 Fed. 335, holding notice of incompetence to shift boss without authority to discharge men not notice to master.

Cited in notes (41 L. R. A. 47, 97, 98) on knowledge as element of employer's liability to injured servants; (40 L. R. A. 146) on intoxication as affecting negligence.

**Master's duty as to rules and employment of servants.**

Cited in notes (43 L. R. A. 347) on duty of master and servant as to rules promulgated for safe conduct of business; (48 L. R. A. 390) on duty of master as to employment of servants.

Disapproved in *Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 629, 43 U. S. App. 113, 73 Fed. 640, holding officer entitled to suspend servant temporarily is one authorized to receive notice for company of his incompetency.

**Evidence of incompetence of servants.**

Cited in *Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 627, 43 U. S. App. 113, 73 Fed. 638; *Stoll v. Daly Min. Co.* 19 Utah, 284, 57 Pac. 295; *Park v. New York C. & H. R. R. Co.* 85 Hun, 186, 32 N. Y. Supp. 482, — holding evidence of reputation as to care and prudence of brakeman admissible on subject of notice to master before employment; *Gier v. Los Angeles Consol. Electric R. Co.* 108 Cal. 134, 41 Pac. 22, holding servant's reputation for carelessness not proof of, but admissible upon, question of actual unfitness; *Green v. Western American Co.* 30 Wash. 116, 70 Pac. 310, holding, in action for personal injury to coal miner from fall of roof, evidence of specific acts of incompetence of pit boss is competent.

25 L. R. A. 719, *DEYO v. HAMMOND*, 102 Mich. 122, 60 N. W. 455.

**Merger of conversation in written contract.**

Cited in *Leffel v. Piatt*, 126 Mich. 453, 86 N. W. 65, holding prior conversation as to testing machinery merged in written contract of sale, under which purchaser was to accept or return machinery within thirty days.

25 L. R. A. 721, *MULLEN v. SANBORN*, 79 Md. 364, 47 Am. St. Rep. 421, 29 Atl. 522.

**Immunity of nonresident suitor or witness.**

Cited in *Cooper v. Wyman*, 122 N. C. 785, 65 Am. St. Rep. 731, 29 S. E. 947, holding process in another action cannot be served on nonresident coming into state solely as suitor or witness; *Monroe v. St. Clair Circuit Judge*, 125 Mich. 285, 52 L. R. A. 190, footnote p. 189, 84 N. W. 305, holding vendor of libeled vessel coming into state, at request of purchaser, to procure release, not exempt

from arrest in another suit brought by such purchaser; *Guynn v. McDanel*, 4 Idaho, 610, 95 Am. St. Rep. 158, 43 Pac. 74, holding nonresident attending term of Federal court as plaintiff in action, not exempt from service of summons in action in state court, brought by defendant in former suit; *Murray v. Wilcox*, 122 Iowa, 192, 64 L. R. A. 537, 101 Am. St. Rep. 263, 97 N. W. 1087, holding nonresident defendant in criminal proceeding brought into state on extradition, not subject to service of original notice in civil action, and referring with approved to annotation in 25 L. R. A. 721.

Annotation in 25 L. R. A. 721, referred to approvingly in *Greenleaf v. People's Bank*, 133 N. C. 299, 63 L. R. A. 503, 98 Am. St. Rep. 709, 45 S. E. 638, holding nonresident attorney not exempt from service of process when coming into state to transact business before courts for client.

25 L. R. A. 739, *BALDWIN v. HOSMER*, 101 Mich. 119, 59 N. W. 432.

**Right to assets of insolvent corporation in hands of receiver.**

Cited in *Wheeler v. Dime Sav. Bank*, 116 Mich. 271, 72 Am. St. Rep. 521, 74 N. W. 496, holding member of benevolent association of another state, over which receiver appointed in that state, cannot by garnishment in this state obtain advantage over other members; *Baldwin v. Hosmer*, 101 Mich. 436, 59 N. W. 669, holding injunction petitioned by ancillary receiver of foreign benevolent association against garnishment proceedings by local creditor to subject fund held within jurisdiction, properly refused; *Sands v. E. S. Greeley & Co.* 31 C. C. A. 425, 59 U. S. App. 610, 88 Fed. 132, holding that appropriation of local assets to claims of local creditors to prejudice of title of foreign receiver is matter of judicial discretion, and refusal to make such appropriation will not be disturbed on appeal where claims of creditors of equal validity and equity; *MacMurray v. Sidwell*, 155 Ind. 566, 80 Am. St. Rep. 255, 58 N. E. 722, holding local receiver of foreign building association should not pay local creditors in full, but turn over net proceeds of fund to general receiver appointed in foreign state, for general distribution, but under conditions protecting rights of local creditors; *Smith v. Taggart*, 30 C. C. A. 567, 57 U. S. App. 493, 87 Fed. 98, holding that ancillary receivers of benevolent association should transmit to receiver appointed in state where association was incorporated, all funds in their hands belonging to supreme lodge; *Hale v. Bugg*, 82 Fed. 37, refusing upon petition for appointment of ancillary receiver for foreign corporation to interfere with sheriff's possession of property under previous attachment proceedings in state court.

Cited in footnotes to *Failey v. Fee*, 32 L. R. A. 311, which requires payment of established debts before sending assets to receiver at domicile of foreign insolvent corporation; *Castleman v. Templeman*, 41 L. R. A. 367, which denies receiver's power to consent to decree in other state for payment of assessments by stockholders to creditors.

Cited in notes (34 L. R. A. 740) on right to enforce stockholder's liability outside of state of incorporation; (38 L. R. A. 98) on distribution of assets of insolvent insurance company.

**Right of foreign receiver to sue.**

Cited in *Gray v. Josselyn*, 117 Mich. 24, 75 N. W. 96, referring to, without deciding, the question whether foreign receiver will be permitted to sue for debt due estate in contravention of rights of local creditors.

25 L. R. A. 744, POOLE v. CONSOLIDATED STREET R. CO. 100 Mich. 379, 59 N. W. 390.

**Contributory negligence of injured passenger.**

Cited in *Fillingham v. St. Louis Transit Co.* 102 Mo. App. 589, 77 S. W. 314, holding passenger on street car not negligent in alighting at dangerous place, when invited to do so by conductor; *Richard v. Detroit, R. R. & L. O. R. Co.* 129 Mich. 462, 89 N. W. 52, holding street car passenger alighting upon erroneous call of stopping point by conductor, and injured by sudden starting of car, not negligent.

**Jury trial.**

Cited in *Hennig v. Globe Foundry Co.* 112 Mich. 618, 71 N. W. 156, holding defendant has right to have his theory of case presented to jury by judge.

25 L. R. A. 746, WARREN v. FIRST NAT. BANK, 149 Ill. 9, 38 N. E. 122.

**Preferences by insolvent corporation.**

Cited in *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 526, 48 N. E. 82, holding insolvency does not deprive corporation of power to mortgage corporate property to bona fide creditor, although mortgagee thereby secure preference to other creditors; *O'Donnell v. Illinois Steel Co.* 53 Ill. App. 332, holding deed made by corporation to trustee to secure indebtedness upon which the directors were liable should be set aside; *Blair v. Illinois Steel Co.* 159 Ill. 362, 31 L. R. A. 274, 42 N. E. 895, holding insolvent corporation may bona fide prefer a creditor, though she be aunt of three of its directors; *Illinois Steel Co. v. O'Donnell*, 156 Ill. 630, 31 L. R. A. 266, 47 Am. St. Rep. 245, 41 N. E. 185, and *Gottlieb v. Miller*, 154 Ill. 52, 39 N. E. 992, holding that insolvent corporation may prefer creditors subject to same conditions as individuals; *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 621, 38 N. E. 153, holding president of corporation may not prefer his wife as creditor in pursuance of plan to exchange her holdings of stock into demand judgment notes; *Peterson v. Brabrook Tailoring Co.* 150 Ill. 295, 37 N. E. 242, holding entry of judgment by confession of corporation and issue of execution thereon is not of itself a diversion or misappropriation of a trust fund.

Cited in footnote to *Adams & W. Co. v. Deyette*, 31 L. R. A. 497, which denies right to prefer debt for money borrowed by corporation to purchase its own stock.

**Extraterritorial effect of laws and decisions.**

Cited in *Nathan v. Lee*, 152 Ind. 239, 43 L. R. A. 824, 52 N. E. 987, upholding mortgage on local real estate given by insolvent foreign corporation to preferred creditors, notwithstanding decision of court of corporation's residence that disposition of property must be for equal benefit of all creditors.

**Assignment of fund not yet in existence.**

Cited in *Smith v. Bates Mach. Co.* 182 Ill. 169, 55 N. E. 69, Affirming 79 Ill. App. 526, and *Young v. Jones*, 180 Ill. 220, 54 N. E. 235, holding equitable assignment of part of fund valid though fund only potentially in existence; *Brewer v. Griesheimer*, 104 Ill. App. 331, holding unearned wages or salary assignable.

**Sufficiency of transcript.**

Cited in *Baltimore & O. R. Co. v. Gaulter*, 165 Ill. 235, 46 N. E. 256, holding transcript sufficient which contains true and complete transcript of the record.

25 L. R. A. 755, *STATE ex rel. CHILDS v. MINNETONKA*, 57 Minn. 526, 59 N. W. 972.

**Incorporation of villages.**

Followed in *State ex rel. Childs v. Fridley Park*, 61 Minn. 146, 63 N. W. 613, and *State ex rel. Douglas v. Holloway*, 90 Minn. 272, 96 N. W. 40, holding inclusion of large tracts of agricultural land not suburban in character, nor having unity of interest with platted lands having compact nucleus of population, illegal.

Cited in *State ex rel. Hammond v. Dimond*, 44 Neb. 160, 62 N. W. 498, holding under statute permitting incorporation of sections, or parts thereof, platted into blocks and lots and adjacent territory, only such lands as have a nucleus of population and those really suburban in character can be included; *State ex rel. Railroad & W. Comrs. v. Minneapolis & St. L. R. Co.* 76 Minn. 474, 79 N. W. 510, holding statute requiring building of stations and stopping trains at village refers to incorporated villages; *St. Paul Gaslight Co. v. Sandstone*, 73 Minn. 231, 75 N. W. 1050, holding valid, statute delegating to thirty petitioners the initiative in organizing village from certain lands; *State ex rel. Holland v. Lammers*, 113 Wis. 414, 89 N. W. 501, holding power to incorporate village limited to such land as has a reasonably compact center or nucleus of population, and is not merely agricultural.

Cited in note (35 L. R. A. 397) on what constitutes a village.

**Proper remedy to oust municipal corporation.**

Cited in *State ex rel. Childs v. Crow Wing County*, 66 Minn. 529, 35 L. R. A. 746, 69 N. W. 925, holding quo warranto will lie to oust municipal corporation from specific territory over which it wrongfully exercises jurisdiction.

**What forum must determine legality of municipal incorporation.**

Cited in *State ex rel. Holland v. Lammers*, 113 Wis. 415, 89 N. W. 501, holding question of legality of attempted incorporation of village, judicial, and not legislative.

25 L. R. A. 759, *STATE v. HOSKINS*, 58 Minn. 35, 59 N. W. 545.

**Class legislation.**

Cited in *State v. Sherod*, 80 Minn. 450, 50 L. R. A. 663, 81 Am. St. Rep. 268, 83 N. W. 417, declaring valid, exercise of police power to regulate manufacture and sale of baking powder; *State v. Whitaker*, 160 Mo. 71, 60 S. W. 1068, holding act requiring screens to protect electric motormen from weather not class legislation.

Cited in footnotes to *State v. Nelson*, 26 L. R. A. 317, which holds valid, requirement of glass or other material to protect motormen on electric cars: *Indianapolis Union R. Co. v. Houlihan*, 54 L. R. A. 787, which sustains statute making railroad company liable to employees for injuries by negligence of specified servants; *People ex rel. Nechameus v. City Prison*, 27 L. R. A. 718, which upholds act requiring examination and certificate from employing or master plumbers; *Re Morgan*, 47 L. R. A. 52, which holds void, eight-hour law applying to smelters.

Cited in notes (32 L. R. A. 853) on police power to protect health of employees; (31 L. R. A. 804, 805) on police regulation of electric companies.

**Impairing obligation of contract.**

Cited in note (50 L. R. A. 145) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts.

**Cruel or unusual punishments.**

Cited in note (35 L. R. A. 577) on cruel and unusual punishments.

25 L. R. A. 761, *AVERELL v. SECOND NAT. BANK*, 2 App. D. C. 470.

25 L. R. A. 766, *CASE v. HALL*, 52 Ohio St. 24, 38 N. E. 618.

**Merger of mortgage in title.**

Cited in *Hulshoff v. Bowman*, 19 Ohio C. C. 558, holding that merger of mortgage in deed may be prevented by agreement.

25 L. R. A. 770, *BOARD OF EDUCATION v. STATE*, 51 Ohio St. 531, 46 Am. St. Rep. 588, 38 N. E. 614.

**Taxing power of legislature.**

Cited in *Caldwell v. Cuyahoga County*, 15 Ohio C. C. 171 (Affirming 5 Ohio N. P. 162), holding unconstitutional, statute fixing amount recoverable for injuries from mob violence without regard to damages sustained; *New York L. Ins. Co. v. Cuyahoga County*, 45 C. C. A. 241, 106 Fed. 131, Reversing 99 Fed. 852, holding act authorizing commissioners of county to issue bonds in payment of property obtained through unconstitutional legislation valid.

Cited in footnotes to *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes; *State ex rel. Sayre v. Moore*, 25 L. R. A. 774, which authorizes appropriation to reimburse county for expenses of murder trial.

**What is judicial inquiry.**

Cited in *New York L. Ins. Co. v. Cuyahoga County*, 99 Fed. 856, declaring determination of question of equitable or moral obligation to pay public indebtedness is judicial, and not legislative.

25 L. R. A. 774, *STATE ex rel. SAYRE v. MOORE*, 40 Neb. 854, 59 N. W. 755.

**Attorney's lien.**

Cited in footnote to *Loofbourow v. Hicks*, 55 L. R. A. 874, which holds lien for attorney's fees allowed by judgment of foreclosure enforceable against land bid in by mortgagee or assignee.

**What is appropriation.**

Cited in footnotes to *Board of Education v. State*, 25 L. R. A. 770, which holds unconstitutional, act authorizing board of education to levy tax to pay claim for which no obligation exists; *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes.

Cited in note (42 L. R. A. 37, 49) on what claims constitute valid demands against a state.

Distinguished in *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 99, 61 Am. St. Rep. 538, 69 N. W. 373, holding act providing for beet-sugar bounties not an appropriation because not specific or limited.

**When mandamus will issue.**

Cited in *State ex rel. Simons v. Cornell*, 51 Neb. 555, 71 N. W. 300, denying L. R. A. AV.—VOL. III.—53.

mandamus to compel auditor to pay salary of public officer who has failed to swear to or affirm his claim; *State ex rel. Society of Home for Friendless v. Cornell*, 54 Neb. 160, 74 N. W. 398, refusing mandamus to compel auditor to issue warrant for claim disallowed by him; *State ex rel. New Orleans Canal & Bkg. Co. v. Heard*, 47 La. Ann. 1693, 47 L. R. A. 523, 18 So. 746, compelling state auditor to pay claim against state in pursuance of resolution of legislature; *State ex rel. Butler County Agri. Soc. v. Coufal*, 1 Herdman (Neb.) 132, 95 N. W. 362, holding allowance by county supervisors of statutory sum due county agricultural society may be compelled by mandamus.

Cited in notes (58 L. R. A. 843) on original jurisdiction of court of last resort in mandamus case; (47 L. R. A. 516) on unconstitutionality of statute as defense against mandamus to compel its enforcement.

Distinguished in *Burton v. Furman*, 115 N. C. 172, 20 S. E. 443, holding that mandamus will not lie against state officers to compel them to audit and pay from statutory fund, claim of attorney for services rendered to state.

**Contracts to procure legislation.**

Cited in *Richardson v. Scott's Bluff County*, 59 Neb. 406, 48 L. R. A. 297, 30 Am. St. Rep. 682, 81 N. W. 309, declaring void an agreement to compensate lobbyist for procuring passage of act to reimburse county for expense of murder trial.

**Appointment of police board by governor.**

Cited in *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 523, 41 L. R. A. 638, 76 N. W. 175 (dissenting opinion), majority holding act granting governor power to appoint metropolitan police board invalid.

25 L. R. A. 781, *Re GAGE*, 141 N. Y. 112, 56 N. Y. S. R. 662, 35 N. E. 1094.

**Legislative power over elections and removals from office.**

Cited in *Spitzer v. Fulton*, 33 Misc. 266, 68 N. Y. Supp. 660, holding legislature may determine persons qualified to vote for village officers and as to such officers constitutional provisions as to elections do not apply; *People ex rel. Goring v. Wappingers Falls*, 83 Hun, 135, 31 N. Y. Supp. 758, holding office of justice of peace, having been determined by legislature to be elective, came under constitutional provisions as to election by the people; *Harris v. Burr*, 32 Or. 362, 39 L. R. A. 771, footnote p. 768, 52 Pac. 17, holding women may vote at school meeting for director notwithstanding constitutional provision limiting right to "vote at all elections authorized by law" to male citizens; *People ex rel. Coffey v. Democratic General Committee*, 164 N. Y. 348, 51 L. R. A. 679, 58 N. E. 124 (dissenting opinion), majority denying power of county committee of political party to remove one of its members; *People v. Dooley*, 171 N. Y. 82, 63 N. E. 815, holding legislature cannot provide for election of local magistrates in one division of city borough and for appointment of same class of magistrates in another division.

Cited in footnote to *Gougar v. Timberlake*, 37 L. R. A. 644, which denies right of women to vote under provision giving right to "male" citizens.

25 L. R. A. 784, *BOTTOMS v. SEABOARD & R. R. CO.* 114 N. C. 699, 41 Am. St. Rep. 799, 19 S. E. 730.

**Imputable negligence.**

Cited in *Warren v. Manchester Street R. Co.* 70 N. H. 382, 47 Atl. 735, refusing

to impute to infant of three years negligence of parent in permitting it to go unattended upon street through which street railway ran; *South Covington & C. Street R. Co. v. Herrklotz*, 104 Ky. 414, 47 S. W. 265, holding negligence of father not imputable to child under four years whose arm was crushed by street car; *Chicago G. W. R. Co. v. Kowalski*, 34 C. C. A. 4, 92 Fed. 312, refusing to impute to infant of three months the negligence of father and mother with whom it was riding; *Berry v. Lake Erie & W. R. Co.* 70 Fed. 683, refusing to impute mother's negligence to child of seven years crossing railroad; *Evansville v. Senhenn*, 151 Ind. 54, 41 L. R. A. 732, footnote p. 728, 68 Am. St. Rep. 218. 47 N. E. 634, refusing to impute negligence of parent to child of five years crippled by fall of pile of lumber in street; *Bradley v. Ohio River R. Co.* 126 N. C. 742, 36 S. E. 181, upholding instruction to jury that deceased killed by cars backing onto stage not responsible for conduct of driver unless she assumed to direct or control him; *Duval v. Atlantic Coast Line R. Co.* 134 N. C. 349, 65 L. R. A. 729, 101 Am. St. Rep. 830, 46 S. E. 750, holding negligence of driver of buggy not imputable to daughter riding with him.

Cited in footnotes to *Ploof v. Burlington Traction Co.* 43 L. R. A. 108, which holds parent's negligence in permitting ten-year old boy in street not proximate cause of accident from his attempt to cross street in front of street car; *Ives v. Welden*, 54 L. R. A. 854, which holds child injured by explosion of unlabeled gasoline, not affected by father's negligence; *Nashville R. Co. v. Howard*, 64 L. R. A. 437, which holds negligence of mother not imputable to child four years old thrown from street car by jolting.

#### **Duty of railroad to trespasser.**

Explained in *Jeffries v. Seaboard Air Line R. Co.* 129 N. C. 240, 39 S. E. 836 holding railroad liable if engineer by looking ahead could have seen child on track in time to avoid striking it.

Cited in *Mason v. Southern R. Co.* 58 S. C. 81, 53 L. R. A. 918, footnote p. 913. 79 Am. St. Rep. 826, 36 S. E. 440, holding railroad company liable for death of child on track from failure to keep reasonable lookout; *Gunn v. Ohio River R. Co.* 42 W. Va. 681, 36 L. R. A. 578, 36 S. E. 546, holding engineer's duty to try to avoid injuring child seen on railroad; *Smith v. Norfolk & S. R. Co.* 114 N. C. 749, 25 L. R. A. 296, 19 S. E. 863, holding railroad liable for neglect of engineer to exercise due care in discovering and avoiding injuries to helpless persons on track.

Cited in footnotes to *Gunn v. Ohio River R. Co.* 36 L. R. A. 575, which holds it duty of engineer and fireman to keep lookout for persons on track; *Ashworth v. Southern R. Co.* 59 L. R. A. 502, which holds company liable for injury to young child while riding on running board of engine according to known custom of children; *Trudell v. Grand Trunk R. Co.* 53 L. R. A. 271, which holds engineer justified in believing good-sized boy will leave track in time to avoid injury; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 99, which denies duty towards trespassers on track before discovery; *Barney v. Hannibal & St. J. R. Co.* 26 L. R. A. 847, which denies duty of railroad company to fence switch yards for protection of children; *Kramer v. Southern R. Co.* 52 L. R. A. 359, which denies railroad company's liability for death of child by fall of pile of cross-ties in unused portion of street.

Cited in notes (25 L. R. A. 287) on duty to maintain lookout on railroad train; (55 L. R. A. 456) on doctrine of last clear chance.

**Contributory negligence of children.**

Cited in *Gunn v. Ohio River R. Co.* 42 W. Va. 680, 36 L. R. A. 578, 26 S. E. 546, holding child under five killed on railroad track not guilty of contributory negligence; *Citizens Street R. Co. v. Hamer*, 29 Ind. App. 434, 62 N. E. 656, holding question for jury, whether contributory negligence imputable to child crossing street in front of approaching car.

Cited in footnote to *Lake Erie & W. R. Co. v. Mackey*, 20 L. R. A. 757, which holds negligence of nine-year old child climbing over coupling of car standing on crossing for jury.

**Action for death of child due to parent's negligence.**

Cited in *Bamberger v. Citizens' Street R. Co.* 95 Tenn. 28, 28 L. R. A. 490, footnote p. 486, 49 Am. St. Rep. 909, 31 S. W. 163, holding father of child killed on street railway cannot maintain action as administrator when he is sole beneficiary and death due to his contributory negligence.

**Action by child for personal injury on coming of age.**

Cited in *Scarlett v. Norwood*, 115 N. C. 286, 20 S. E. 450, discussing question whether seduced minor, after action by parent, can, on arriving of age, bring another action herself.

25 L. R. A. 794, *PEOPLE v. EWER*, 141 N. Y. 129, 56 N. Y. S. R. 668, 38 Am. St. Rep. 788, 36 N. E. 4.

**Police power.**

Cited in *People ex rel. Nechameus v. City Prison*, 144 N. Y. 536, 27 L. R. A. 721, 39 N. E. 686, sustaining validity of act requiring certificate of state examining board before engaging as master plumber; *Grannan v. Westchester Racing Asso.* 153 N. Y. 461, 47 N. E. 896, holding racing association organized for public purpose subject to authority of legislature to determine conditions upon which it should exercise rights; *People ex rel. Tyroler v. City Prison*, 157 N. Y. 147, 43 L. R. A. 276, 68 Am. St. Rep. 763, 51 N. E. 1006 (dissenting opinion), majority holding act invalid making it a penal offense to sell passage tickets on vessels and railroads except by specially authorized agents; *People v. Havnor*, 149 N. Y. 201, 31 L. R. A. 691, 52 Am. St. Rep. 707, 43 N. E. 541, upholding act prohibiting barber from carrying on business on Sunday, as it tends to promote public health; *People ex rel. Zeese v. Masten*, 79 Hun, 583, 29 N. Y. Supp. 891, holding commitment of child for commission of crime to a house of refuge was for "general comfort, health, and prosperity of the state;" *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 App. Div. 372, 56 N. Y. Supp. 431, releasing female committed to inebriate asylum on ground she was without notice of proceedings; *People v. Buffalo Fish Co.* 164 N. Y. 111, 52 L. R. A. 810, 79 Am. St. Rep. 622, 50 N. E. 34 (dissenting opinion), majority holding fish dealer cannot be indicted for having in his possession fish imported under revenue laws of United States during close season; *State v. Bailey*, 157 Ind. 330, 59 L. R. A. 437, footnote p. 435, 61 N. E. 730, holding compulsory education law not an unauthorized invasion of parental rights; *State v. Theriault*, 70 Vt. 627, 43 L. R. A. 294, 67 Am. St. Rep. 695, 41 Atl. 1030, upholding act restraining owner of stream from fishing in it for a certain period; *People v. Lochner*, 177 N. Y. 152, 101 Am. St. Rep. 773, 69 N. E. 373, Affirming 73 App. Div. 124, 76 N. Y. Supp. 396, upholding validity of provision of labor law restricting time of employment of



bakers to sixty hours per week, Reversed in 197 U. S. —, 49 L. ed. —, 25 Sup. Ct. Rep. 539; *State v. Cantwell*, 179 Mo. 272, 78 S. W. 569, upholding validity of statute prohibiting employment of laborers under ground longer than eight hours a day; *New York v. Chelsea Jute Mills*, 43 Misc. 269, 88 N. Y. Supp. 1085, upholding validity of statute prohibiting employment of child under fourteen years of age during school year; *Viemeister v. White*, 88 App. Div. 50, 84 N. Y. Supp. 712, upholding validity of statute prohibiting unvaccinated children from attending school; *Whiteley v. Terry*, 83 App. Div. 200, 82 N. Y. Supp. 89, upholding validity of statute making it misdemeanor in cities of first and second class to offer real estate for sale without written authority of owner.

Cited in footnote to *Collins v. State*, 35 L. R. A. 501, which holds boy almost as large as father not "child" within laws preventing cruelty to children.

Cited in notes (49 L. R. A. 114) on constitutionality of discrimination against women in police regulations; (32 L. R. A. 353) on police power to protect health of employees.

25 L. R. A. 798, *Re REISS*, 46 La. Ann. 347, 15 So. 151.

#### **Custody of infants.**

Cited in footnote to *Re Young*, 36 L. R. A. 224, which upholds grandparents' right to custody of children to exclusion of father's sister appointed guardian by his will.

25 L. R. A. 800, *RIDGELY v. RIDGELY*, 19 Md. 298, 29 Atl. 597.

#### **Jurisdiction of action to annul marriage.**

Cited in *Henneger v. Lomas*, 145 Ind. 299, 32 L. R. A. 852, footnote p. 848, 44 N. E. 402, holding courts have jurisdiction of marriages procured by fraud independently of divorce law.

Cited in footnote to *Kelley v. Kelley*, 25 L. R. A. 806, which denies authority of court of chancery to annul marriage without statutory authority.

Cited in note (37 L. R. A. 786) on whether court of equity can protect personal rights.

25 L. R. A. 806, *KELLEY v. KELLEY*, 161 Mass. 111, 42 Am. St. Rep. 389, 36 N. E. 837.

#### **Presumption as to laws of another state.**

Cited in *McMahon v. Eagle Life Asso.* 169 Mass. 541, 61 Am. St. Rep. 306, 48 N. E. 339, holding court of general jurisdiction of another state presumed to have jurisdiction in action at law to enforce contract; *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 298, 43 Atl. 33, holding statute law of one state altering common law not presumed to have been adopted in another state.

Cited in footnotes to *First Nat. Bank v. National Broadway Bank*, 42 L. R. A. 140, which denies presumption that statutory restrictions on alienation of interests of *cestui que trust* are law of other state; *Aslanian v. Dostumian*, 47 L. R. A. 495, which denies presumption that law merchant as to protest of draft prevails in Asiatic Turkey.

Cited in note (25 L. R. A. 800) on jurisdiction of chancery to decree nullity or dissolution of marriage.

#### **Presumption as to jurisdiction.**

Cited in *American Mut. L. Ins. Co. v. Mason*, 159 Ind. 19, 64 N. E. 525, hold-

ing court of another state having judge, clerk, and seal, presumed to be one of general jurisdiction, and that proceedings leading to judgment were regular.

**Credit due judgments of another state.**

Cited in *American Mut. L. Ins. Co. v. Mason*, 159 Ind. 18, 64 N. E. 525, holding judgment of court having jurisdiction of subject-matter and of parties conclusive on merits in other states.

Cited in footnotes to *Arrington v. Arrington*, 52 L. R. A. 201, which holds foreign decree for alimony after defendant's appearance entitled to full faith and credit; *Trowbridge v. Spinning*, 54 L. R. A. 204, which holds judgment for alimony though subject to alteration final for enforcement in other state; *Felt v. Felt*, 47 L. R. A. 546, which holds divorce on substituted service in other state where complainant domiciled entitled to recognition by interstate comity.

25 L. R. A. 810, *STATE v. GORHAM*, 115 N. C. 721, 44 Am. St. Rep. 494, 20 S. E. 179.

**Regulation of interstate commerce.**

Cited in *Collier v. Burgin*, 130 N. C. 635, 41 S. E. 874, holding sales of books by foreign corporation through canvassers, to be paid for by instalments, title remaining in seller till paid for, makes seller peddler subject to license tax.

Cited in footnotes to *South Bend v. Martin*, 29 L. R. A. 531, which holds ordinance imposing license on peddlers not interference with commerce as to the peddling of chairs imported before employment begun; *Racine Iron Co. v. McCommons*, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers, not engaged in interstate commerce; *Croy v. Epperson*, 51 L. R. A. 254, which holds one taking orders in own name for articles manufactured in other state, and delivering separate articles to customers, not engaged in interstate commerce; *French v. State*, 52 L. R. A. 160, which holds agent of nonresident company selling organ taken with him, or taking orders for others to be delivered by him, engaged in interstate commerce; *State v. Willingham*, 52 L. R. A. 198, which holds interstate commerce, delivery of portraits and frames by agent previously taking order for nonresident manufacturer; *Re Wilson*, 48 L. R. A. 417, which holds void as applied to sale of original packages territorial statute requiring license for sale of coal oil; *Smith v. Jackson*, 47 L. R. A. 416, which holds agent collecting garments and sending them to laundry outside of state and redelivering to owners, not engaged in commerce; *State v. Coop*, 41 L. R. A. 501, which holds purchase of frame for portrait in accordance with option included in order for making portrait in other state not within statute against peddling.

Distinguished in *Wrought Iron Range Co. v. Campen*, 135 N. C. 519, 47 S. E. 658, holding license tax on itinerant persons peddling ranges unconstitutional as interference with interstate commerce, in respect to goods brought from another state, and sold in original packages.

**Police power.**

Cited in footnotes to *Brownback v. North Wales*, 49 L. R. A. 446, which holds valid as to residents, ordinance requiring license for sale of goods on street or by soliciting orders from house to house; *Singer Mfg. Co. v. Wright*, 35 L. R. A. 497, which sustains state statute requiring every company selling sewing machines in state to pay license tax; *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood.

25 L. R. A. 813, *GASKINS v. DAVIS*, 115 N. C. 85, 44 Am. St. Rep. 439, 20 S. E. 188.

**Right of action for cutting timber.**

Cited in footnotes to *Alliance Trust Co. v. Nettleton Hardware Co.* 36 L. R. A. 155, which authorizes trover or trespass by true owner after re-entry for value of trees cut during disseisin; *Keystone Lumber Co. v. Kolman*, 34 L. R. A. 821, which requires licensee to repay trespasser enhanced value of timber before recovering.

25 L. R. A. 815, *GRAND RAPIDS ICE & COAL CO. v. SOUTH GRAND RAPIDS ICE & COAL CO.* 102 Mich. 227, 47 Am. St. Rep. 516, 60 N. W. 681.

**Rights of riparian owners.**

Cited in *Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co.* 118 Mich. 124, 76 N. W. 395, holding party to contract fixing boundary in lake cannot have apportionment on other lines because of alleged reliance on mistake in decision subsequently overruled; *Oliver v. Olmstead*, 112 Mich. 484, 70 N. W. 1036, holding riparian owners entitled to ice formed on surface of river; *Kean v. Calumet Canal & Improv. Co.* 190 U. S. 489, 47 L. ed. 1149, 23 Sup. Ct. Rep. 651 (dissenting opinion), majority holding patent to state under swamp land act conveying certain fractional sections bordering on non-navigable lake gave title to lands under water.

Cited in footnotes to *Fuller v. Shedd*, 33 L. R. A. 146, which holds grant of meandered lake goes only to water's edge; *Noyes v. Collins*, 26 L. R. A. 609, which holds unnavigable lake not to belong to riparian owners.

Distinguished in *Edinger v. Woodke*, 127 Mich. 44, 86 N. W. 397, holding "east half" and "west half" in a deed of lands by government survey have reference to dividing line running to lake according to act of Congress, and not to equal quantities.

**Knowledge of law presumed.**

Cited in *Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co.* 178 U. S. 276, 44 L. ed. 1067, 20 Sup. Ct. Rep. 931, appeal dismissed because no Federal question involved and because state court decided there was laches on part of plaintiff; *Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co.* 118 Mich. 132, 76 N. W. 395, holding everyone is presumed to know law and is guilty of laches in keeping silent when he should speak.

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25 L. R. A. 819, *COIT & CO. v. SUTTON*, 102 Mich. 324, 4 Inters. Com. Rep. 768, 60 N. W. 690.

**State control of foreign corporations.**

Cited in *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 66, 72 N. W. 117, holding debt to foreign corporation incurred for goods sold by its itinerant salesman collectable although corporation had not paid fee for doing business in state; *Toledo Commercial Co. v. Glen Mfg. Co.* 55 Ohio St. 222, 45 N. E. 197, holding that foreign corporation is not required to obtain certificate "to do business in state" in order to sell and deliver goods manufactured out of state; *Aultman, M. & Co. v. Holder*, 68 Fed. 471, holding act imposing tax upon foreign corporation for privilege of selling wares in state invalid under interstate commerce act; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.* 55 C. C. A. 97, 118

Fed. 243, holding franchise tax upon foreign corporation doing business in state is upon the occupation of the corporation in state; *Havens & G. Co. v. Diamond*, 93 Ill. App. 565, holding act requiring foreign corporations, before doing business in state, to do certain things, does not apply to orders solicited by drummers; *Vaughn Mach. Co. v. Lighthouse*, 64 App. Div. 142, 71 N. Y. Supp. 799, holding procuring of orders to be filled by foreign corporation in another state is not doing business in state requiring certificate; *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. Ct. 191, holding act requiring foreign corporation doing business in state to have office and agents does not apply to sales by order or samples.

Cited in notes (57 L. R. A. 92) on taxation of corporate franchises in the United States; (60 L. R. A. 680) on corporate taxation and the commerce clause.

Distinguished in *Moline Plow Co. v. Wilkinson*, 105 Mich. 60, 62 N. W. 1119, upholding act requiring foreign corporation doing business in state to pay same franchise fee as domestic corporation.

#### **Construction of statutes.**

Cited in *People v. Smith*, 108 Mich. 534, 32 L. R. A. 857, 66 N. W. 382, holding statute should always be so construed as to bring it within constitution, if it can be reasonably done.

25 L. R. A. 821, *CRIPPEN v. ROGERS*, 67 N. H. 207, 30 Atl. 346.

#### **Action by foreign receiver against resident shareholder.**

Cited in *Tompkins v. Blakey*, 70 N. H. 587, 49 Atl. 111, holding receiver of foreign corporation, appointed in another state, may maintain action in this state for assessment against resident shareholder.

25 L. R. A. 824, *YARDLEY v. PHILLER*, 62 Fed. 645, 10 C. C. A. 562, 17 U. S. App. 647.

Reversed in 107 U. S. 344, 42 L. ed. 192, 17 Sup. Ct. Rep. 835.

#### **Preferences by insolvent banks.**

Cited in footnotes to *O'Brien v. Grant*, 28 L. R. A. 361, which holds payment of checks on insolvent bank by member of clearing house in accordance with previous contract not illegal preference; *Voltz v. National Bank*, 30 L. R. A. 155, which sustains right of guaranteeing bank to recover against drawers of certified check paid according to guaranty.

Cited in note (25 L. R. A. 548) on exceptions to prohibition of preferences by insolvent national banks.

Distinguished in *Crane, P. & Co. v. Fourth Street Nat. Bank*, 38 W. N. C. 114, Affirming 16 Pa. Co. Ct. 275, 4 Pa. Dist. R. 133, holding bank, member of clearing-house association, liable to customer for proceeds of draft, deposited with association by such bank to offset indebtedness due from another and insolvent debtor to association.

#### **Sufficiency of notice of withdrawal of deposit.**

Cited in footnote to *O'Brien v. East River Bridge Co.* 48 L. R. A. 122, which upholds notice by insolvent bank director to corporation of which he is president on signing of check for withdrawal of notes deposited.

#### **Who estopped from denying genuineness of drawer's signature.**

Cited in footnote to *First Nat. Bank v. Northwestern Nat. Bank*, 26 L. R. A.

289, which holds both collecting bank and drawee bank estopped to deny genuineness of drawer's signature.

25 L. R. A. 833, ST. LOUIS, I. M. & S. R. CO. v. NEEDHAM, 63 Fed. 107, 11 C. C. A. 56, 27 U. S. App. 227.

**Who are fellow servants.**

Followed in Northern P. R. Co. v. Mase, 11 C. C. A. 64, 27 U. S. App. 238, 63 Fed. 115, holding conductor of railroad train through whose negligence in leaving open switch employee of another train injured is fellow servant of such employee.

Cited in Parker v. New York & N. E. R. Co. 18 R. I. 775, 30 Atl. 849, and Denver & R. G. R. Co. v. Sipes, 23 Colo. 229, 47 Pac. 287, holding yard conductor neglecting to close switch, fellow servant of locomotive fireman injured thereby; Southern P. Co. v. Schoer, 57 L. R. A. 709, 52 C. C. A. 271, 114 Fed. 469, holding engineer running second section of train into the first at yard limits, fellow servant of train employee, notwithstanding state statute making him vice principal; Brady v. Chicago & G. W. R. Co. 57 L. R. A. 715, 52 C. C. A. 51, 114 Fed. 103, holding engineer running train through yard at night with caboose forward, fellow servant of switchman, whose death was caused thereby; Jackson v. Norfolk & W. R. Co. 43 W. Va. 400, 46 L. R. A. 355, 31 S. E. 258, holding conductor of train fellow servant of brakeman crushed between cars through negligence of former in ordering engineer to back train; Donnelly v. San Francisco Bridge Co. 117 Cal. 424, 49 Pac. 559, holding superintendent calling to workman throwing down blocks to other workmen, that all was clear, acts as fellow servant of workmen; Missouri P. R. Co. v. Lyons, 54 Neb. 640, 75 N. W. 13, holding members of two switching crews of same railway under sole control of same yardmaster and switching cars in same yard are fellow servants; Martin v. Chicago & A. R. Co. 65 Fed. 385, holding train master giving order to take out cars from train, fellow servant of brakeman caught between switch engine and car while coupling; Pennsylvania Co. v. Fishack, 59 C. C. A. 273, 123 Fed. 469, holding yardmaster directing train to take track which he represented as clear, fellow servant of fireman injured by collision with cars standing on track.

Cited in notes (50 L. R. A. 432) on what servants are deemed to be in same common employment apart from statutes, where no questions as to vice principalship arise; (46 L. R. A. 358) on when conductor is deemed to be a co-servant of other railroad employees.

**When employee vice principal.**

Cited in Southern Indiana R. Co. v. Harrell, 161 Ind. 609, 63 L. R. A. 466, 68 N. E. 262, holding foreman of bridge construction gang not representative of master, who negligently directed raising stone by derrick when train passing, causing injury to employee; Missouri, K. & T. R. Co. v. Elliott, 42 C. C. A. 203, 102 Fed. 110 (dissenting opinion), majority holding train dispatcher vice principal.

Cited in note (54 L. R. A. 112, 114, 129) on vice principalship as determined with reference to character of act which caused injury.

**Assumption of risk.**

Cited in Sofield v. Guggenheim Smelting Co. 64 N. J. L. 613, 50 L. R. A. 431, 46 Atl. 711, holding neglect of fellow workman to cover pit of hot water with

planks furnished by master part of risk assumed by employee falling therein; *Gulf, C. & S. F. R. Co. v. Jackson*, 12 C. C. A. 509, 27 U. S. App. 519, 65 Fed. 50, holding sectionman took increased hazard in the work of dismantling old track and laying new one.

**Proximate cause.**

Cited in *St Louis, I. M. & S. R. Co. v. Needham*, 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 824, holding for jury to determine whether absence of target on switch proximate cause of injury to employee on derailed train.

**When general verdict not sustained.**

Cited in *Fireman's Fund Ins. Co. v. McGreevy*, 55 C. C. A. 547, 118 Fed. 419, refusing to sustain general verdict with several issues submitted to jury one of which erroneous; *Lyon, P. & Co. v. First Nat. Bank*, 29 C. C. A. 50, 55 U. S. App. 747, 85 Fed. 125, refusing to sustain general verdict when a false issue was submitted to jury, since it may have been based on this issue; *Durant Min. Co. v. Percy Consol. Min. Co.* 35 C. C. A. 256, 93 Fed. 170, refusing to sustain general verdict which might have been based upon instruction which, on one theory, was harmless, but on another, erroneous.

**Appeal; erroneous admission of evidence.**

Cited in *United States v. Honolulu Plantation Co.* 58 C. C. A. 231, 122 Fed. 583, holding admission of evidence, in condemnation proceeding, as to value of improvements on part of land not taken, reversible error, where land taken will not affect remainder.

25 L. R. A. 838, *MARTIN v. TYLER*, 4 N. D. 278, 60 N. W. 392.

**Validity of drainage statutes.**

Followed in *Birchall v. Griggs*, 4 N. D. 305, 50 Am. St. Rep. 654, 60 N. W. 342, holding county commissioners may be enjoined at suit of taxpayer from issuing bonds to defray costs of drain constructed under invalid statute.

Cited in *Aldrich v. Paine*, 106 Iowa, 467, 76 N. W. 812, holding appropriation of land, without compensation, cannot be made for purpose of constructing drains to promote public health; *Redmon v. Chacey*, 7 N. D. 233, 73 N. W. 1081, holding warrants drawn by drainage commissioners against fund to be raised by special tax create no liability against municipality.

Cited in note (60 L. R. A. 175, 201, 227) on procedure for the establishment of drains and sewers.

**Eminent domain; sufficiency of payment.**

Cited in footnotes to *Steinhart v. Superior Court*, 59 L. R. A. 404, which holds payment into court of sufficient to compensate landowner, not payment authorizing giving possession of land sought to be condemned; *Harrisburg, C. & C. Turnp. Road Co. v. Harrisburg & M. Electric R. Co.* 34 L. R. A. 439, which holds payment into court of award appealed from in eminent domain case insufficient.

**When subject expressed in title.**

Cited in *State ex rel. Carey v. Cornell*, 50 Neb. 531, 70 N. W. 56, holding provision for payment of stenographer germane to act providing for "courts;" *Re Monk*, 16 Utah, 103, 50 Pac. 810, holding title of act "providing for the manner of locating and recording" mining claims, includes means of locating and recording and, therefore, the instrumentality for recording.

**Presumption as to validity of statute.**

Cited in *State ex rel. Comstock v. Stewart*, 52 Neb. 251, 71 N. W. 998, holding no presumption of validity in favor of remaining portions of statute, a part of which has been declared invalid; *Western U. Teleg. Co. v. Austin*, 67 Kan. 213, 72 Pac. 850, holding presumption in favor of constitutionality of statute not indulged, when already adjudged unconstitutional in part, and legislative intent that remainder should stand not apparent.

**Limitation to legislative power.**

Cited in *McDermont v. Dinnie*, 6 N. D. 284, 69 N. W. 294, holding legislature cannot abolish police courts established by Constitution.

25 L. R. A. 848, *CONSOLIDATED COAL & MIN. CO. v. FLOYD*, 51 Ohio St. 542, 38 N. E. 610.

Followed in *Coal & Min. Co. v. Devault*, 52 Ohio St. 605, 44 N. E. 1133, without discussion.

**Duty to furnish safe place for employees.**

Cited in *Petaja v. Aurora Iron Min. Co.* 106 Mich. 468, 32 L. R. A. 438, footnote p. 435, 66 N. W. 951, holding the timbering up a stope with lagging for purpose of temporarily supporting roof of mine to enable miners to continue work not under rule of "safe place" required by owner; *Callan v. Bull*, 113 Cal. 604, 45 Pac. 1017, holding building of appliance as part of the construction of a jetty does not come under rule; *Carolan v. Southern P. Co.* 84 Fed. 87, holding railroad not liable for injuries to laborer falling from pile of boxes of tea he was loading into cars; *Kelly Island Lime & Transport Co. v. Pachuta*, 69 Ohio St. 471, 100 Am. St. Rep. 706, 69 N. E. 988, holding rule not applicable where place becomes unsafe through negligence of fellow servant during progress of common employment.

Cited in footnotes to *Finn v. Cassidy*, 53 L. R. A. 877, which holds safety of place question for jury where contractor sent employee to work in trench near foundation of chimney, with the knowledge that the undisturbed earth was saturated with water; *Victor Coal Co. v. Muir*, 26 L. R. A. 435, which holds mine owner's nonobservance of statutory regulation as to safety of place will not support action for injury due to laborer's own neglect to attend to propping of roof with materials furnished; *Tradewater Coal Co. v. Johnson*, 61 L. R. A. 161, which holds master liable for failure of loaders to remove loose coal hanging in mine rendering it unsafe for other employees; *Ellsworth v. Metheney*, 51 L. R. A. 389, which holds mine owner required to properly guard electric wire in passage way where miners accustomed to go; *Beesley v. F. W. Wheeler & Co.* 27 L. R. A. 266, which denies ship builders' liability for negligence of carpenters in preparing scaffold for other workmen.

Distinguished in *Corson v. Coal Hill Coal Co.* 101 Iowa, 230, 70 N. W. 185, holding inapplicable, act making it misdemeanor for miner or mining employee to neglect or refuse to prop entry to mine, if entry is not under his control; *Hanley v. California Bridge & Constr. Co.* 127 Cal. 238, 47 L. R. A. 600, footnote p. 597, 59 Pac. 577, holding that portion of tunnel which has been completed must be kept in reasonably safe condition for workmen employed in extending it; *Wellston Coal Co. v. Smith*, 65 Ohio St. 75, 55 L. R. A. 101, 87 Am. St. Rep. 547, 61 N. E. 143, holding entry in mine furnished by company, through mine boss, must be kept in reasonably safe condition by boss.

**Duty of master to employ competent men.**

Cited in *Binder v. Cincinnati*, P. & V. R. Co. 16 Ohio C. C. 268, holding lack of averment of knowledge on part of master of incompetence of fellow servant of injured party demurrable.

Cited in footnote to *Indianapolis Union R. Co. v. Houlihan*, 54 L. R. A. 787, which sustains statute making railroad company liable to employees for injuries by negligence of specified servants.

Cited in notes (25 L. R. A. 713) on master's liability for injuries caused to one servant by incompetency of fellow servant; (54 L. R. A. 111, 138) on vice principalship as determined with reference to character of act which caused injury.

**Validity of statutory regulations for protection of employees.**

Cited in footnotes to *Durkin v. Kingston Coal Co.* 29 L. R. A. 808, which holds void, imposition of liability on mine owner for certified foreman's failure to perform duty; *Chicago, W. & V. Coal Co. v. People*, 48 L. R. A. 554, which sustains statute for inspection of mines at cost of mine owners; *Consolidated Coal Co. v. People*, 56 L. R. A. 266, which sustains statute for inspection of coal mines as often as inspector deems necessary at owner's expense; *Mapel v. John*, 32 L. R. A. 800, which upholds act prohibiting mine owners from digging within 5 feet of division line without adjoining owner's consent; *Re Morgan*, 47 L. R. A. 52, which holds void, eight-hour law applying to smelters.

Cited in note (32 L. R. A. 854) on police power to protect health of employees.

**Contributory negligence of employee.**

Cited in note (49 L. R. A. 46, 47) on contributory negligence in entering or remaining in employment.

**25 L. R. A. 856, CRAFT REFRIGERATING MACH. CO. v. QUINNIPIAC BREWING CO. 63 Conn. 551, 29 Atl. 76.****Operation of practice act.**

Cited in *Greenthal v. Lincoln*, 67 Conn. 377, 35 Atl. 266, holding practice act abandoned aim of common law to bring controversy to a single, certain, and material point.

**Sufficiency of complaint.**

Cited in *Baxter v. Camp*, 71 Conn. 251, 42 L. R. A. 517, 71 Am. St. Rep. 169, 41 Atl. 803, holding cause of action arising out of single transaction should not be separated into two or more counts; *Dawson v. Marsh*, 74 Conn. 500, 51 Atl. 529, holding complaint of tenant against landlord for dispossessing her, detaining part of furniture, and removing remainder into street, should be set forth in one count; *Morehouse v. Throckmorton*, 72 Conn. 451, 44 Atl. 747, holding complaint alleging performance of services, their value, acceptance of service by defendant, death of plaintiff, appointment of administratrix, and nonpayment of indebtedness by defendant states cause of action under practice act; *Goodrich v. Stanton*, 71 Conn. 424, 42 Atl. 74, holding single transaction resulting in indorsement of two notes cannot be set forth in six counts of complaint; *Palmer v. Hartford Dredging Co.* 73 Conn. 187, 47 Atl. 125, holding that single cause of action should be stated in a single count; *Metropolis Mfg. Co. v. Lynch*, 68 Conn. 471, 36 Atl. 832, holding if facts alleged and proved show cause of action for breach of contract, plaintiff is entitled to judgment, although he treated action



as one in trover; *Dunnett v. Thornton*, 73 Conn. 5, 46 Atl. 158, holding only rule as to pleading is plain and concise statement of facts.

**Joinder of causes of action.**

Cited in *Maisenbacker v. Society Concordia*, 71 Conn. 376, 71 Am. St. Rep. 213, 42 Atl. 67, holding question whether two causes of action are improperly joined in one count is waived by failure to demur to complaint; *Knapp v. Walker*, 73 Conn. 461, 47 Atl. 655, holding that causes of action for breach of contract for personal property, and for fraud in inducing party to part with his property on false representations may be united if growing out of same transaction; *Plumb v. Curtis*, 66 Conn. 174, 33 Atl. 998, holding separate count founded on estoppel cannot be added to complaint founded on original liability; *Swenson v. Colvin*, 130 Fed. 627, holding cause of action for deceit, based on misrepresentations inducing written contract, cannot be united with action for breach of such contract; *Knapp v. Walker*, 73 Conn. 461, 47 Atl. 655, holding damages for breach of contract may be recovered under complaint setting forth such cause of action, and also one for fraud, in single count, although no fraud found.

**How defense should be pleaded.**

Cited in *Botsford v. Wallace*, 72 Conn. 200, 44 Atl. 10, holding that answer to single cause of action or one founded on transaction with several causes of action not distinguishable from each other, should be single and only divided into paragraphs.

**Effect of noncompliance with order of trial court.**

Distinguished in *Dunnett v. Thornton*, 73 Conn. 17, 46 Atl. 158, reversing judgment for material error though nonsuit granted for disobedience of order to file bill of particulars.

25 L. R. A. 862, *STATE ex rel. TAYLOR v. PENNOYER*, 26 Or. 205, 37 Pac. 906, 41 Pac. 1104.

**Suit by private individual to restrain acts of public officials.**

Reaffirmed on subsequent appeal in 28 Or. 498, 31 L. R. A. 473, 43 Pac. 471.

Cited in *Burness v. Multnomah County*, 37 Or. 468, 60 Pac. 1005, holding individual taxpayer may maintain suit to prevent carrying out of contract between county officials and individual for collection of taxes; *Brownfield v. Houser*, 30 Or. 537, 49 Pac. 843, holding taxpayer may bring action, in his own name, to have county clerk restrained from issuing to sheriff order for services performed by such officer.

**Suit by state to prevent official action.**

Distinguished in *State ex rel. McCain v. Metschan*, 32 Or. 383, 41 L. R. A. 694, footnote p. 692, 46 Pac. 791, holding that action can be maintained by state, without showing special injury to restrain state treasurer from paying warrant issued without authority for purchase of land for insane asylum.























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